

A CRITICAL ANALYSIS OF THE CONCURRENT ENFORCEABILITY OF RESTRAINT OF TRADE AGREEMENTS AND GARDEN LEAVE IN SOUTH AFRICAN LABOUR LAW

A Dissertation submitted in fulfilment of the requirements for
the LLM degree at the University of Venda

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Module: DIS 6700

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2018

Acknowledgements

First and foremost, I wish to thank the Almighty God for giving me the opportunity, strength and perseverance to complete this study.

I am deeply indebted to my Supervisor, Professor Lonias Ndlovu, for supervising this dissertation. It was a great honour for me to complete this study under his expertise and passionate supervision. I learnt a lot from him and I hope to make him proud in my future professional endeavours.

I also like to express my sincere gratitude to Miss Tshifularo Batrice Ramadwa who generously assisted me with the registration fee for the LLM degree when I was desperately in need of it. This work would not have been possible without her invaluable financial assistance.

I gratefully acknowledge the generous financial assistance from the UNIVEN Work-Study Bursary.

I would like to thank my friends for understanding my unavailability during my studies, listening to my complaints, support and their motivations during my difficult times.

I wish to record my gratitude to the UNIVEN Law Librarian, Mr Ramabina for the assistance rendered to me in accessing the relevant legal sources. This work would not have been possible without those sources or materials I visited in the law library.



DECLARATION

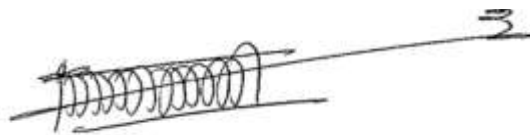
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Abstract

The study critically analyses the concurrent enforceability of restraint of trade and garden leave in South African Labour law. The study seeks to answer the question of whether or not the simultaneous enforceability of restraint of trade agreements and garden leave is reasonable. Designed within a qualitative paradigm primarily based on a critical literature review, the study employs a doctrinal approach to establish the contemporary legal position in respect of the simultaneous enforceability of restraint of trade agreements and garden leave in South African Labour law. The objectives pursued by the study are to mitigate the controversies and clear the confusion relating to the enforceability of restraint of trade agreements; to justify the doctrine of restraint of trade; assess the reasonableness of the simultaneous enforceability of garden leave and restraint of trade; examine the onus of proof in matters dealing with the enforceability of restraint of trade agreements; test the constitutionality of restraint of trade agreements; evaluate the relationship between restraint of trade agreements and garden leave; and propose practical recommendations that can be employed to address identified legal flaws in the context of the topic.

Structurally, the study begins with unpacking the background to the research topic, the history, origin and rationality of restraint of trade agreements together with an assessment of their enforceability. It further examines the effect of garden leave on restraint of trade agreements, outlines comparative perspectives on restraint of trade, including aspects relating to garden leave and highlights lessons South Africa may learn from the selected jurisdictions.

Finally, the study recommends that South African jurisprudence should be developed to shift the burden of proof to employers to prove reasonableness of garden leave and restraint of trade agreements, to impose an obligation on employers to pay former employees for rendering them jobless and to set a maximum period that an employee can be prevented to compete or be employed by employer's competitors.

Keywords: Enforceability, restraint of trade, trade secrets, legitimate interest, public interest, garden leave.

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CHAPTER ONE

RESEARCH PROBLEM, DELIMITATION AND CONTEXT

1.1 Introduction and background

The South African Law of Contract confers parties with the freedom of contract.¹ The notion of freedom of contract gives the contracting parties the liberty to include contractual terms of their choice in their agreement.² It is for the above reason that the employer and the employee may exercise their freedom of contract, and thus include both restraint of trade and garden leave in the contract of employment. The law of contract further prescribes requirements which must be satisfied by any legal agreement namely, consensus,³ legality,⁴ the capacity to act,⁵ compliance with prescribed formalities,⁶ and the possibility of performance.⁷

A restraint of trade agreement (restraint of trade) may be defined as a contractual agreement entered into between the employer and the employee, imposing certain limitations on the employee's future activities after termination of employment, such as free trade, exercising their profession freely, or assuming potential employment.⁸ Garden leave may be defined as a contractual clause in which the employee is restricted from working for the employer close to the termination of the employment contract, and while on such leave, the employee will be entitled to full remuneration.⁹ Both the South African restraint of trade law and the garden leave doctrine are rooted in English law.¹⁰ The enforceability of restraint of trade agreements continues to be a controversial issue in South African Labour law, despite numerous writings and court decisions on the subject.

The problem relating to restraint of trade agreements is aggravated by its relationship with garden leave. The simultaneous enforceability of garden leave and restraint of trade

¹ SWJ Van Der Merwe, *et al Contract General Principles* (2012) 9.

² Van Der Merwe (note 1 above).

³ D Hutchison The Nature and Basis of Contract in the D Hutchison and CJ Pretorius (eds) *The Law of Contract in South Africa* (1999) 6.

⁴ As above.

⁵ As above.

⁶ As above.

⁷ As above.

⁸ *Petrofina (Great Britain) Ltd v Martin* 1966 (1) Ch 146.

⁹ G Van Zyl "Garden leave" (2016) 11 *Without Prejudice* 18.

¹⁰ R Kelbrick, *Restraints of trade and the Constitution* (2006) 14 *Juta Business Law* 131.

agreements is questionable and likely to be abused since both serve the same purpose of mitigating the possibility of the employee disclosing confidential information to the employer's direct competitors or preventing the likelihood of the employee using trade secrets acquired during a period of employment against the employer.¹¹

The jurisprudence dealing with the validity and enforceability of restraint of trade agreements differs from case to case. However, there are standard rules regulating restraint agreements. The current position of South African Labour jurisprudence in relation to the enforceability of such agreements is that a restraint of trade agreement is *prima facie* valid and enforceable, unless the party who wishes to avoid its enforceability can prove that the restraint is not aimed at protecting legitimate interests of the employer and is against the public policy.¹² Whenever a court is called for an assessment of whether a restraint of trade agreement is enforceable or not, the court considers its reasonableness, the period of restraint and the extent of the area of restriction.¹³

One of the controversial issues which the present study deals with is the onus of proof in restraint disputes. In *Magna alloys and Research (SA) (Pty) Ltd v Ellis*,¹⁴ the court held that the onus of proof falls on an employee who is avoiding the enforceability of a restraint of trade agreement.¹⁵ The South African Appellant Division in *Basson v Chilwana*¹⁶ confirmed that one who wishes to avoid the enforceability of restraint of trade agreement must bear the onus to prove that such restraint is unenforceable.¹⁷

In *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*,¹⁸ the court held that a restraint of trade seeks to limit the employee's constitutional rights to freedom of trade, occupation and profession.¹⁹ The court pointed out that it is unconstitutional to

¹¹ Y Mupangavanhu The Relationship between Restraints of Trade and Garden Leave (2017) 20 *Potchefstroom Electronic Law Journal* 3, 6. See also J.T Perri, Garden Leave vs. Covenants Not to Compete (2010) 6 *Review of Law and Economics* 168.

¹² *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A) 875 H-I.

¹³ CJ Pretorius Covenants in Restraint of Trade: A Synthesis of Traditional, Common Law and Constitutional Approaches. (2009) 30 *Obiter* 158.

¹⁴ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 12 above).

¹⁵ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 12 above) 893A, 898C-D.

¹⁶ 1993 3 SA 742 (A).

¹⁷ *Basson v Chilwana and others* (note 16 above).

¹⁸ (2005) 3 SA 205 (N).

¹⁹ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 18 above).

impose the onus of proof on an employee,²⁰ to prove that he/she is protected by the Constitution of the Republic of South Africa.²¹ This is consistent with the traditional legal principle of he who alleges must prove.²² The court relied on Section 36 (1) of the Constitution of the Republic of South Africa in holding that the employer must bear the onus of proof, to prove that 'the restraint is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.²³ Du Plessis endorses the decision in *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*,²⁴ which indicates that the onus of proof must be on the employer who seeks to enforce restraint of trade agreement,²⁵ to show its reasonableness.²⁶ Of importance, Du Plessis contends that the decision in *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*²⁷ brought the onus of proof in conformity with the South African traditional view that an employer who seeks to enforce a restraint of trade agreement must prove that such restraint is reasonable.²⁸ However, the majority of cases decided after this case still support *Magna alloys and Research (SA) (Pty) Ltd v Ellis*,²⁹ that the onus must be on he who wishes to avoid the enforceability of restraint of trade agreement, to prove that such restraint is unreasonable.³⁰ The issue of onus of proof remains controversial.

The Supreme Court of Appeal in the case of *Reddy v Siemens Telecommunications (Pty) Ltd* was presented with an opportunity to settle the issue of whether the South African Constitution reversed the onus of proof to the employer.³¹ The court did not answer the question of onus of proof but rather reasoned that it shall make no difference whether or not the onus of proof is reversed to the employer.³² The present study answers the

²⁰ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 18 above) 209F.

²¹ As above.

²² *Miller v Minister of Pensions* [1947] 2 All ER 372.

²³ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 18 above) 209G.

²⁴ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 18 above).

²⁵ MA Du Plessis *Stare Decisis; Is the Onus in Restraints of Trade Hanging on a Thread?* (2006) 2 *Tydskrif Vir die Suid Afrikaans Reg* 425. See also *Advtech Resourcing (Pty) Limited v Kuhn and another* [2007] 4 All SA 1368 para 28.

²⁶ Du Plessis (note 25 above) 425.

²⁷ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 18 above).

²⁸ Du Plessis (note 25 above) 425.

²⁹ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 12 above) 874. See also *Advtech Resourcing (Pty) Limited v Kuhn and another* (note 25 above) para 28.

³⁰ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 12 above) 893A-B, 898C-D.

³¹ *Reddy v Siemens Telecommunications (Pty) Ltd* (251/06) [2006] ZASCA 135 para 13.

³² *Reddy v Siemens Telecommunications (Pty) Ltd* (note 31 above) para 14.

burning issue of whether the Constitution reverses the onus of proof to employer in disputes relating to the enforceability of restraint of trade agreements.³³

Some employers misuse the doctrine of restraint of trade as a mechanism to discourage the employees from fair competition.³⁴ Some restriction periods are longer than necessary to protect the legitimate interests of the employer and make the employee to be economically inactive for a period which is inordinately too long.³⁵ This abuse and misconception of restraint of trade agreements is addressed in this study.

There is no unanimity between the existing literature and case law on the enforceability of restraint of trade agreements. This study is focused mainly on the conundrum surrounding the enforceability of the restraint of trade in the circumstances of its combination with the garden leave and equally bring clarity on the issue of the enforceability of restraint agreements.

1.2. Research Problem

Restraint of trade agreements have become prevalent in most contemporary employment contracts. The enforceability of restraint of trade agreements has remained controversial, raising conflicting debates within the context of South African Labour law. It is submitted that South African Courts have used controversial approaches in dealing with the question of the enforceability of restraint of trade agreements.³⁶ In the light of the above, it is therefore necessary to conduct an in-depth assessment and further critically analyse the enforceability of restraint of trade agreements in the context of South African Labour law.

The problem relating to the enforceability of restraint of trade agreements is aggravated by its relationship with garden leave.³⁷ The enforceability of a combination of garden leave

³³ K Calitz *Restraint of Trade Agreements in Employment Contracts: Time for Pacta Sunt Servanda to Bow Out?* (2011) 22 *Stellenbosch Law Review* 57. See also J Neethling *The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants – A Need for Exercising Restraint* (2008) 20 *South African Mercantile Law Journal* 94.

³⁴ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (16575/15) [2016] ZAGPPHC 791, para 25.

³⁵ L Kohn *Restraint of Trade Agreements* (2008) 1 *without Prejudice* 6.

³⁶ M Van Jaarsveld *The Validity of a Restraint of Trade in an Employment Contract* (2003) 15 *South African Mercantile Law Journal* 331.

³⁷ Mupangavanhu (note 11 above) 3.

and restraint of trade agreements is ‘problematic’ and ‘open to abuse’.³⁸ The South African Labour Court observed that ‘the concept of garden leave and its relationship, if any, with a restraint of trade agreement has not been the subject of consideration by the South African Courts’.³⁹ The South African Labour Court first dealt with the relationship between garden leave and restraint of trade in 2016. Given the novelty of the relationship between garden leave and restraint of trade, it is crucial to further review and scrutinise the relationship.

There is a conflicting debate about the question of who bears the onus of proof in issues of a restraint of trade agreements.⁴⁰ This debate strikes at the heart of the constitutionality of restraint of trade agreements. The Appellant Division was presented with an opportunity to settle the issue of whether the current Constitution of South Africa reverses the onus of proof to the employer to prove reasonableness of the enforceability of restraint of trade agreements.⁴¹ The court did not answer the question directly but reasoned that it shall make no difference whether the onus is reversed to the employer or not.⁴² There is however a need for the courts to unequivocally settle the issue of onus of proof in restraint of trade agreements.

The present study highlights controversies regarding restraint of trade agreements; and provides insights into the nature of the relationship between restraint of trade agreements and garden leave.

1.3. Assumptions underlying the study

This study assumes that a restraint of trade agreement is a justifiable mechanism to protect the legitimate interests of the employer. However, a restraint of trade agreement should not unreasonably prevent employees from taking advantage of other available job opportunities, freely exercise their trade, profession or earn a living. This study further assumes that there must be no justification for subsequent enforcement of a restraint of

³⁸ Mapangavanhu (note 11 above) 2.

³⁹ *Vodacom (Pty) Ltd v Motsa and Another* (J 74/16) [2016] ZALCJHB 53 para 22.

⁴⁰ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 18 above) 209G. See also *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 12 above) 893A-B, 898C-D.

⁴¹ *Reddy v Siemens Telecommunications* (note 31 above) para 13.

⁴² *Reddy v Siemens Telecommunications (Pty) Ltd* (note 31 above) para 14.

trade agreement in a case where garden leave sufficiently serves the purpose of protecting the legitimate interest of an employer. The above assumptions were thoroughly tested using both the primary and secondary sources of law.

1.4. Aim

The focal aim of this study was to examine the relationship between restraint of trade agreements and garden leave in the context of South African Labour law, and critically analyse the controversial issues of the enforceability of restraint of trade agreements.

1.5. Objectives

To achieve the above aim, the study addressed the following objectives, which are to:

- Outline the controversies and explain the confusion relating to the enforceability of restraint of trade agreements;
- explore common arguments advanced to justify the doctrine of restraint of trade;
- evaluate and assess the relationship between restraint of trade agreements and garden leave;
- examine the issue of burden of proof in matters involving the enforceability of restraint of trade agreements;
- assess the constitutionality of restraint of trade agreements; and
- recommend legal and policy solutions to mitigate identified legal lacunae.

1.6. Research Questions

To achieve the above objectives, the study answered one key research question, namely:

Is the simultaneous enforceability of periods of a restraint of trade agreements and garden leave reasonable?

In pursuit of an answer to the key research question, the study answered the following sub-questions:

- a) Can courts enforce restraint of trade agreements in cases where the employee is avoiding to perform as agreed?

- b) Are restraint of trade agreements justifiable and still relevant in the current constitutional dispensation?
- c) Who bears onus of proof in cases in which the enforceability of a restraint of trade agreement is disputed?
- d) What is the nature of the relationship between restraint of trade agreements and garden leave?

1.7. Research Methodology

There are different forms of research methodological tools that one may use in legal research. The two main research methods are quantitative and qualitative. The qualitative research method is concerned with exploratory research, in which an in-depth inquiry is conducted through observation and interpretation of texts.⁴³ The qualitative research method 'generates ideas for later quantitative researchers'.⁴⁴

Hammersley explains the quantitative research method as one which:

....refers in large part to the adoption of the natural science experiment as the model of scientific research, its key features being quantitative measurement of the phenomena studied and systematic control of the theoretical variables influencing those phenomena.⁴⁵

In the quantitative method, the researcher uses surveys and experiments to collect relevant data, whereas qualitative researchers 'employ case study, narrative, phenomenology, grounded theory and action research etc.'⁴⁶ The purpose of the qualitative research method is to study the problem in its point of view and gain an in-depth understanding of it.⁴⁷ This study developed a clear understanding of the problem relating to the simultaneous enforceability of restraint of trade agreements and garden

⁴³ C Satnam Doing Ethnographic Research: Lessons from a Case Study in M McConville & WH Chui *Research Methods for Law* (2007) 84.

⁴⁴ Atlas.ti Data Analysis Comparison of Qualitative and Quantitative Research. <http://atlasti.com/quantitative-vs-qualitative-research/> (accessed on 08 June 2017)

⁴⁵ M Hammersley (ed.) *Principles of Social and Educational Research* (2007) 39. See also WH Chui *Quantitative Legal Research* in M McConville & WH Chui *Research Methods for Law* (2007) 48.

⁴⁶ J Frecknall-Hughes Research methods in taxation history (2016) 3 *Review Methods in Taxation History* 5.

⁴⁷ Atlas.ti Data Analysis Comparison of Qualitative and Quantitative Research. <http://atlasti.com/quantitative-vs-qualitative-research/> (accessed on 08 June 2017)

leave, and subsequently recommended how the issue may be addressed.⁴⁸ This study therefore adopted a qualitative research method.

The study primarily conducted a literature review in which both primary and secondary sources of law were used. Primary sources that were used are legislations and case law. Secondary sources that were reviewed include law textbooks, journal articles, case law, international agreements and legislation, most of which were accessed online. Reviewing the views of other writers enabled the researcher to identify gaps regarding the simultaneous enforceability of restraint of trade and garden leave.

The doctrinal approach was employed in this study in order to determine the current law on the enforceability of restraint of trade agreements in South African Labour law. Ian and Francis contend that the doctrinal approach is concerned with an inquiry of 'what the law is in a particular area'.⁴⁹ Generally, the doctrinal approach assists the qualitative researcher to determine the real position of the law and equally answer the research question. McKerchar submits that the doctrinal researcher primarily relies on the 'black letter' analysis of the authoritative rules and legal principles, in order to answer the question of law being studied.⁵⁰ More importantly, the doctrinal researcher relies on the deductive form of legal reasoning.⁵¹

McConville and Chui contend that 'black-letter' research 'aims to systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources'.⁵²

The study outlined the comparative perspectives of garden leave, including aspects relating to restraint of trade and lessons South Africa may learn from selected foreign jurisdictions namely, England and Germany. The selected jurisdictions are crucial since

⁴⁸ See chapter 5, section 5.4 of this study.

⁴⁹ D Ian & J Francis, J. 2007. Qualitative Legal Research in M McConville & WH Chui *Research Methods for Law* (2007) 19

⁵⁰ M McKerchar *Design and Conduct of Research in Tax, Law and Accounting* (2010) 15.

⁵¹ As above.

⁵² M McConville, & WH Chui *Research Methods for Law* (2007) 3.

England uses the English Common law system,⁵³ which largely influenced the South African jurisprudence.⁵⁴ Germany applies Roman-Dutch law which equally influenced the development of the South African legal system.⁵⁵ English Common law imposes the burden of proof on the employer in disputes involving the enforceability of restraint of trade agreements.⁵⁶ This contrasts with the legal position in South Africa, in which the onus of proof is reversed to the employee.⁵⁷ In Germany, the validity of a restraint of trade agreement depends on whether the parties agreed on the specific monetary compensation.⁵⁸ If the employer is not prepared to financially compensate the former employee such restraint agreement cannot be enforced.⁵⁹ Conversely, South African jurisprudence does not make the employer to bear the costs of rendering the employee economically inactive.

1.8. Literature Review

A literature review is fundamental to any research. It is in the literature review that a researcher identifies the gap between what has been written on the topic and what has not been written, alongside possible flaws in the literature.⁶⁰ One of the purposes of literature review is to 'indicate where the study fits into the broader debates, and justify the significance of a research project against the backdrop of previous research'.⁶¹ In the light of the above, a literature review curtails the possibility of duplicating studies that have already been conducted by other researchers.

⁵³ I. Farlam, Some reflections on the study of South African legal history 2003 (9) *Fundamina: A Journal of Legal History* 3. See also "Australia's Legal System." <https://www.lawteacher.net/free-law-essays/australian-law/australias-legal-system.php?cref=1>.

⁵⁴ Farlem (note 53 above). See also R Van den Bergh The Remarkable Survival of Roman-Dutch Law 2012 (18) *Fundamina: A Journal of Legal History* 73-74.

⁵⁵ Van den Bergh (note 54 above) 89. See also J.H.A. Lokin Harmonisation in Roman, Roman-Dutch and South African law (2008) 14 *Fundamina: A Journal of Legal History* 34

⁵⁶ *Thinkstorm Pty Ltd v Farah* [2017] NSWSC 11 para 23. See also K Kemp The Significance of Consideration Paid for Post-Employment Restraints in England and Germany (2005) 2 *Stellenbosch Law Review*.

⁵⁷ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 12 above) 893A, 898C-D.

⁵⁸ Kemp (note 56 above) 264.

⁵⁹ As above.

⁶⁰ M Kobus & C Van der Westhuizen 'Planning a Research Proposal' in Kobus *et al* (eds) *The First Steps in Research* (2010) 26.

⁶¹ Kobus & Van der Westhuizen (note 60 above) 26. See also C.B Fouche & C.S.L Delpont 'Writing the research proposal' In A.S De Vos, *at al* (4th edi) *Research Grass Roots* (2017) 109.

Different courts and legal writers considered the problems of restraint of trade in different facets. The available court decisions and legal publications surrounding the enforceability of restraint of trade agreements conflict on some points. This inspired an in-depth study of the literature, so as to develop a clear understating of the doctrine of restraint of trade. A literature review assists the researcher to point out the inconsistencies and lacunae relating to the simultaneous enforceability of a restraint of trade agreements and garden leave in the context of South African Labour law. Thus, the identified inconsistencies or gaps warranted the qualitative researcher to reason carefully and critically analyse the fairness of law relating to the simultaneous enforceability of restraint of trade agreements and garden leave.

The starting point in the discussion of the enforceability of restraint of trade agreements is to define a restraint of trade. Landis and Grossett define restraint of trade as a form of employment contract that imposes restrictions on an employee not to 'work in competition with the employer by doing work for another employer or starting businesses in competition with the employer on leaving the employer's employ'.⁶² A similar definition was offered in the case of *Petrofina (Great Britain) Ltd v Martin*,⁶³ where restraint of trade was defined as a contractual agreement entered into between employer and employee that imposes certain limitations on the employee's future activities or employment should he/she leave the employment.⁶⁴ In simple terms, a restraint of trade may be defined as an agreement entered into between employer and employee, in terms of which the employee is restrained from using, or making available any trade secrets and trade connections to the direct competitors of the former employer for a specified time in a defined geographical area upon termination of employment contract.

Joffe holds the view that the purpose of a restraint of trade agreement is to protect the legitimate interests of the employer.⁶⁵ In the same vein, the Supreme Court of Appeal stressed that the rationality of restraint of trade agreement is to protect legally

⁶² H Landis & L Grossett Restraint of trade: what effect does it have today? (2006) 22 *Management Today* 55.

⁶³ *Petrofina (Great Britain) Ltd v Martin* (note 8 above).

⁶⁴ *Petrofina (Great Britain) Ltd v Martin* (note 8 above) para 146.

⁶⁵ H Joffe Restraint of trade agreements come unstuck after inspection (2005) *Moneyweb's Tax Breaks*: 7. See also Landis & Grossett (note 62 above) 57.

recognisable interests or trade secrets of employer.⁶⁶ It was similarly established in the case of *Forman v Barnett*,⁶⁷ that a restraint of trade agreement which seeks to protect an employer from ordinary trade competition *per se* in the absence of showing that the employee possesses trade secrets, knowledge of trade connections or customer connection is not enforceable.⁶⁸ Emphasis should be placed on the fact that not all trade secrets acquired by the employee can be treated or qualify as a legally protectable interests.⁶⁹ The employee cannot be restrained from using the skills he/she acquired in the former employment.⁷⁰ In light of the above, it is clear that the doctrine of restraint of trade promotes fair competition.

The crucial question to be addressed is the question of whether restraint of trade agreements are enforceable in the context of South African Labour law. One intriguing answer to this question is that it is not objectionable that restraint of trade agreements are *prima facie* valid and enforceable.⁷¹ However, Van Jaarsveld asserts that not all restraint of trade agreements that are voluntarily entered into by parties of full capacity to contract are enforceable.⁷² Calitz expresses a similar opinion that an agreement of a restraint of trade may not be enforced if another party may prove that the agreement is in fact, against public interest and is not aimed at protecting legitimate business interest of the employer.⁷³

It was noted that not all trade secrets acquired by the employee qualify as a legal protectable interest of employer.⁷⁴ The most striking question that one may raise is what, then would constitute legitimate protectable interests of employer? It is clear from the decision in *David Crouch Marketing v Du Plessis*,⁷⁵ that an employer who seeks to restrain an employee from what he deems as the legally protectable interests or trade

⁶⁶ *Automotive Tooling System (Pty) Ltd v Wilkens and other* (2007) 2 SA para 282 E-G.

⁶⁷ 1941 WLD 54.

⁶⁸ *Forman v Barnett* (note 67 above) 60. See also *Supersafes (Pty) Ltd v Voulgarides* 1975 (2) SA 783 (W); V Oosthuizen, Shepstone & Wylie *The Current Law on Restraints of Trade* (2008) 1 *Professional Accountant* 22.

⁶⁹ (2009) 30 ILJ 1828 (LC) para 19.

⁷⁰ *Supersafes (Pty) Ltd v Voulgarides* (note 68 above).

⁷¹ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 12 above) 893.

⁷² Van Jaarsveld (note 36 above) 333.

⁷³ Calitz (note 33 above) 50. See also *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 12 above) 875 H-I.

⁷⁴ *David Crouch Marketing v Du Plessis* (2009) 30 ILJ 1828 (LC) para 19.

⁷⁵ *David Crouch Marketing v Du Plessis* (note 74 above). See also *Vumatel (Pty) Ltd v Majra and Others* (J2400/18) [2018] ZALCJHB 335 (9 October 2018) para 38.

secrets must show the court that the information acquired by employee is 'unique to its business and it is not in the public domain and is not accessible to the public'.⁷⁶ Grey contends in this regard that the skills possessed by employee does not form the basis of legally protectable trade secrets of the employer.⁷⁷

Kemp observes that employers abuse the doctrine of restraint of trade by incorporating ambiguous restrictions, which are too-broad, in order to punish employees by making them economically inactive for a long period.⁷⁸ Kemp further contends that employers abuse the doctrine of restraint of trade by unreasonably restraining employees from taking advantage of other employment opportunities after the termination of employment relationship.⁷⁹ It is not objectionable that majority of employees are not in a financial position to challenge the legitimacy of post-employment restraint of trade agreements due to expensive legal costs.⁸⁰ In the light of the above, employees mostly comply without contesting the validity of restraint in question.⁸¹ It is intriguing to learn that in Germany, all restraint of trade agreements are limited to a period of two years in order to mitigate the issue of rendering the employee economically inactive for too long a period.⁸² Another mechanism in Germany, adopted to discourage employers from abusing the doctrine of restraint of trade, is that an employer is liable to pay the employee for rendering such an employee economically inactive.⁸³ In Germany, employers are obliged to financially compensate employees for the period they are prevented from obtaining alternative employment.⁸⁴ For a restraint of trade agreement to be valid in Germany, parties must have agreed that the employee will be compensated during the period of the restraint.⁸⁵ However, in English law, the most important requirement for the validity of a restraint of

⁷⁶ *David Crouch Marketing v Du Plessis* (note 74 above) para 21.

⁷⁷ J Grey *Restraint of trade and confidentiality (2008) 2 Enterprise Risk* 34.

⁷⁸ Kemp (note 56 above) 258.

⁷⁹ As above.

⁸⁰ *Mason v Provident Clothing and Supply Co Ltd* 1913 AC 724 734

⁸¹ Kemp (note 56 above) 258.

⁸² Kemp (note 56 above) 264.

⁸³ As above.

⁸⁴ Kemp (note 56 above) 258.

⁸⁵ As above.

trade is that an agreement should specifically determine with a reasonable degree of exactness, which trade secrets or commercial information it seeks to protect.⁸⁶

Like Germany, South Africa should consider obligating employers to pay employees a monthly compensation during the period of restraint of trade. In Germany 'each extra month of restraint is an extra month of compensation to be paid by an employer'.⁸⁷

This is why only a few German employment contracts contain non-competition clauses. On the one hand the employer does not want to pay compensation to low-salaried employees who are not expected to exert serious competitive pressure in the future. On the other hand, the compensation payments to relevant senior executives who could be a threat after termination, could, depending on their salary, become an unbearable financial burden for the former employer.⁸⁸

In terms of the Common law principle of *pacta sunt servanda* and ordinary contractual rules, it is clear that parties of competent capacity to contract, who voluntarily enter into an agreement are fully bound to discharge their performance as agreed.⁸⁹ It is a trite general principle of law that agreements legally entered into must be honoured.⁹⁰ Thus far, the prominent principle of *pacta sunt servanda* gains meaningful status and recognition in both International law,⁹¹ and under the South African Law of Contract.⁹² The Constitutional Court confirmed in *Barkhuizen v Napier*⁹³ that although the doctrine of *pacta sunt servanda* is a recognised Common law principle, there is nothing which prevents courts to interfere and pronounce an agreement unenforceable.⁹⁴ Moreover, Barnard points out that courts cannot enforce agreements which are unreasonable and contrary to public policy.⁹⁵ The above line of reasoning resonates with the submission by Oosthuizen *at al* that the enforcement of a restraint of trade agreement is based on the

⁸⁶ A Christopher What/ Whose Knowledge? Restraints of Trade and Concepts of Knowledge (2012) 36 *Melbourne University Law Review* 369.

⁸⁷ Kemp (note 56 above) 265.

⁸⁸ As above.

⁸⁹ RH Christie & V McFarlane (5thedi) *The Law of Contract in South Africa* (2005) 12.

⁹⁰ Kelbrick (note 10 above) 133.

⁹¹ A. Taehee Application of Pacta Sunt Servanda to State Contracts between Investors and Host States and its Implication for International Investment Regime (2013) *University of Michigan Law School* https://works.bepress.com/taehee_ahn/2/ (accessed 02 November 2017)

⁹² Christie & McFarlane (note 89 above).

⁹³ 2007 (5) SA 323 (CC).

⁹⁴ *Barkhuizen v Napier* (note 93 above) para 70.

⁹⁵ As above. See also AJ Barnard-Naude Hegemony, freedom of contract, good faith and transformation (2008) 1 *Constitutional Court Review* 174.

question of whether a restraint agreement is reasonable to protect the employer's trade secrets or confidential information from being used by employees in competition with the employer.⁹⁶ Accordingly, the principle of *Pacta sunt servanda* must be balanced with public policy and the Constitution of the Republic of South Africa.⁹⁷

Whenever a court is confronted with the question of the enforceability of a restraint of trade agreement, the criteria authoritatively developed in the case of *Basson v Chilwan and others* must be followed.⁹⁸ In this case, Nienaber JA identified four considerations:

1. Is there an interest of one party which is deserving of protection at the termination of the agreement?
2. Is such interest being prejudiced by the other party?
3. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?
4. Is there another facet of public policy having nothing to do with relationship between the parties, but which requires that the restraint should either be maintained or rejected?⁹⁹

In the matter of considering the reasonableness of a restraint of trade agreement, the court must examine two elements, namely the geographical area of restriction and duration of restriction.¹⁰⁰ Calitz opines that a restraint of trade period which is longer than necessary to protect the employer is in effect unreasonable, and consequently unenforceable.¹⁰¹

The intrinsic question that one may raise is whether the courts have a discretion to reduce the geographical area which is too wide and/or period of restriction which is too long as the case may be, to render the restrictive agreement valid and enforceable. There are however conflicting decisions on this subject. Some courts reduce the unreasonably wide

⁹⁶ Oosthuizen, Shepstone & Wylie (note 68 above) 22.

⁹⁷ Calitz (note 33 above) 57. See also *Mozart Ice Creams Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) Para 78.

⁹⁸ *Basson v Chilwana and Another* (note 16 above)

⁹⁹ *Basson v Chilwan and Another* (note 16 above) 767 G-H. See also *Reddy v Siemens Telecommunications (Pty) Ltd* (note 31 above) Para 16.

¹⁰⁰ *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* (1991) (2) SA 482 D-E.

¹⁰¹ Calitz (note 33 above) 53. See also *Den Braven S.A. (Pty) Limited v Pillay and Another* (2899/2008) [2008] ZAKZHC 22 para 55.

geographical area and/or long period of restriction in question.¹⁰² Conversely, some courts decline to grant the enforceability of restraint of trade agreements in which either geographical area or period of restriction is too long.¹⁰³ The above-mentioned cases rejected to reduce the unreasonable period or geographical area of restriction to make an agreement reasonable in relevant circumstances.¹⁰⁴

There is uncertainty about the relationship between garden leave and restraint of trade agreements.¹⁰⁵ Van Niekerk J observed that the 'concept of garden leave and its relationship, if any with a restraint of trade agreement has not been the subject of consideration by the South African Courts.'¹⁰⁶ Mupangavanhu contends that there is a direct nexus between restraint of trade agreement and garden leave.¹⁰⁷ She further argues that the concurrent enforcement of garden leave and restraint of trade period tends to be problematic.¹⁰⁸ This justifies this in-depth study which was conducted to examine the existing relationship between restraint of trade agreements and garden leave.

In the case of *Vodacom (Pty) Ltd v Motsa and others*, Van Niekerk J, was called to consider a case in which the concurrent enforcement of garden leave and a restraint of trade agreement was at stake.¹⁰⁹ In this case, the employer elected to enforce both six months of garden leave and six months of restraint of trade agreement.¹¹⁰ The court considered the reasonableness of the combined period of the restraint of trade clause and period of garden leave.¹¹¹ The respondent argued that the combination of garden leave and restraint of trade period was unreasonable and therefore, unenforceable.¹¹² The court held that having regard to the nature of the information Mr. Motsa had access

¹⁰² *National Chemsearch SA (Pty) Ltd v Borrowman and another* 1979 (3) 1092 (T) 1116 D-G. See also *Turner-Morris (Pty) Ltd v Riddell* 1996 (4) SA 397.

¹⁰³ *Sasfin (Pty) Limited v Beukers* 1989 (1) SA (A) 16G-17A. See also *EOH Mthombo (Pty) Ltd v Prelence Bheekie-ODHAV* (C177/12) [2012] ZALCCT 10 para 28; *Advtech Resourcing (Pty) Limited v Kuhn and another* (note 25 above) para 44.

¹⁰⁴ As above.

¹⁰⁵ *Vodacom (Pty) Ltd v Motsa and others* (note 39 above) para 22.

¹⁰⁶ As above.

¹⁰⁷ Mupangavanhu (note 11 above) 3.

¹⁰⁸ Mupangavanhu (note 11 above) 2.

¹⁰⁹ *Vodacom (Pty) Ltd v Motsa and Another* (note 39 above) para 1.

¹¹⁰ As above.

¹¹¹ *Vodacom (Pty) Ltd v Motsa and Another* (note 39 above) para 23.

¹¹² *Vodacom (Pty) Ltd v Motsa and Another* (note 39 above) para 22.

to, there was no basis on which it could be concluded that concurrently enforcing six months of garden leave and six months of restraint of trade agreement is unreasonable.

Mupangavanhu describes garden leave as the employment contractual clause which confers a discretion on an employer, of electing whether to require an employee to spend a whole or part of the leave at home, at nearly the period of termination of the employment contract, as to allow 'the confidential information to which the employee had access to become stale and keeping the employee out of the clutches of competitors'.¹¹³

It is noteworthy that garden leave applies where there is a clause in the employment contract which provides that either party shall be entitled to terminate a contract by giving the other contracting party a notice of termination within less than a determined period.¹¹⁴ In such circumstance, the employer may elect to enforce garden leave and prevent employee from doing work for him\her.¹¹⁵ However, during the subsistence of garden leave, the employee is legally entitled for a full remuneration until the termination of the employment contract.¹¹⁶

Restraint of trade clause seeks to protect the employer's confidential information, trade secrets and trade connections.¹¹⁷ In the same light, garden leave seeks to make the employee to forget the confidential information he/she acquired during the course of employment.¹¹⁸ Practically speaking, it seems clear that the purpose of garden leave is the same as that of a restraint of trade agreements – to restrain an employee from benefiting out of the confidential information of the employer. Mupangavanhu contends that restraint of trade and garden leave differ on the time upon which each becomes enforceable.¹¹⁹ She argues that a restraint of trade becomes operational at the termination of an employment contract, while garden leave is enforced at about the

¹¹³ Mupangavanhu (note 11 above) 12. See also *Vodacom (Pty) Ltd v Motsa and Another* (note 39 above) para 22.

¹¹⁴ J. Van Wyk "Garden Leave" and restraint of trade agreements. <http://www.polity.org.za/article/garden-leave-and-restraint-of-trade-agreements-2016-05> 27/searchString:garden+leave (accessed on 10 June 2017)

¹¹⁵ *Vodacom (Pty) Ltd v Motsa and Another* (note 39 above) para 5; see also <http://www.polity.org.za/article/gardening-leave-and-the-enforceability-of-restraints-of-trade>. (accessed on 14 February 2016)

¹¹⁶ *Vodacom (Pty) Ltd v Motsa and Another* (note 39 above) para 5. See also <http://www.polity.org.za/article/gardening-leave-and-the-enforceability-of-restraints-of-trade>. (accessed on 14 February 2016)

¹¹⁷ Mupangavanhu (note 11 above) 12. See also *Vodacom (Pty) Ltd v Motsa* (note 39 above) para 39.

¹¹⁸ Mupangavanhu (note 11 above) 12 see also *Vodacom (Pty) Ltd v Motsa* (note 39 above) paras 22, 39.

¹¹⁹ Mupangavanhu (note 11 above) 12. See also *Vodacom (Pty) Ltd v Motsa and Another* (note 39 above) paras 22, 39.

termination of employment contract.¹²⁰ It should however be noted that the purpose of both garden leave and restraint of trade agreements is to protect the confidential information of the employer against the risk of such information being used by the employee or competitors.

The primary concern of the present study is to investigate the concurrent enforcement of restraint of trade clauses and garden leave despite these two clauses serving the same purpose. In other words, the study examines the reasonableness of the concurrent enforceability of restraint of trade and garden leave. The study endorses a notion that there should be no justification for the subsequent enforcement of a restraint of trade in a case where garden leave sufficiently served the purpose of protecting the legitimate interest of an employer.¹²¹

Another area of controversy in relation to the enforceability of restraint of trade agreements is the issue of the onus of proof. In *Magna alloys and Research (SA) (Pty) Ltd v Ellis*,¹²² Rabie CJ held that the onus of proof falls on an employee who is avoiding the enforceability of restraint of trade agreement.¹²³ Neethling endorses the aforementioned decision.¹²⁴ Conversely, in *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*,¹²⁵ the court held that a restraint of trade seeks to limit the employee's constitutional rights to freedom of trade, occupation and profession.¹²⁶ The court further pointed out that it is unconstitutional to impose the onus of proof on employee to prove the unreasonableness of restraint of trade agreement.¹²⁷ The issue of onus of proof remains controversial and unresolved.

The Supreme Court of Appeal was presented with an opportunity to settle the issue of whether the current Constitution of the Republic of South Africa reversed the onus of

¹²⁰ As above.

¹²¹ *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13 para 89.

¹²² *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 12 above).

¹²³ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 12 above) 893A, 898C-D. See also *Dickinson Holdings v Du Plessis* 2008 ILJ 1666.

¹²⁴ Neethling (note 33 above) 80.

¹²⁵ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 18 above).

¹²⁶ As above.

¹²⁷ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 18 above) 209F. See also *Advtech Resourcing Ltd t/a Communicate Personnel Group v Kuhn* (note 25 above) para 28.

proof to an employer.¹²⁸ The court did not answer the question directly.¹²⁹ But reasoned that it shall make no difference whether onus is reversed to the employer or not.¹³⁰ In the same vein, Neethling affirms that ‘the outcome of the value judgment would be the same irrespective of whether the burden rested on the covenantor or the covenantee’.¹³¹ Calitz posed a critical question of why courts avoid answering the question of whether the Constitution of the Republic of South Africa reversed the onus of proof to the employer in the disputes of the enforceability of restraint of trade agreement.¹³² He further contends that there is a need for certainty on the question of onus of proof regarding restraint of trade agreements.¹³³

Accordingly, Mupangavanhu argues that onus in proof of restraint of trade disputes should rest with the employer if he/she seeks the enforceability of restraint of trade agreement after enforcing a garden leave to prove that an additional protection is necessary.¹³⁴

The present study is not primarily concerned about answering the question of who bears the onus of proof in disputes involving the enforceability of restraint of trade agreement. However, the proposed study is premised on the question of whether the employee should bear the onus of proof to prove unreasonableness of simultaneous enforceability of restraint of trade agreement and garden leave. This study contends that after the enforcement of garden leave, the employer must bear the onus of proof to prove that garden leave was insufficient to protect the legitimate business interests.

The central question that one may pose is whether the doctrine of restraint of trade survive constitutional scrutiny. Section 2 of the Constitution of the Republic of South Africa provides that the Constitution is the supreme law of the land.¹³⁵ The same provision goes further to provide that any law or conduct which is in conflict with the Constitution of the

¹²⁸ *Reddy v Siemens Telecommunications (Pty) Ltd* (note 31 above) para 13.

¹²⁹ As above.

¹³⁰ *Reddy v Siemens Telecommunications (Pty) Ltd* (note 31 above) para 14.

¹³¹ Neethling (note 33 above) 94.

¹³² Calitz (note 33 above) 57. See also Neethling (note 33 above) 94.

¹³³ As above.

¹³⁴ Mupangavanhu (note 11 above) 18.

¹³⁵ Constitution of the Republic of South Africa Act 108 1996, sec 2.

Republic of South Africa is invalid.¹³⁶ It is for the above reason that agreements, conducts, doctrines and laws should be tested against the Constitution so as to inquire into the question of whether such is in line with the supreme law of the Republic of South Africa. In addition, section 172 (1) (a) of the Constitution of the Republic of South Africa gives a court the power to interfere and declare 'any law or conduct' that is in conflict with it invalid.¹³⁷

Section 22 of the Constitution of the Republic of South Africa, guarantees everyone to freely practice trade or profession of their choice.¹³⁸ It is beyond dispute that a restraint of trade clause restrains the party from exercising his freedom of trade or profession, for a particular period, and within a particular geographical area.¹³⁹ In the case of *Fidelity Guards Holdings (pty) Ltd v Pearman*,¹⁴⁰ Liebenberg J held that restraint of trade agreements limits the constitutional rights of the employees.¹⁴¹ Freedom of trade may be limited in terms of section 36 of the Constitution of the Republic of South Africa.¹⁴² Of importance, the court did not find the doctrine of restraint of trade inconsistent with the Constitution of the Republic of South Africa.¹⁴³

Freedom of trade is a fundamental right entrenched in the Constitution of South Africa,¹⁴⁴ it is therefore common cause that this right can be limited in terms of the 'law of general application only to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity and freedom'.¹⁴⁵ It is further submitted that the Constitution of the Republic of South Africa demands that when courts develop Common law, they 'must promote the spirit, purport and object of the Bills of Rights'.¹⁴⁶ Pretorius opines that if the constitution is applied in restraint of trade agreements, such restraint agreements will be invalid and unenforceable, unless an

¹³⁶ Constitution of the Republic of South Africa Act 108 1996, sec 2.

¹³⁷ Constitution of the Republic of South Africa 1996 (note 135 above) sec 172 (1) (a).

¹³⁸ Constitution of the Republic of South Africa 1996 (note 135 above).

¹³⁹ Pretorius (note 13 above) 159.

¹⁴⁰ 1997 (4) All SA 650.

¹⁴¹ *Fidelity Guards Holdings (Pty) Ltd v Pearman* (note 140 above) 658G.

¹⁴² Constitution of the Republic of South Africa 1996 (note 135 above).

¹⁴³ As above.

¹⁴⁴ Constitution of the Republic of South Africa 1996 (note 135 above) sec 22.

¹⁴⁵ Constitution of the Republic of South Africa 1996 (note 135 above) sec 36.

¹⁴⁶ Pretorius (note 13 above) 60. See also Constitution of the Republic of South Africa 1996 (note 135 above) sec 39 (2).

employer shows that the enforceability is reasonable.¹⁴⁷ Conversely, Rabie CJ held that restraint of trade agreements are *prima facie* valid and enforceable, unless the employee shows that its enforceability is unreasonable.¹⁴⁸ Although the present study attempts to bring certainty pertaining to controversial issue of the enforceability of restraint of trade, it is however focused primarily on the novel concept of the existing relationship between restraint of trade agreements and garden leaves in the context of South African Labour law.

1.9. Definition of key Concepts

(a). Competition. May be defined as a struggle between two or more parties who are in the same business, to obtain financial gain from the same customers or clients.¹⁴⁹

(b). Confidential information. Kruger J defined the concept as the 'information that is capable of application in trade or industry, which is of economic value; not of public knowledge'.¹⁵⁰

(c). Enforceability. May be defined as the court's power to order a party who is avoiding to perform his contractual obligation to discharge the performance as per agreement.¹⁵¹

(d) Garden leave. Is the practice whereby an employee who is leaving a job is instructed to stay away from a workplace and from divulging the confidential information of the employer during the notice period while entitled for a pay roll.¹⁵²

(e). Legitimate interest. The concept may be defined as an interest that is recognised by the law.¹⁵³

¹⁴⁷ Pretorius (note 13 above) 60.

¹⁴⁸ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 12 above) 875 H-I.

¹⁴⁹ BA Garner, 9th ed *Blacks lawyer's Dictionary* (2009) 322.

¹⁵⁰ *Metcash Trading Africa (Pty) Ltd v Pauls* [2005] ZAFSHC 153 (8 December 2005).

¹⁵¹ Enforceability. Dictionary.com Unabridged. Random House, Inc. <http://www.dictionary.com/browse/enforceability> (accessed on the 16 May 2017).

¹⁵² Garden Leave. (n.d.). Definitions.net. Available at <http://www.definitions.net/definition/GARDEN LEAVE> (Accessed on 06 November 2017).

¹⁵³ Garner (note 148 above) 886.

(f). Pacta sunt servanda. It is a rule which provides that agreement voluntarily entered into by parties of competent capacity to contract must be honoured.¹⁵⁴

(g). Public interest. May be defined as 'legal practice that advances social justice or other causes for the public good'.¹⁵⁵

(h). Reasonable. Fair and proper under the given circumstances of the case and conforming to the standards which are generally considered free of extremes.¹⁵⁶

(i). Restraint of trade. The court defined restraint of trade as a contractual agreement entered into between the employer and the employee that imposes certain limitations on the employee's future activities or employment should he/she leave the employment.¹⁵⁷

(j). Trade secret. The court defined trade secret as 'information belonging to a commercial enterprise which is unique or special to it and which is disclosed only to those employees who have a need to know it'.¹⁵⁸

1.10. Ethical Considerations

The researcher is aware of the Plagiarism Policy of the University of Venda. For that reason, the study meticulously avoided plagiarism. The work of other writers has been properly acknowledged and referenced. The study does not fabricate information, nor conceal the truth, or impart misleading information about the true contemporary position of the law, regarding the doctrine of restraint of trade. This study does not contain information which was unethically gathered. The present study does not involve the interview of human subjects. It is primarily based on a literature review, in which both primary and secondary sources of law were used. The study was conducted with the diligent observance of the highest levels of integrity and objectivity.

¹⁵⁴ United Nations, Vienna Convention on the Law of Treaties art 26, 23 May 1969, United Nations, Treaties Series, vol. 1155, p331 available at: <http://www.refworld.org/docid/3ae6b3a10.html> (Accessed on 02 November 2017). See also Garner (note 148 above) 1217.

¹⁵⁵ Garner (note 148 above) 1350.

¹⁵⁶ L Emanuel 1999 *Latin for Lawyers*. New York: Emanuel Publishing Corp. (1999) 324. See also Garner (note 148 above) 1379.

¹⁵⁷ *Petrofina (Great Britain) Ltd v Martin* (note 8 above) para 146.

¹⁵⁸ *David Crouch Marketing v Du Plessis* (note 74 above) para 21. See also Emanuel (note 155 above) 369.

1.11. Framework of the Study

In addition to this introductory chapter, this study is divided into four other chapters focusing on specific themes.

The second chapter outlines the history, origin, and rationality of restraint of trade agreements and concepts. It also provides the criteria that are applied by South African Courts when enforcing restraint of trade agreements in the case where the employee is avoiding to perform as agreed. The chapter argues that restraint of trade agreements are justifiable, constitutional, and still relevant in the current dispensation. In this chapter, controversies are pointed out regarding the question of who bears onus of proof in cases in which the enforceability of a restraint of trade agreement is disputed.

The third chapter examines the effect of garden leave on the restraint of trade agreements. It also studies the nature of the relationship between garden leave and restraint of trade agreements, particularly how garden leave affects the enforceability of the full period of restraint of trade agreements. The chapter further examine the reasonableness of the simultaneous enforceability of both a restraint of trade agreement and garden leave.

The fourth chapter outlines comparative perspectives on garden leave, including aspects relating to restraint of trade and lessons South Africa may learn from England and Germany.

The last chapter makes specific recommendations and provides a general conclusion on the issue of the reasonableness of the simultaneous enforceability of restraint of trade agreements and garden leave.

1.12. Limitations of Study

Since the study adopts a qualitative research methodology only, it relies heavily on the availability of literature, case law, and legislation in South Africa and the selected comparative jurisdictions. The concept of the relationship between restraint of trade agreements and garden leave is novel under South African law. There is only one known

South African Labour Court case which dealt with the matter in South Africa, and very few writers have considered the topic. Accordingly, the researcher had to rely on sources of law in foreign jurisdictions due to a lack of relevant information in South Africa.

CHAPTER TWO

HISTORICAL AND CONCEPTUAL ISSUES IN RESTRAINT OF TRADE AGREEMENTS

2.1 Introduction

The chapter outlines the history, origin, and rationality of restraint of trade agreements. It provides criteria applied by South African Courts when enforcing restraint of trade agreements in cases where the employee is avoiding to perform as agreed. The chapter argues that a restraint of trade agreements are justifiable, constitutional and still relevant in the current dispensation. The chapter also discusses controversies regarding the question of who bears onus of proof in cases where the enforceability of a restraint of trade agreement is disputed.

2.2 Legal historical background to the enforceability of restraint of trade agreements in South Africa

It is imperative to conduct an investigation into the historical development and general principles regarding restraint of trade agreements. The above is necessary to review the developments of the restraint of trade doctrine. The legal historical study exposes the real purpose, fairness, and importance of restraint trade agreements in the contemporary legal dispensation.¹ This paves the way for one to propose amendments to the existing law with reference to the given historical facts.

In 1652 Jan Van Riebeeck established Cape Town as a refreshment station and thus brought Roman-Dutch law in South Africa.² From 1652 Cape Town was ruled by the Netherlands.³ The Roman-Dutch law was developed and applied over South Africa.⁴ However, in 1795 Cape Town was temporarily surrendered to the British.⁵ In 1802 the

¹ Teacher, Law. (November 2013). History of Law. Retrieved from <https://www.lawteacher.net/free-law-essays/english-legal-system/history-of-law.php?cref=1> (accessed on 01 December 2017).

² H.A Mocke & H.C. Wallis *History for the Eighties Standard* 6 (1985) 111. See also P Havenga *at al*, (7th edi) *General Principles of Commercial Law* (2010) 3; K. Duard (3rd edi) *Beginner's Guide for Law Students* (2002) 35.

³ Mocke *et al* (note 2 above) 110.

⁴ Duard (note 2 above) 35.

⁵ Mocke *et al* (note 2 above) 110.

Amiens Peace Treaty was entered into which stipulated that Cape Town had to be restored to the Netherlands.⁶ Cape Town and other Dutch colonies were governed directly from Holland.⁷ This meant that parties with a legal dispute, who were not satisfied with a verdict, were entitled to appeal to the highest court in the Netherlands.⁸

It will be recalled that South Africa was a British Colony.⁹ In 1806 the Cape was annexed by Britain for the second time.¹⁰ Britain ruled Cape as a 'Crown Colony'.¹¹ The Cape was ruled directly from London through its governors in Cape Town.¹² As a result, the English Common law system largely influenced South African legal system.¹³ However, Britain allowed the application of Roman-Dutch law to continue in the country.¹⁴ Roman-Dutch law equally influenced the South African jurisprudence.¹⁵ By virtue of the aforementioned application of both the Roman-Dutch law and the English law principles, South African Courts have been applying conflicting approaches in resolving restraint of trade disputes. Didcott J confirmed the existence of this problem by pointing out that when a judge is faced with a dispute of deciding whether a restraint of trade agreement is '*prima facie* valid or *prima facie* void depends upon one's preference for the idea of the sanctity of contracts'.¹⁶

Prior to 1984, the majority of South African Courts favoured English Common law in enforcing restraint of trade agreements.¹⁷ Centlivres J confirmed that 'there have been a large number of cases which have unquestioningly applied the English law on the point'.¹⁸ The English law values the notion of freedom of contract,¹⁹ which is founded on the basis

⁶ Mocke *et al* (note 2 above) 110.

⁷ Mocke *et al* (note 2 above) 113.

⁸ As above.

⁹ Duard (note 2 above) 35.

¹⁰ Mocke *et al* (note 2 above) 111.

¹¹ As above.

¹² Mocke *et al* (note 2 above) 120.

¹³ I Farlam, Some reflections on the study of South African legal history 2003 (9) *Fundamina: A Journal of Legal History* 3.

¹⁴ Duard (note 2 above) 35.

¹⁵ R Van den Bergh The Remarkable Survival of Roman-Dutch Law 2012 (18) *Fundamina: A Journal of Legal History* 89. See also J.H.A. Lokin Harmonisation in Roman, Roman-Dutch and South African law (2008) 14 *Fundamina: A Journal of Legal History* 34.

¹⁶ *National Chemsearch SA (Pty) Ltd v Borrowman and another* 1979 (3) 1092 (T) 1100H.

¹⁷ H Landis & L Grossett 2006. Restraint of trade: what effect does it have today? (2006) 22 *Management Today* 55.

¹⁸ *Holmes v Goodall and Williams* 1936 P.D 35 at 42.

¹⁹ K Kemp The Significance of Consideration Paid for Post-Employment Restraints in England and Germany (2005) 2 *Stellenbosch Law Review* 260.

that everyone is entitled to freely trade.²⁰ In terms of the English law, restraint of trade agreements are *prima facie* invalid and unenforceable, unless the employer can discharge the onus that such agreement is not against public interest.²¹

Before 1984, few cases followed Roman-Dutch law in determining the reasonableness of validity and enforceability of restraint of trade agreements.²² In *National Chemsearch SA (Pty) Ltd v Borrowman and another*,²³ Botha J observed that Roman-Dutch law is also applied in resolving disputes of enforceability of restraint of trade agreements.²⁴ The two classical South African decisions which preferred Roman-Dutch law over traditional English law in relation to matters concerning restraint of trade agreements are namely *Roffey v Catteral, Edwards & Goudre (pty) Ltd*,²⁵ and *Highlands Park Football Club Ltd v Vijjoen and another*.²⁶ In terms of Roman-Dutch law, a restraint of trade agreement is *prima facie* valid and enforceable unless the employee can discharge the onus of proof on preponderance of evidence that the agreement in question is unreasonable and inimical to public interest.²⁷

It is worth noting that Roman-Dutch law values the notion of sanctity of contract.²⁸ The notion of sanctity of contract is premised upon the principle of *pacta sunt servanda*.²⁹ The above-mentioned principle provides that parties who voluntarily enter into an agreement should be bound to honour their agreements.³⁰ This explains why restraint of trade agreements are *prima facie* valid and enforceable in terms of Roman-Dutch law.³¹

²⁰ Kemp (note 19 above) 260.

²¹ *Van de pol v Silberman and Another* 1952 (2) SA 561 A, 569 C. See also C.J. Pretorius *Covenants in Restraint of Trade: A Synthesis of Traditional, Common Law and Constitutional Approaches* (2009) 30 *Obiter* 156; Landis & Grossett (note 17 above) 55.

²² *Holmes v Goodall and Williams* (note 18 above) 42.

²³ *Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above).

²⁴ *Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1099 D-E.

²⁵ 1977 (4) SA 494 (N)

²⁶ 1978 (3) SA 191 (W)

²⁷ *Roffey v Catteral, Edwards & Goudre (pty) Ltd* (note 25 above) 505 E-F.

²⁸ M Van Jaarsveld *The Validity of a Restraint of Trade in an Employment Contract* (2003) 15 *South African Mercantile Law Journal* 331.

²⁹ K Calitz *Restraint of Trade Agreements in Employment Contracts: Time for Pacta Sunt Servanda to Bow Out?* (2011)

²² *Stellenbosch Law Review* 62-63; Van Jaarsveld (note 28 above) 332.

³⁰ As above.

³¹ *Roffey v Catteral, Edwards & Goudre (pty) Ltd* (note 25 above) 505 E-F.

Both Roman-Dutch law and English law value the reasonableness of restraint of trade agreements and public interest in determining the enforceability of such agreements.³² Botha J states that 'even Roman-Dutch law does not enforce restraint of trade agreements which are unreasonable and against public policy'.³³

In *National Chemsearch SA (Pty) Ltd v Borrowman*,³⁴ the court shared the same view with Didcott J that the idea of sanctity of contracts should take precedence over the idea of freedom of trade.³⁵ In *Roffey v Catteral, Edwards & Goudre*,³⁶ the court was satisfied that South African law prefers the sanctity of contracts and that the public policy does not discourage the enforcement of restraint of trade agreements.³⁷

The court in *National Chemsearch SA (Pty) Ltd v Borrowman*,³⁸ and another clearly defined contracts which are against public policy as:

One stipulating a performance which is not per se illegal, or immoral, but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interests of the community.³⁹

The adoption of both English law and Roman-Dutch law in South Africa in the settlement of matters relating to enforcement of restraint of trade agreements caused problems. The South African Courts had to apply conflicting approaches. As such, some courts applied English law,⁴⁰ while others adopted Roman-Dutch law.⁴¹ In *Roffey v Catteral, Edwards & Goudre*,⁴² Didcott J noted that:

³² Van Jaarsveld (note 28 above) 156. See also Landis & Grossett (note 17 above) 55.

³³ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1099 D-E.

³⁴ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above).

³⁵ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1099. See also *Roffey v Catteral, Edwards & Goudre* (note 25 above) 504.

³⁶ *Roffey v Catteral, Edwards & Goudre* (note 25 above).

³⁷ *Roffey v Catteral, Edwards & Goudre* (note 25 above) 505E-F.

³⁸ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above).

³⁹ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1107 F-G.

⁴⁰ *Holmes v Goodall and Williams* (note 18 above) 42.

⁴¹ *Roffey v Catteral, Edwards & Goudre* (note 25 above). See also *Highlands Park Football Club Ltd v Vijjoen and another* 1978 (3) SA 191 (W).

⁴² *Roffey v Catteral, Edwards & Goudre* (note 25 above).

When one is faced with a choice: whether covenants in restraint of trade are *prima facie* valid, or *prima facie* void depends upon one's preference for the idea of the sanctity of contracts.⁴³

In 1984, the Supreme Court of Appeal in *Magna Alloys and Research (SA) Pty Ltd v Ellis*,⁴⁴ brought legal certainty and provided an approach which ought to be followed in determining the validity and enforceability of restraint of trade agreements.⁴⁵ The court held that restraint of trade agreements are *prima facie* valid and enforceable only if they are not against public policy.⁴⁶ The court further pointed out that South African law prefers sanctity of contract,⁴⁷ which requires parties to honour agreements they voluntarily entered into.⁴⁸ Rabie CJ came to the conclusion that the South African legal position regarding restraint of trade agreements is that the sanctity of contract overrides the right to freedom of trade.⁴⁹ The then Appellate Division changed the applicable law from English law to Roman-Dutch law.⁵⁰ The court rejected previous decisions based on English law.⁵¹ However, there is still a debate about which approach best suits the enforcement of restraint of trade agreements in South Africa.

This study argues that English Common law best suits the South African jurisprudence regarding the enforceability of restraint of trade agreements since it is in line with Section 22 of the Constitution, particularly on the question of who bears the onus of proof. Freedom of trade as a constitutional right, may be limited in terms of Section 36 of the Constitution. This then generally means that an employer must show that a restraint of trade agreement which is restricting a former employee from freely trading is in all circumstances a reasonable and justifiable limitation in terms of the limitation clause.⁵² Therefore, an employer must show that a restraint of trade agreement which restricts a

⁴³ *Roffey v Catteral, Edwards & Goudre* (note 25 above) 505 D-E. See also *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1100H.

⁴⁴ 1984 (4) SA 874 (A).

⁴⁵ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above) 893A-B, 898C-D.

⁴⁶ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above) 875 H-I.

⁴⁷ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above) 875 G-I

⁴⁸ As above.

⁴⁹ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above).

⁵⁰ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above) 893A-B, 898C-D.

⁵¹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above).

⁵² Constitution of the Republic of South Africa Act 108 1996, Sec 36.

former employee to freely trade is a reasonable and justifiable limitation of Section 22 of the Constitution.

In terms of the English law, a party who seeks to enforce a restraint of trade agreement bears the burden of proving that such agreement is unreasonable and contrary to public policy.⁵³ The Appellant Division in *Magna Alloys and Research (SA) Pty Ltd v Ellis*,⁵⁴ refused to adopt the above-mentioned English approach, and held that a party who seeks to avoid the enforceability of a restraint agreement is encumbered with the onus of proving that such agreement is unreasonable and against public policy.⁵⁵

Freedom of trade is a fundamental right entrenched in the Constitution.⁵⁶ Section 22 of the Constitution provides that everyone has the right to choose their trade, occupation or profession freely.⁵⁷ Freedom of trade as a constitutional right may be limited in terms of Section 36 of the Constitution. The legal implication is that an employer must show that a restraint of trade agreement which restricts a former employee from freely trading is in all circumstances a reasonable and justifiable limitation in terms of the limitation clause.⁵⁸ It is arguable that after the employee has established that the employer intends to limit his/her freedom of trade, an employer must then prove that such infringement (limitation) constitutes a legitimate limitation of the right.⁵⁹ In simple terms, the employer must show that a restraint of trade agreement which is restricting a former employee to freely trade is a reasonable and justifiable limitation of Section 22 of the Constitution. Calitz contends that there is need for certainty on onus of proof regarding restraint of trade agreements.⁶⁰ Due care must be exercised whenever a constitutional right of an individual is limited. Constitutional rights should only be limited when it is exceptionally necessary to do so.

⁵³ *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (HL) 319E. See also *Commercial Plastic Ltd v Vincent* [1964] 3 All ER 546 (CA) 551D.

⁵⁴ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above).

⁵⁵ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above) 893EG, 897H-898D.

⁵⁶ Constitution of the Republic of South Africa 1996 (note 52 above) Sec 22.

⁵⁷ As above.

⁵⁸ Constitution of the Republic of South Africa 1996 (note 52 above) Sec 36.

⁵⁹ As above.

⁶⁰ Calitz (note 29 above) 57. See also Neethling (note 327 above) 94.

2.3 Rationality of restraint of trade agreements

The current position of the South African jurisprudence in relation to the enforceability of restraint of trade agreements is that such agreements are *prima facie* valid and enforceable, unless the party who wishes to avoid its enforceability can prove that the restraint is not aimed at protecting legitimate business interests of the employer and is contrary to public policy.⁶¹ As such, a restraint of trade agreement may not be enforced if an employee may prove that the agreement is in fact not aimed at protecting legitimate business interests of the employer.⁶²

The rationale of the restraint of trade doctrine is to protect legally recognisable business interests or trade secrets of the employer.⁶³ This reasoning was confirmed by the recent decision in *Vodacom (Pty) Ltd v Motsa and Another*.⁶⁴ It is thus not surprising that employers cannot seek protection from ordinary fair competition in the absence of showing that an employee possesses trade secrets, or knowledge of trade connections which may be used to the employer's detriment.⁶⁵ The decision in *Mozart Ice Creams Classic Franchises (Pty) Ltd v Davidoff and Another*⁶⁶ confirms that a restraint of trade agreement should not be construed as a mechanism to discourage competition but to protect legitimate business interests of the employer.⁶⁷

This study emphasises that the employer should not construe the rationality of a restraint of a trade agreement as one which prevents competition *inter partes* (between employer and employee).⁶⁸ Everyone is entitled to freely trade or exercise his/her profession in

⁶¹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above) 875 H-I.

⁶² Calitz (note 29 above) 50.

⁶³ R McGuirk & A. Scott. Confidential Information: Lessons from a failed injunction (2017) 182 *Employment Law Journal* 13. See also *Automotive Tooling V Wilkens and Other* 7(2007) 2 SA 282 E-G.

⁶⁴ *Vodacom (Pty) Ltd v Motsa and Another* (J 74/16) [2016] ZALCJHB 53 para 41

⁶⁵ *Forman v Barnett* 1941 WLD 54, 60. See also *One Capital Sponsor Services (Pty) Ltd and Another v Chellan and Others* (J1572/17) [2017] ZALCJHB 340 (18 September 2017) para 19; Calitz (note 29 above) 50; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above). 875 H-I.

⁶⁶ (2009) 30 ILJ 1750 (C).

⁶⁷ *Mozart Ice Creams Classic Franchises (Pty) Ltd v Davidoff and Another* (note 61 above) 1751 A-B. See also *World Net Express (A division of World Net Logistics (Pty) Ltd) v Aucamp and Another* (J1794/17) [2017] ZALCJHB 324 (12 September 2017) para 22.

⁶⁸ As above.

competition with others,⁶⁹ provided the said competition is lawful.⁷⁰ Society promotes competition, as such, it cannot be excluded in the market place.⁷¹ Some employers misuse the doctrine of restraint of trade as a mechanism to discourage employees from engaging in fair competition.⁷² The employer cannot equally utilise the doctrine of restraint of trade to prevent the departing employee from taking other available job opportunities or to start an enterprise.⁷³ Employers often introduce extremely broad restraint of trade terms in employment contracts, knowing that employees are not in a financial position to challenge such unreasonable restrictions in court due to expensive legal costs.⁷⁴ As such, affected employees comply with unreasonable restrictions to avoid complicated expensive lawsuits. Employers must only enter into restraint of trade agreements when they have legitimate protectable interests.⁷⁵ The above reasoning depicts that restraint of trade agreements should not be entered into solely as a standard contractual employment term. Courts have a duty to examine each case from its peculiar facts, to determine whether indeed from the case in question, the employer seeks to prevent an ordinary competition or to protect legitimate commercial interests from being divulged or used by the former employee, to the employer's detriment.⁷⁶ It is unreasonable to restrain a former employee from work without taking into account the financial means that such an employee should use to survive for the period he is restrained to work.

2.4 Nature of restraint of trade agreements

A restraint of trade may be defined as an agreement entered into between employer and employee, in terms of which the employee is restrained from using, or making available of any trade secrets and trade connections to the direct competitors of the employer for a specified time in a defined geographical area upon termination of employment contract.⁷⁷ The above definition explicitly lays out elements or requirements of a valid

⁶⁹ *H Mocke Construction (Pty) Ltd and Another v Pexmart CC and Others* (58201/2014) [2017] ZAGPPHC 718 (13 November 2017) para 24.

⁷⁰ As above.

⁷¹ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (16575/15) [2016] ZAGPPHC 791 para 14. See also Competition Act 89 of 1998.

⁷² *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 25.

⁷³ Kemp (note 19 above) 257.

⁷⁴ Kemp (note 19 above) 258.

⁷⁵ As above.

⁷⁶ N.C. Scoble *Restraint of trade on Employees* 1963 (3) *The Rhodesia And Nyasaland Law Journal* 199.

⁷⁷ *Petrofina (Great Britain) Ltd v Martin* 1966 (1) Ch 146.

restraint of trade agreement namely, activity restriction (confidential information and trade connections), time restriction, and territorial restriction. This generally means that care must be exercised when drafting restraint of trade agreements, to curtail a possibility of an agreement being pronounced invalid and unenforceable. However, drafting an agreement which lays out all the above-mentioned elements does not automatically make a restraint of trade agreement valid and enforceable. The courts will still have to examine whether or not such a restraint agreement is reasonable. The reasonableness of an agreement depends on the employer having a protectable interest deserving legal protection,⁷⁸ whether or not the geographical area is too wide,⁷⁹ and the length of the period of restriction.⁸⁰

Restraint of trade agreements are not enforceable if they cover too wide a geographical area and impose a restriction period which is too long or unnecessary to protect the legitimate commercial interests of the employer.⁸¹ The standard position relating to the enforceability of restraint of trade agreements is that an agreement which is too broad or too wide in scope is unreasonable and therefore, unenforceable.⁸² This generally means that restraint of trade agreements are only enforced if they are reasonable *inter partes* (between both employer and employee).

2.4.1 Activity restriction/ nature of restriction (protectable interests)

This aspect of a restraint of trade places a restriction on an employee not to utilise the protectable interests of the employer or making available of any trade secrets and trade connections to the direct competitors of the employer.⁸³ Activity restriction protects the employer's confidential information and trade connections against being used by the employee.⁸⁴ In terms of the South African Labour law, a restraint of trade agreement is

⁷⁸ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above) 875 H-I.

⁷⁹ *One Capital Sponsor Services (Pty) Ltd and Another v Chellan and Others* (note 60 above) para 23.

⁸⁰ *Den Braven SA (Pty) Ltd v Pillay and Another* (2899/2008) [2008] ZAKZHC 22 para 55; Calitz (note 29 above) 53.

⁸¹ S Whitaker *Restrictive Covenants: Spot the Difference- Restrictions in Sale and Shareholders Agreements* (2017) 184 *Employment Law Journal* 18. See also *Sasfin (Pty) Limited v Beukers* 1989 (1) SA (A) 16G-17A, *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* (1991) (2) SA 482.

⁸² *Den Braven SA (Pty) Limited v Pillay and Another* (note 75) para 36. See also *Sasfin (Pty) Limited v Beukers* (note 76 above) 16G-17A.; *EOH Mthombo (Pty) Ltd v Bheekie-Odhav* (C177/12) [2012] ZALCCT 10 Para 28.

⁸³ C. Arup *et al* (2013) *Restraints of trade: The legal practice*. Retrieved from http://epublications.bond.edu.au/law_pubs/610 (accessed on 04 December 2017) 1

⁸⁴ As above.

enforceable only if it is reasonable to protect legitimate business interests of the employer.⁸⁵ In a nutshell, this means that restraint of trade agreements are not solely entered into to restrain former employees from engaging in the same business venture as former employers. The aim is to protect commercial trade secrets of the employer from being utilised to his/her detriment. Of importance is that such deprivation of an employee's freedom to compete in the employment market or commercial intercourse must be reasonable and fair between the employer and employee.⁸⁶

In terms of the South African jurisprudence on the enforceability of restraint of trade agreements, there are two types of employer commercial interests worthy of legal protection namely, trade connections and trade secrets (confidential information).⁸⁷ Trade connections involve the relationships that the employer has with potential customers, existing customers, and suppliers.⁸⁸ On the other hand, trade secrets are all matters that are not in the public domain or not easily accessible to the public which could be useful to the employer's competitors.⁸⁹ Trade secrets protection prevents an employee from disclosing knowledge that qualifies as a trade secret.

However, not all trade secrets acquired by the employee qualify as legally protectable interests of the employer.⁹⁰ But ultimately, the critical question to be answered is what, then would constitute legitimate protectable interests of the employer? The above question was addressed in the case of *David Crouch Marketing v Du Plessis*.⁹¹ It was made clear that an employer who seeks to restrain an employee from what he/she deems as the legally protectable interests or trade secret must prove that the information acquired by the employee is 'unique to its business and it is not in the public domain and is not accessible to the public'.⁹² However, in terms of Australian jurisprudence, for a restraint of trade agreement to be enforceable, it should specifically determine with

⁸⁵ Arup, (note 78 above) 3.

⁸⁶ Kemp (note 19 above) 257.

⁸⁷ *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (C516/2017) [2017] ZALCCT 44 (4 October 2017) para 22.

⁸⁸ *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (note 82 above) para 22.

⁸⁹ As above. See also *Vumatel (Pty) Ltd v Majra and Others* (J2400/18) [2018] ZALCJHB 335 (9 October 2018) para 33.

⁹⁰ *David Crouch Marketing v Du Plessis* (2009) 30 ILJ 1828 (LC) para 19.

⁹¹ *David Crouch Marketing v Du Plessis* (note 85 above) para 21.

⁹² As above.

exactness which trade secrets or commercial information it seeks to protect.⁹³ Therefore, the purpose of restraint of trade agreements is not to confer employer protection against what may be deemed as a fair competition that might arise with former employees.

One of the problems identified by South African Courts in relation to the enforceability of restraint of trade agreements is that some courts fail to determine the employer's protectable interests. However, it is settled law that not all trade secrets acquired by the employee qualify as legal protectable interests of the employer.⁹⁴ Drafters of restraint of trade covenants must with reasonable degree of precision specify the trade secrets the employer seeks to protect.⁹⁵ Moreover, South African Courts should encourage employers to draft restraint of trade agreements which clearly lay out what the employee is restricted from divulging. Interestingly, this is likely to prevent a multiplicity of litigations against what may be regarded as a fair competition. It is a common cause that restraint of trade agreements take employees out of the labour markets for a particular period, in a particular geographical area.⁹⁶ Clearly, a restraint of trade agreement does not only affect former employees by rendering them unemployed, they also affect business entities or people who desire to employ those former employees. It is for this reason that courts should *inter alia*, consider the fact that it is not easy to get a job in South Africa.⁹⁷ Therefore, the decision to keep an employee out of the labour market should not be taken lightly. The study further finds that people should be at liberty to utilise skills and experience acquired from their former employment for their own benefit and to the best advantage of those who wish to employ them.

The legal position in South Africa is that an employer who seeks to restrain an employee from what he deems as the legally protectable interest or trade secret must show the court that the information acquired by the employee is 'unique to its business and it is not in the public domain and is not accessible to the public'.⁹⁸ If the general knowledge

⁹³ A. Christopher, *What/Whose Knowledge? Restraints of Trade and Concepts of Knowledge* (2012) 36(2) *Melbourne University Law Review* 369

⁹⁴ *David Crouch Marketing v Du Plessis* (note 85 above) para 19

⁹⁵ J Grey *Restraint of trade and confidentiality* (2008) 2 *Enterprise Risk* 35.

⁹⁶ Pretorius (note 21 above) 158.

⁹⁷ T Naude & G Lubbe 'Exemption clauses- Occasioned by *Afrox Healthcare Bpk v Strydom*' 2005 *South African Law Journal* 368. See also *Barkhuizen v Napier* (2007) (5) SA 323 (CC) para 135.

⁹⁸ *David Crouch Marketing v Du Plessis* (note 85 above) para 21.

acquired by an employee during the course of employment is not a trade secret, then its use cannot be restrained.⁹⁹ The question of whether information is confidential or amounts to a trade secret depends on the special facts of each case.¹⁰⁰ For the information to be treated as confidential, it must be 'capable of application in trade or industry'.¹⁰¹ Furthermore, confidential information must be of such a nature that it could put the employer's competitors at an advantage over the employer.¹⁰² This generally means that the alleged confidential information must be useful.¹⁰³ In *Automotive Tooling v Wilkens and Other*,¹⁰⁴ the applicant attempted to limit the skills possessed by the employees through restraint of trade agreements.¹⁰⁵ The court established that the skills and expertise possessed by the employees belonged to the employees.¹⁰⁶ The court further emphasised that skills of the employees did not constitute trade secrets of the employer.¹⁰⁷ The purpose of a restraint of trade is not to prevent employees from using skills and expertise acquired during employment.¹⁰⁸ Restraint of trade agreements are a good mechanism to curtail employees from divulging trade secrets of their employers after the termination of employment contracts.

It is crucial to reiterate that protectable commercial interests of an employer are different from general knowledge, skills and experience which the employee gleans from his or her employer.¹⁰⁹ In *Attwood v Lamont*,¹¹⁰ the United Kingdom King's Bench Division confirmed that an employer cannot reasonably prevent a former employee from utilising talents, knowledge and skills acquired during the employer's service.¹¹¹ In the case of *Laser Junction (Pty) Ltd v Fick*,¹¹² the court held that the employee's talents, skills and

⁹⁹ *Supersafes (Pty) Ltd v Voulgarides* (note 32 above). See also Grey (note 90 above) 34-35.

¹⁰⁰ *Laser Junction (Pty) Ltd v Fick* (2017) 38 ILJ 2675 (KZD) (28 September 2017) para 37.

¹⁰¹ *Waste Products Utilisation (Pty) Ltd v Wilkes and another* 2003 (2) SA 515 (W) at 577B C. See also *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (note 82 above) para 34; Grey (note 90 above) 34.

¹⁰² *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (note 82 above) para 33.

¹⁰³ As above.

¹⁰⁴ *Automotive Tooling V Wilkens and Other* (note 58 above).

¹⁰⁵ *Automotive Tooling V Wilkens and Other* (note 58 above) 272E-F, 276E-F.

¹⁰⁶ *Automotive Tooling V Wilkens and Other* (note 58 above) 282E-F.

¹⁰⁷ As above.

¹⁰⁸ As above.

¹⁰⁹ Grey (note 90 above) 35.

¹¹⁰ [1920] 3 K.B. 571.

¹¹¹ *Attwood v Lamont* (note 105 above) 690. See also *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 39; *Sibex Engineering Services (Pty) Ltd v Van Wyk* (note 76 above) 507D-H; *Basson v Chilwan and others* (1993) (3) SA 742 (A) 771C-F and 778D.

¹¹² *Laser Junction (Pty) Ltd v Fick* (note 95 above).

capabilities are vested in him personally.¹¹³ As such, an employer cannot prevent an employee from using his proprietary interests (talents, skills and experience) through a restraint of trade without compensation.¹¹⁴ In the same vein, in the case of *Triplex Safety Glass Co. Ltd v Scoralz*,¹¹⁵ Farwell J remarked that it is contrary to public policy to prevent a former employee from using knowledge and skills he/she learned (acquired) from the employer's business, workshops or laboratories of the employer.¹¹⁶ In terms of the Skills Development Act,¹¹⁷ employers bear a social obligation to provide training and skills to employees.¹¹⁸ However, restraint of trade agreements which are reasonable and enforceable are those restraining employees from divulging their employer's trade secrets and trade connections.¹¹⁹ General knowledge and skills acquired by the employee during the course of employment may be used by such an employee in the furtherance of the interests of the new employer.¹²⁰

In *Basson v Chilwan & others*,¹²¹ Eksteen JA held that:

...trade connection of a business, in the form of relationships with customers, potential customers and suppliers constitutes part of its goodwill and capable of protection by restraint of trade and confidential matters such as costing and pricing structures useful for carrying on of a business and capable of protection.¹²²

In this matter, the court enforced a restraint of trade to protect the interests of the employer.¹²³ On the contrary, in the case of *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another*,¹²⁴ Khumalo J did not enforce restraint of trade agreement based on the ground that the employer failed to prove the protectable interest worthy of protection.¹²⁵ The

¹¹³ *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 39.

¹¹⁴ As above.

¹¹⁵ [1937] 4 All E.R. 693.

¹¹⁶ *Triplex Safety Glass Co. Ltd v Scoralz* (note 110 above) 697. See also *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 39.

¹¹⁷ 97 of 1998

¹¹⁸ Skills Development Act (note 112 above) Sec 2. See also *Laser Junction (Pty) Ltd v Fick* (note 95 above) paras 28, 39.

¹¹⁹ *Triplex Safety Glass Co. Ltd v Scoralz* (note 110 above) 697.

¹²⁰ *Landis & Grossett* (note 32 above) 56. See also *Scouble* (note 71 above) 196.

¹²¹ *Basson v Chilwan and others* (note 106 above).

¹²² *Basson v Chilwan & others* (note 106 above) 751 A-B.

¹²³ *Basson v Chilwan & others* (note 106 above).

¹²⁴ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above).

¹²⁵ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 31.

employer was refused protection despite showing the court that the employee had a close relations with the clients, knew their names, and had knowledge of their needs, their expectations, problems they experienced in relation to products, their expectations and product preferences.¹²⁶ The employer further argued that the company would suffer substantial harm by virtue of the first respondent (Mr. Bouwer) being the employee of its direct competitor that is Supreme Pet CC.¹²⁷ The applicant, *Montego Pet Nutrition (Pty) Ltd* contended that considering the company information possessed by Mr. Bouwer, it was undoubted that the second respondent would be in a position to know the commercial interests necessary to compete for its clients without difficulty in enticing them.¹²⁸ Courts must enforce restraint of trade agreements to prevent employees from diverting employers' customer connections to employees' new business or new employment.

In *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another*,¹²⁹ the court refused to enforce a restraint of trade agreement which spanned over a period of two years, restricting the former employee from working anywhere in South Africa.¹³⁰ The court opined that 'mere customer connection and the like are insufficient to create a protectable interest'.¹³¹ The respondent, Mr. Bouwer argued that he did not acquire any special and specific knowledge or specific training,¹³² since he joined the applicant with vast marketing skills¹³³ and that the new employer (Supreme Pet CC) was a small enterprise which could not be a threat to the applicant.¹³⁴ The applicant made an admission that it sought to stifle the former employee from competing with its business.¹³⁵ The court emphasised the general rule that a restraint of trade designed to prevent competition *per se* is unreasonable and unenforceable.¹³⁶ The court further held that an agreement preventing healthy

¹²⁶ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) paras 7.5.1; 15.5; 15.6 and 27.

¹²⁷ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 15.6.

¹²⁸ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 11.

¹²⁹ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above).

¹³⁰ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 24.

¹³¹ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 28.

¹³² *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 14.6.

¹³³ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 29.

¹³⁴ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) 30.

¹³⁵ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 25.

¹³⁶ As above.

competition or preventing employees from taking available opportunities constitutes an unreasonable restriction to the employee's freedom of trade.¹³⁷

It is not disputed that the employer's trade connections are his/her interests worthy of legal protection.¹³⁸ Contemporary South African jurisprudence dictates that for trade connections to be treated as protectable interests, it must be proven that the relationship of the former employee and former employer's customers and/or suppliers is of such nature that the former employee could entice (induce) customers or suppliers to his business or other competitors.¹³⁹

In *Automotive Tooling (Pty) Ltd v Wilkens and Other*,¹⁴⁰ the employees (Wilkens and Rothmann) were employed by the applicant (Automotive Tooling (Pty) Ltd)¹⁴¹ and each entered into a restraint of trade agreement¹⁴² in which the two employees were restrained from working for direct competitors of the employer.¹⁴³ The two employees resigned and took employment with the third respondent (AMS Manufacturing).¹⁴⁴ The Company then approached the court pleading for the enforcement of the restraint of trade agreement,¹⁴⁵ alleging that the two employees breached the restraint of trade agreements.¹⁴⁶ Cachalia AJA found that the agreements restricted the employees from using their skills and expertise.¹⁴⁷ In this case, the court established that the skills and expertise possessed by the employees belonged to the employees.¹⁴⁸ The court ruled that the skills and expertise of the employees did not constitute trade secrets of the employer.¹⁴⁹ Employees have a

¹³⁷ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above) para 25.

¹³⁸ *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (note 82 above) para 42.

¹³⁹ M. Van Jaarsveld, Labour Law (2008) 2008 *Annual Survey of South African Law* 654. See also *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 38; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA) para 20; *Den Braven SA (Pty) Ltd v Pillay and Another* (note 75 above). See also *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (note 82 above) para 42.

¹⁴⁰ *Automotive Tooling V Wilkens and Other* (note 58 above).

¹⁴¹ *Automotive Tooling V Wilkens and Other* (note 58 above) 272E-F, 276 C.

¹⁴² *Automotive Tooling V Wilkens and Other* (note 58 above) 272E-F, 276E-F.

¹⁴³ *Automotive Tooling V Wilkens and Other* (note 58 above) 272E-F, 276E-F.

¹⁴⁴ *Automotive Tooling V Wilkens and Other* (note 58 above) 272 F, 276I.

¹⁴⁵ As above.

¹⁴⁶ As above.

¹⁴⁷ *Automotive Tooling V Wilkens and Other* (note 58 above) 282E-F.

¹⁴⁸ As above.

¹⁴⁹ As above.

right to earn a living using their skills and expertise,¹⁵⁰ therefore preventing them from using their skills and expertise is contrary to public policy.¹⁵¹

It is arguable that some employers abuse the doctrine of restraint of trade by including ambiguous restrictions which are too broad and punish employees through making them economically inactive for a long period of time thus restraining them from taking advantage of the good employment opportunities upon leaving employment.¹⁵² In this regard, South African Courts may look at the English jurisprudential approach. In English Common law, for a restraint of trade to be enforceable, it should specifically determine with exactness the trade secrets or information it seeks to protect.¹⁵³

In the case of *OH Mthombo (Pty) Ltd v Prelene Bheekie-odhv*,¹⁵⁴ the restraint of trade agreement was well crafted with precise information on what the employee was restrained from doing.¹⁵⁵ The applicant (OH Mthombo (Pty) Ltd) sought an order interdicting the respondent from being employed by the applicant's competitors.¹⁵⁶ However, the court held that the respondent did not breach the restraint contract since the signed contract specifically restricted the employee from being employed by the applicant's customers anywhere in the world,¹⁵⁷ not being restricted from being employed by employer's direct competitors.¹⁵⁸ Although the protectable interests of the employer were at stake, the court did not enforce a restraint of trade clause.

On a related note Lagrange J points out that courts should be reluctant to scrutinize restraint of trade agreements that are too broad, to make such agreements reasonable and enforceable.¹⁵⁹ Obviously, if indeed the trade secrets of the employer are used to his/her detriment, the employer could seek alternative relief instead of relying on a

¹⁵⁰ *Automotive Tooling V Wilkens and Other* (note 58 above) 282F.

¹⁵¹ *Automotive Tooling V Wilkens and Other* (note 58 above) 282F-G. See also Van Jaarsveld (note 134 above) 655.

¹⁵² Kemp (note 19 above) 258.

¹⁵³ Christopher (note 88 above) 369.

¹⁵⁴ (C177/12) [2012] ZALCCT 10.

¹⁵⁵ *OH Mthombo (Pty) Ltd v Prelene Bheekie-odhv* (note 149 above) para 4.

¹⁵⁶ As above.

¹⁵⁷ *OH Mthombo (Pty) Ltd v Prelene Bheekie-odhv* (note 149 above) para 7.3 and 22.

¹⁵⁸ As above.

¹⁵⁹ *Henred Freuhof (Pty) Ltd v Davel and another* (J91/2010) [2010] ZALCJHB 331 para 22. See also *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C) at 392-393; *Safin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 16H-I.

restraint of trade agreement. A precisely couched restraint of trade narrows the general claim that could be brought by the employer against the employee.

Frahm illustrates a problem of an employer who drafts a restraint of trade agreement which does not clearly show which commercially protectable interests the employer is seeking protection for.¹⁶⁰ Frahm contends that companies make the 'costly mistake of rushing to court to enforce a restraint without giving thought to the critical issue of what proprietary interest they are seeking to protect'.¹⁶¹ South African Courts must encourage the practice of enforcing restraint of trade agreements which clearly show the trade secrets of the employer. In other words, the restraint of trade clause must list trade secrets that the employee is prohibited from using or divulging at the outset. Employers must avoid misusing restraint of trade agreements as a mechanism to discourage employees from fair competition.¹⁶²

South African law dictates that the enforceability of a restraint of trade agreement depends on whether or not the restraint of trade in dispute is reasonable.¹⁶³ The approach to be used was authoritatively established and confirmed by the Appellate Division, where Nienaber JA in the case of *Basson v Chilwan and others*,¹⁶⁴ identified four considerations:

1. Is there an interest of one party which is deserving of protection at the termination of the agreement?
2. Is such interest being prejudiced by the other party?
3. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?

¹⁶⁰ L Frahm, Restraints of trade 2013 (9) *Without Prejudice* 51-52.

¹⁶¹ As above.

¹⁶² *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (note 66 above), para 25

¹⁶³ *Basson v Chilwan and Another* (note 106 above) 767 G-H. See also *Reddy v Siemens Telecommunications (Pty) Ltd* (note 134 above) para 16.

¹⁶⁴ *Basson v Chilwana* (note 106 above).

4. Is there another facet of public policy having nothing to do with relationship between the parties, but which requires that the restraint should either be maintained or rejected?¹⁶⁵

The reasonableness of a restraint of trade is also examined taking into account the wideness of territorial restriction, period of restriction, and necessity of commercial activities (legitimate protectable interests) which the employee is restrained from freely engaging.¹⁶⁶

In terms of restraint of trade agreements, employees have a duty not to divulge confidential information of their employers.¹⁶⁷ It is further submitted that even the Common law confers a fiduciary duty of loyalty to the employer.¹⁶⁸ The above duty demands employees to act in good faith towards the employer even after the termination of the employment agreement.¹⁶⁹

Apart from protecting confidential information, a restraint of trade agreement deems trade connections as legitimate commercial protectable interests.¹⁷⁰ To this end, a departing employee is prevented from enticing customers, suppliers, clients, or patients of the employer during the term of serving the employer or upon termination of employment relationship. It has already been pointed out that even the Common law notion of fiduciary duty of good faith guarantees employers with such protection that employees must avoid any prospect of competing unfairly with their former employers.¹⁷¹

The main point of contention is the issue of when an employer must plead to court for the enforceability of a restraint of trade agreement against an employee. In terms of the restraint of trade doctrine, it is not necessary for an employer to prove to the court an actual harm resulted out of the disclosure of confidential information by the employee or

¹⁶⁵ *Basson v Chilwan and Another* (note 106 above) 767 G-H. See also *Reddy v Siemens Telecommunications (Pty) Ltd* (note 134 above) para 16.

¹⁶⁶ *Den Braven SA (Pty) Ltd v Pillay and Another* (note 75 above) para 55. See also *Calitz* (note 29 above) 53.

¹⁶⁷ *Grey* (note 90 above) 35.

¹⁶⁸ As above.

¹⁶⁹ *Grey* (note 90 above) 35.

¹⁷⁰ *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (note 82 above) para 22.

¹⁷¹ *Grey* (note 90 above) 35. See also *Landis & Grossett* (note 17 above) 55.

actual enticement of his/her customers or suppliers.¹⁷² The employer is only required to prove that the former employee is likely to exploit its trade secrets, trade connections, and business interests to its detriment.¹⁷³ A similar conclusion was reached in *Ntsanwisi v Mbombi*,¹⁷⁴ in which the court held that it is not necessary for the employer to prove that he lost patients to the former employee.¹⁷⁵ The employer was *inter alia* required to show the court that the employee formed a practice in breach of restraint of trade agreement.¹⁷⁶

2.4.2 Time/period restriction

A restraint of trade agreement must stipulate a specific period of restriction for it to be reasonable and enforceable.¹⁷⁷ In *Spa Food Products, Ltd. and Other v Sarif*,¹⁷⁸ Beadle J held that a restraint of trade agreement unlimited in time is unreasonable and unenforceable.¹⁷⁹ In the light of the above, an agreement restraining an employee from engaging in a business enterprise similar to that of the employer without stipulating a particular period of restriction is unreasonable and therefore, unenforceable.¹⁸⁰

It is important to note that companies or employers must restrain employees from free trade for a reasonable time.¹⁸¹ The question that then arises relates to what amounts to a reasonable time in relation to restraint of trade agreements. It is submitted that reasonable time differs from case to case.¹⁸² Grey argues that a reasonable period is normally between six (6) to twelfth (12) months.¹⁸³ In *Pam Golding Properties (Pty) Ltd v*

¹⁷² *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (note 82 above) para 31. See also *Turner-Moris (Pty) Ltd v Riddel* 1996 (4) SA 397; *One Capital Sponsor Services (Pty) Ltd and Another v Chellan and Others* (note 60 above) para 25.

¹⁷³ *New Justfun Group (Pty) Ltd v Turner and Others* (J786/14) [2014] ZALCJHB 177 (14 May 2014) para 13. See also *Turner-Moris (Pty) Ltd v Riddel* (note 167 above); *One Capital Sponsor Services (Pty) Ltd and Another v Chellan and Others* (note 60 above) para 25.

¹⁷⁴ 2004 (3) SA 58.

¹⁷⁵ *Ntsanwisi v Mbombi* (note 169 above) 58H-E, 63C.

¹⁷⁶ *Ntsanwisi v Mbombi* (note 169 above) 58H-E, 63C.

¹⁷⁷ AJ Venter *Employment Contract* (2008) 2 *Enterprise Risk* 25.

¹⁷⁸ 1952 (1) S.A. 713. See also Venter (note 172 above) 25.

¹⁷⁹ Venter (note 172 above) 25. See also *Spa Food Products, Ltd. and Other v Sarif* (note 173 above) 713.

¹⁸⁰ Venter (note 172 above) 25. See also *Spa Food Products, Ltd. and Other v Sarif* (note 173 above) 713.

¹⁸¹ Grey (note 90 above) 35.

¹⁸² *EOH Mthombo (Pty) Ltd v Prence Bheekie-ODHAV* (note 77 above) para 17.

¹⁸³ Grey (note 90 above) 35.

Neille,¹⁸⁴ Spilg J found six (6) months period of restriction to be unreasonable and consequently reduced it to three (3) months.¹⁸⁵

In the case of *Den Braven SA (Pty) Ltd v Pillay*,¹⁸⁶ Wallis AJ held that a restraint of trade period which is longer than necessary to protect the employer's legitimate business interests is in effect unreasonable, and consequently unenforceable.¹⁸⁷ The test for the validity of a restraint of trade agreement is whether such a period of restriction goes further than what may be deemed reasonable or affords the employee more than adequate protection.¹⁸⁸

It is submitted that courts have a discretion to reduce the geographical area which is too wide and/or period of restriction which is too long as the case may be, to render the restrictive agreement valid and enforceable. Therefore, some courts reduce the unreasonably wide geographical area and/or long period of restriction in question.¹⁸⁹ Some courts refuse to grant the enforceability of restraint of trade agreements of which either geographical area or period of restriction is too long.¹⁹⁰ In Germany, the duration of all restraint of trade agreements is limited to a maximum of two years.¹⁹¹ Similarly, South African jurisprudence generally limits the period of restriction to a maximum of two years.¹⁹² A restraint of trade agreement cannot be used to render employees economical inactive, it must be used to protect trade secrets of the employer.

¹⁸⁴ (26039/17) [2017] ZAGPJHC 219 (28 July 2017).

¹⁸⁵ *Pam Golding Properties (Pty) Ltd v Neille* (note 179 above) para 23.

¹⁸⁶ *Den Braven SA (Pty) Ltd v Pillay and Another* (note 75 above).

¹⁸⁷ *Den Braven SA (Pty) Ltd v Pillay and Another* (note 75 above) para 55. See also Calitz (note 29 above) 53.

¹⁸⁸ *Van de pol v Silberman and Another* (note 21 above) 564E-F. See also *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* (1999) (1) SA 472 (W) at 484E; *World Net Express (A division of World Net Logistics (Pty) Ltd) v Aucamp and Another* (note 62 above) para 22.

¹⁸⁹ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1116 D-G. See also *Turner-Morris (Pty) Ltd v Riddell* 1996 (4) SA 397.

¹⁹⁰ *Sasfin (Pty) Ltd v Beukes* (note 76 above) 6H-I. See also *EOH Mthombo (Pty) Ltd v Prence Bheekie-ODHAV* (note 77 above) para 28; *Advtech Resourcing (Pty) Limited v Kuhn and another* (note 154 above) 44.

¹⁹¹ *Handelsgesetzbuch of 1897 (HGB)* English translated by: M Pelzer/EA Voigt "German Commercial Code" (2003) Sec 74(a). See also Calitz (note 29 above) 67.

¹⁹² As above.

2.4.3 Territorial restriction

For a restraint of trade to be enforceable, it must *inter alia*, stipulate a geographical area of restriction.¹⁹³ Ultimately, in territorial restriction, the courts examine whether the geographical area of restriction is wider than reasonably necessary to protect the legitimate interests of the employer.¹⁹⁴ Courts will generally not enforce restraint of trade agreements couched in unreasonably wide terms as they are against public policy.¹⁹⁵ The reasonableness of territorial restriction depends on whether in the area of restriction in question there are customers, clients or patients of the employer or not.¹⁹⁶ In the light of the above, if the customers, clients, or patients of the employer are widely distributed, the nature of restriction placed by the employer applicable within wide geographical area of restriction is reasonable and enforceable in order to protect the legitimate commercial interests of such an employer.¹⁹⁷ In terms of the above, a restraint of trade agreement which is too wide beyond the area in which the former employer carried out business and beyond the place where an employee served material employment responsibilities before the termination of employment contract is unreasonable and therefore, unenforceable. A former employee can be employed or start a similar business venture elsewhere beyond the area of restraint.¹⁹⁸

In *Macphail (Pty) Ltd v Janse Van Rensburg and others*,¹⁹⁹ the court dealt *inter alia* with the reasonableness of a territorial restriction.²⁰⁰ In this case, the applicant, Macphail (Pty) Ltd alleged that the first respondent, Mr. B.J Janse Van Rensburg entered into employment agreement in breach of a restraint of trade agreement.²⁰¹ The applicant engaged in the business of distributing coal country wide.²⁰² The restraint of trade agreement restrained the first respondent from engaging in the same business after the

¹⁹³ Venter (note 172 above) 25.

¹⁹⁴ *One Capital Sponsor Services (Pty) Ltd and Another v Chellan and Others* (note 60 above) para 23

¹⁹⁵ *Den Braven SA (Pty) Limited v Pillay and Another* (note 75 above) para 36. See also *Sasfin (Pty) Limited v Beukers* (note 76 above) 16G-17A; *EOH Mthombo (Pty) Ltd v Bheekie-Odhav* (note 77 above) para 28.

¹⁹⁶ Scouble (note 71 above) 196-197.

¹⁹⁷ As above.

¹⁹⁸ L. Frahm-Arp L. Russell Multi-Country Survey on Covenants Not to Compete, 2018 *Association of Corporate Counsel* 93, 98.

¹⁹⁹ 1996 (1) SA 594 (TPD).

²⁰⁰ *Macphail (Pty) Ltd v Janse Van Rensburg and others* (note 194 above) 599 D-E.

²⁰¹ *Macphail (Pty) Ltd v Janse Van Rensburg and others* (note 194 above) 594 I-J, 596A.

²⁰² *Macphail (Pty) Ltd v Janse Van Rensburg and others* (note 194 above) 596B.

termination of employment agreement or to be employed by the applicant's competitors, for three years, in the whole of South Africa, Swaziland, Namibia, Botswana, Lesotho and Mozambique.²⁰³ It was established that it is unreasonable to impose a restraint of trade agreement which restrains an employee beyond the area where the customers of the employer are based.²⁰⁴ Secondly, the employee must have served his/her material employment duties in the area of restriction before termination of employment agreement.²⁰⁵ The court held that the applicant failed to prove protectable interests worthy of legal protection.²⁰⁶

In *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another*,²⁰⁷ the court was inter alia, concerned with territorial restriction which was couched in wide terms.²⁰⁸ The restraint of trade agreement prevented the first respondent, Du Plessis from being employed by the applicant's clients and competitors throughout the Republic of South Africa and the neighbouring Southern African Development Community (SADC) countries.²⁰⁹ Ngubane AJ held that the above restraint of trade agreement was so wide that it is contrary to public policy and it offends the Constitution.²¹⁰ In this case, the court concluded that the restraint agreement was unreasonable and therefore, unenforceable.²¹¹ It is submitted that this case was correctly decided since restraint of trade agreements should not be unreasonably couched with territorial restrictions which are too wide.

In the case of *Turner-Morris (Pty) Ltd v Riddell*,²¹² a restraint of trade agreement was found to be unreasonable and a severability clause was applied to make it reasonable and enforceable.²¹³ The agreement was found to be unreasonable and contrary to public policy on the basis that its territorial restriction was too wide.²¹⁴ The abovementioned

²⁰³ *Macphail (Pty) Ltd v Janse Van Rensburg and others* (note 194 above) 596H-I.

²⁰⁴ *Macphail (Pty) Ltd v Janse Van Rensburg and others* (note 194 above) 595 C, 599D.

²⁰⁵ As above.

²⁰⁶ *Macphail (Pty) Ltd v Janse Van Rensburg and others* (note 194 above) 596H-I.

²⁰⁷ *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* 2007 (1) All SA 583.

²⁰⁸ *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (note 202 above) 583E, 600D.

²⁰⁹ As above.

²¹⁰ As above.

²¹¹ As above.

²¹² 1996 (4) SA 397.

²¹³ *Turner-Morris (Pty) Ltd v Riddell* (note 184 above) 407 G.

²¹⁴ *Turner-Morris (Pty) Ltd v Riddell* (note 184 above) 411 A-B.

agreement was severed to cover only the branch of the applicant's business in East London.²¹⁵ In *Lead Laundry and Catering (Pty) Ltd v Chetty and Another*,²¹⁶ the former employee attacked the enforceability of restraint of trade agreement on the basis that its area of restriction covered the whole of South Africa and that the former employer did not have legitimate protectable interests.²¹⁷ The court surprisingly enforced the restraint of trade without applying the doctrine of severability to reduce the area of restriction which appeared to be unreasonable, no evidence was led to show that the former employer had customers all over South Africa.²¹⁸ The principle of severability is applied where an agreement makes an undertaking, fair and unfair one, the court using this principle will partially enforce the agreement (fair one).²¹⁹ A court can enforce it to the extent that it is reasonable.²²⁰ Mupangavanhu expressed a problem with the unreasonable restraint of trade which was enforced in the Basson case, in which the court restrained Mr. Chilwana from being employed in the whole of South Africa for five years.²²¹ This shows that restraint of trade agreements should not be unreasonable and prevent former employees from being economically active and earn a living for a period which is inordinately too long.

2.5 The Severability doctrine in restraint of trade agreements

A difficult question is whether an employer seeking the enforceability of a restraint of trade, while clearly showing that he/she has a clear right to a protectable interests can be denied legal protection on the basis that the restraint agreement covers too wide a geographical area and/or too long a period of restriction. Such denial may constitutes substantial injustice to the employer.²²² Botha J observed that in the majority of cases, South African 'courts have held the whole contract to be illegal and void where a restraint imposed was in excess of what was reasonable'.²²³ The intrinsic question that one may

²¹⁵ *Turner-Morris (Pty) Ltd v Riddell* (note 184 above) 407 F-G.

²¹⁶ [2017] ZAGPJHC 198 (26 July 2017).

²¹⁷ *Lead Laundry and Catering (Pty) Ltd v Chetty and Another* (note 211 above) paras 1-2.

²¹⁸ *Lead Laundry and Catering (Pty) Ltd v Chetty and Another* (note 211 above) para 27.

²¹⁹ As above.

²²⁰ Landis & Grossett (note 17 above) 58.

²²¹ Y Mupangavanhu *The Relationship between Restraints of Trade and Garden Leave* (2017) 20 *Potchefstroom Electronic Law Journal* 14.

²²² *Den Braven SA (Pty) Limited v Pillay and Another* (note 75 above) para 44. See also *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1115 E-F.

²²³ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1113D-G.

pose is how the employer can ensure that a contract of restraint of trade which has a clear protectable interest is drafted in a manner that eliminates or reduces the possibility of being impugned as too broad. Drafters of contracts of restraint of trade should include severability clauses in restraint of trade agreements. The above maybe done for the purposes of ensuring that the employer is on the safe side and does not suffer from a total denial of the enforceability of restraint of trade agreement by a court. In a nutshell, severability clause empowers courts to ignore severe restrictions and enforce lighter ones.²²⁴

The court has the power to declare a restraint of trade agreement partially enforceable or unenforceable.²²⁵ The court must be satisfied that the restraint does not exceed what is reasonably necessary to protect the business interest.²²⁶ If a restraint of trade agreement is couched in unreasonably wide terms in its scope of operation, a court can enforce it to the extent that it is reasonable.²²⁷ The principle of severability is only applied to appropriate cases to reduce the scope of restriction for such restraint to be reasonable.²²⁸ However, courts are discouraged from making new agreements for the parties.²²⁹ Of importance is that the power of a court to apply the severability principle is limited,²³⁰ and 'amendments suggested by the court should not be very far-reaching as to materially alter the contract'.²³¹

One major concern about restraint of trade agreements is that the drafters of restraint agreements prevalently draw agreements whose area is either too broad or the period of restriction is too long.²³² Wallis AJ observed that 'one of the perennial problems in the field of restraint of trade agreements has been that of over-breadth'.²³³ Legally speaking, restraint of trade agreements couched in a manner covering a wide geographical area or

²²⁴ *Den Braven SA (Pty) Limited v Pillay and Another* (note 75 above) para 42.

²²⁵ Landis & Grossett (note 32 above) 58.

²²⁶ *Sasfin (Pty) Limited v Beukers* (note 76 above) 16G-17A.

²²⁷ Landis & Grossett (note 17 above) 58.

²²⁸ As above.

²²⁹ As above. See also *Cowan v Pameroy* 1952 (3) SA 645 (C) AD 652 F.

²³⁰ As above.

²³¹ As above.

²³² *Den Braven S.A. (Pty) Limited v Pillay and Another* (note 75 above) para 36.

²³³ As above.

long period of restriction which is unnecessary to protect the interests of the employer are unenforceable.²³⁴

In terms of the doctrine of severability, if an agreement contains two separate and independent promises, a bad and a good one, the court will reject the invalid and enforce the valid one.²³⁵ In the case of *Jonker Yzelle*,²³⁶ the court pointed out:

Severability must be physically possible in such a way that one must be able to use a blue pencil and cross out the offending invalid portions and still retain the valid portion.²³⁷

A restraint of trade is severable if severance of such agreement would not confer a different meaning and alter the object of the agreement initially entered into by contracting parties.²³⁸

It is imperative to note that if an agreement has unreasonable terms which are too wide, the courts cannot ‘carve out that portion of the prohibition’ as the court will likely make a new contract for the contracting parties.²³⁹ Accordingly, an agreement couched in a completely unreasonable manner to the extent that it will require major plastic surgery in the form of a drastic re-casting of its provisions to make it reasonable will not be enforced.²⁴⁰ A restraint of trade agreement can be severed if the parts of the agreement which are too wide can be deleted without altering the nature of the agreement, and without adding or modifying the ‘wording in any way other than by excision’,²⁴¹ as aptly captured below:

The contract is severed if the two parts expressed in such a way as to amount to a clear severance by the parties themselves and are such as to substantially equivalent to two separate contracts’.²⁴²

²³⁴ *Sasfin (Pty) Limited v Beukers* (note 76 above) 16G-17A.

²³⁵ *Cowan v Pameroy* (note 222 above) 652 G-H.

²³⁶ 1948 (2) SA 944.

²³⁷ *Jonker Yzelle* (note 229 above) 945.

²³⁸ As above.

²³⁹ *Cowan v Pameroy* (note 222 above) 652 G-H.

²⁴⁰ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1117A.

²⁴¹ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1111H.

²⁴² *Jonker Yzelle* (note 229 above) 944.

The lingering question is whether the courts have a discretion to reduce the geographical area which is too wide and/or period of restriction which is too long as the case may be, to render the restraint agreement valid and enforceable. There are conflicting answers to this question. Some courts reduce the unreasonably wide geographical area and/or too long a period of restriction.²⁴³ Some courts however, have enforced the restraint of trade agreements in which either the geographical area or period of restriction is too long.²⁴⁴

Drafters of restraint of trade agreements should diligently draft agreements which are fair and reasonable to both parties. It is submitted that some employers draft and plead to enforce over-broad restraint agreements to punish employees through making them economically inactive for a long period, and restrain employees from taking advantage of the good employment opportunities upon leaving employment.²⁴⁵ The above practice is ordinarily done by employers with a belief that after the termination of the employment contract, the former employee will not be in good financial position to pay costs for legal representation in order to challenge an over-broad restraint agreement. The general attitude of courts is that the 'practice of cutting and trimming a manifestly over-broad restraint at the behest of the party which drafted it, is not a practice the court should encourage'.²⁴⁶ In the light of the above, courts ordinarily decline the invitation by an employer to sever unreasonable restriction which is over-broad into reasonable prohibitions.²⁴⁷

In *Cowan v Pameroy*,²⁴⁸ the former employee was prohibited by a restraint of trade agreement from selling toys and goods made of plastic materials whereas the company only dealt with toys.²⁴⁹ Van Den Heever JA applied the severability doctrine as an attempt to render the unreasonable restriction to be reasonable by holding that the employee

²⁴³ *National Chemsearch SA (Pty) Ltd v Borrowman and another* (note 16 above) 1116 D-G. See also *Turner-Morris (Pty) Ltd v Riddell* (note 184 above).

²⁴⁴ *Sasfin (Pty) Ltd v Beukes* (note 74 above) 16H-I. See also *EOH Mthombo (Pty) Ltd v Prence Bheekie-ODHAV* (note 77 above) para 28; *Advtech Resourcing (Pty) Limited v Kuhn and another* (note 154 above) para 44.

²⁴⁵ Kemp (note 19 above) 258.

²⁴⁶ *Henred Freuhof (Pty) Ltd v Davel and another* (note 154 above) para 22. See also *Sasfin (Pty) Ltd v Beukes* (note 76 above) 16H-I; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* (note 154 above) 392-393.

²⁴⁷ As above.

²⁴⁸ 1952 (3) SA 645 (C) AD.

²⁴⁹ *Cowan v Pameroy* (note 222 above) 647 G.

should not engage himself in a business similar to that of the former employer.²⁵⁰ However, the court found that the only way in which the reasonable restriction could be achieved is by means of adding words which will constitute an illegal practice of drafting of the new agreement for the contracting parties.²⁵¹ The court therefore found the restraint of trade agreement entered into between the parties to be unreasonable and against public interest.²⁵²

In *Ntsanwisi v Mbombi*,²⁵³ Botha J found a restraint agreement which restricted a medical doctor who was a practicing partner of the applicant to be unreasonable on the basis that the period of restriction was too long.²⁵⁴ The applicant restricted the former partner from practice as a medical practitioner for a period of three years.²⁵⁵ Botha J remarked that the area of restriction is large and the period of restriction is long.²⁵⁶ The court reasoned that 'if the area had been smaller, the length of the period might have been less of a problem'.²⁵⁷ Interestingly, the court reduced the period of restriction from three years to 12 months.²⁵⁸ Botha J emphasised that the purpose of restraint of trade is not to punish.²⁵⁹ He further held that restraint of trade should not serve to make the patients of the respondent to forget and lose desire to be treated by the respondent, Dr. Mbombi as a medical practitioner.²⁶⁰

2.6 Restraint of trade agreements and public policy considerations

Restraint of trade agreements are *prima facie* valid and enforceable only if they are not against public policy.²⁶¹ Restraint of trade agreements are enforced by courts since they signify the actual consensus between the employer and employees in terms of the

²⁵⁰ *Cowan v Pameroy* (note 222 above) 651 A-B.

²⁵¹ *Cowan v Pameroy* (note 222 above) 653 E-F.

²⁵² As above.

²⁵³ *Ntsanwisi v Mbombi* (note 169 above).

²⁵⁴ *Ntsanwisi v Mbombi* (note 169 above) 63I-64E.

²⁵⁵ *Ntsanwisi v Mbombi* (note 169 above) 59H.

²⁵⁶ *Ntsanwisi v Mbombi* (note 169 above) 63H.

²⁵⁷ As above.

²⁵⁸ *Ntsanwisi v Mbombi* (note 169 above) 63I-64E.

²⁵⁹ *Ntsanwisi v Mbombi* (note 169 above) 64E.

²⁶⁰ *Cowan v Pameroy* (note 222 above) 653 E-F.

²⁶¹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above) 887I-888E and 893C.

doctrine of *pacta sunt servanda*.²⁶² However, emphasis should be placed on the long-standing view that for a restraint of trade agreement to be enforced it must not be against public policy.²⁶³ The Constitutional Court in *Barkhuizen v Napier*²⁶⁴ held that whenever a contractual agreement is tested against the Constitution of the Republic of South Africa, the question that remains to be answered is whether the disputed contractual clause is contrary to public policy.²⁶⁵ The reasonableness of restraint of trade agreements is determined with reference to public policy.²⁶⁶

There are several cases which show what public policy means in the context of restraint of trade agreements. For example, in *Barkhuizen v Napier*,²⁶⁷ Sachs J held that ‘public policy represents the legal convictions of the community; it represents those values that are held most dear by the society’.²⁶⁸ Sachs J opined that public policy is not static, evolves over time, dictating what is reasonable in order to serve justice to society.²⁶⁹ Therefore, the commercial conducts of former employers and employees must not be ‘contrary to the morals of the market place and business ethics’.²⁷⁰

Sachs J concluded that after the advent of the democratic Constitution of the Republic of South Africa, public policy is now deep-rooted in the Constitution of the country.²⁷¹ He also pointed out that public policy is determined by the values that underlie the Constitution of the Republic of South Africa such as human dignity, equality and the advancement of freedom.²⁷² The Constitutional Court added that public policy is also determined by the principle of rule of law and the Bill of Rights.²⁷³ A similar unanimous view was held by the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite*

²⁶² RH Christie & V McFarlane (5thedi) *The Law of Contract in South Africa* (2005) 12. See also R Kelbrick, Restraints of trade and the Constitution (2006) 14 *Juta Business Law* 133.

²⁶³ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above) 887I-888E and 893C. See also *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 24.

²⁶⁴ 2007 (5) SA 323 (CC)

²⁶⁵ *Barkhuizen v Napier* (note 92 above) para 28.

²⁶⁶ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above) 887I-888E and 893C. See also *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 24.

²⁶⁷ *Sasfin (Pty) Limited v Beukers* (note 76 above).

²⁶⁸ As above.

²⁶⁹ *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 25.

²⁷⁰ *H Mocke Construction (Pty) Ltd and Another v Pexmart CC and Others* (note 64 above) para 26.

²⁷¹ As above. See also *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 26.

²⁷² *H Mocke Construction (Pty) Ltd and Another v Pexmart CC and Others* (note 64 above) para 26. See also *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA).

²⁷³ As above.

Checkers (Pty) Ltd,²⁷⁴ where the Court held that law of contract must be in line with constitutional values, or where necessary, infused with values underlying the Bill of Rights.²⁷⁵

In *Sasfin (Pty) Ltd v Beukes*,²⁷⁶ Smalberger JA remarked that the interest of the community or the public are of utmost importance concerning the concept of public policy.²⁷⁷ The court construed agreements contrary to public policy as those which are 'inimical to the interests of the community, contrary to law, *contra bonos mores*, or against economic or social expedience'.²⁷⁸

Sachs J remarked that public policy prefers the freedom of contract, and dictates that commercial activities should not be unreasonably restricted.²⁷⁹ It is clear then that there are two competing public policy considerations -the first one is that contracting parties must perform their contractual undertakings, the second is that people should be economically productive and freely participate in trade.²⁸⁰ In this regard, public policy should ultimately promote fairness and do justice between contracting parties.²⁸¹ Agreements which are offensive to public policy are no longer solely construed as those which are *contra bonos mores* (against good morals).²⁸²

It is a general principle of law that agreements contrary to public policy are unenforceable.²⁸³ It is thus not surprising that courts have the power to reject the enforcement of restraint of trade agreements that are contrary to constitutional values.²⁸⁴ However, the Supreme Court of Appeal cautioned courts that they must be careful not to pronounce an agreements as against public policy merely because some of its terms 'offend one's individual sense of propriety and fairness'.²⁸⁵ The Constitutional Court

²⁷⁴ 2012 (3) BCLR 219 (CC).

²⁷⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (note 267 above) para 32.

²⁷⁶ *Sasfin (Pty) Limited v Beukes* (note 76 above).

²⁷⁷ *Sasfin (Pty) Limited v Beukes* (note 76 above) 8-9.

²⁷⁸ *Sasfin (Pty) Ltd v Beukes* (note 76 above) 8C-D. See also *Barkhuizen v Napier* (note 92 above) para 158.

²⁷⁹ *Barkhuizen v Napier* (note 92 above) 159.

²⁸⁰ Frahm (note 155 above) 51.

²⁸¹ *Sasfin (Pty) Ltd v Beukes* (note 76 above) 9G.

²⁸² *Barkhuizen v Napier* (note 92 above) para 29.

²⁸³ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above) 875G-I. See also *Bafana Finance Mabopane v Makwakwa and Another* (note 265 above).

²⁸⁴ *Barkhuizen v Napier* (note 92 above) para 30.

²⁸⁵ *Sasfin (Pty) Ltd v Beukes* (note 76 above) 9 B-C.

concluded that contracts which are contrary to public policy are those which are inimical to the values entrenched in the Constitution of the Republic South Africa.²⁸⁶ Courts therefore have the power to declare restraint of trade agreements void and unenforceable.²⁸⁷ However, courts must exercise necessary care when pronouncing restraint of trade agreements void and unenforceable.²⁸⁸ In the case of *Sasfin (Pty) Ltd v Beukes*,²⁸⁹ the Supreme Court of Appeal stated that:

The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.²⁹⁰

There are two competing Common law aspects of public policy.²⁹¹ The first directs that competent contracting parties who enter into a legal agreement voluntarily must honour their agreements (*pacta sunt servanda*),²⁹² and the second gives everyone the freedom of trade.²⁹³ Although it is in the interest of the community that people should exercise their freedom of trade (be economically active and productive), it is vital that parties to contracts must be bound by their undertakings.²⁹⁴ Of importance is that for a restraint of trade to be enforceable it must be fair and reasonable to both employer and employee.²⁹⁵

2.7 Onus of proof

Another area of controversy which this study focuses on is the issue of the onus of proof. In *Magna alloys and Research (SA) (Pty) Ltd v Ellis*,²⁹⁶ Rabie CJ changed the English law position which was preferred by the majority of South African Courts.²⁹⁷ The Appellant Division favoured the Roman-Dutch law approach to resolve the disputes relating to restraint of trade agreements.²⁹⁸ In terms of the English law, the burden of proving the

²⁸⁶ *Barkhuizen v Napier* (note 92 above) para 29.

²⁸⁷ *Sasfin (Pty) Ltd v Beukes* (note 76 above) 9 B-C.

²⁸⁸ *Eastwood v Shepstone* 1902 TS 294, 302.

²⁸⁹ *Sasfin (Pty) Ltd v Beukes* (note 76 above).

²⁹⁰ *Sasfin (Pty) Ltd v Beukes* (note 76 above) 9 B-C.

²⁹¹ *Weinberg v Mervis* 1953 (3) S.A 863 and 867. See also *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 26.

²⁹² As above.

²⁹³ As above.

²⁹⁴ *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 and 699.

²⁹⁵ *Sasfin (Pty) Ltd v Beukes* (note 76 above) 9G.

²⁹⁶ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above).

²⁹⁷ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above) 893A-B, 898C-D.

²⁹⁸ As above.

reasonableness of a restraint of trade rests on the employer who seeks to enforce a restriction.²⁹⁹ On the contrary, Roman-Dutch law requires that the burden of proof should rest on the party who seeks to attack the enforceability of restraint of trade agreement.³⁰⁰ In *Magna Alloys and Research (SA) Pty Ltd v Ellis*,³⁰¹ the Appellate Division held that the onus of proof falls on an employee who seeks to avoid the enforceability of restraint of trade agreement.³⁰² It should however be noted that the case was decided before the advent of the democratic Constitution of the Republic of South Africa. As such, it is essential to enquire into the question of whether Constitution of the Republic South Africa reversed the onus of proof to the employer.

Kondile J's judgement in *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*³⁰³ openly maintains an explicit opposition of the case of *Magna alloys and Research (SA) (Pty) Ltd v Ellis*³⁰⁴ with regard to the issue of where burden of proof falls between an employer and employee.³⁰⁵ In *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*,³⁰⁶ Kondile J held that a restraint of trade seeks to limit the employee's constitutional rights to freedom of trade, occupation and profession.³⁰⁷ The court further held that it is unconstitutional to impose the onus of proof on an employee to prove the unreasonableness of restraint of trade agreement.³⁰⁸ However, in a recent judgement, the Labour Court favoured the approach applied in *Magna alloys and Research (SA) (Pty) Ltd v Ellis*³⁰⁹ in which it held that the employee must bear the burden of proving the unreasonableness of restraint of trade agreement.³¹⁰ Similarly, in *ARB Eletrical Wholesalers (Pty) Limited v Ashley*,³¹¹ Cele J maintained that the onus of proof must be on the employee who seeks to escape the enforceability of restraint of trade

²⁹⁹ *David Crouch Marketing v Du Plessis* (note 85 above).

³⁰⁰ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above) 893A-B, 898C-D.

³⁰¹ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above)

³⁰² *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above) 893A, 898C-D. See also *Dickinson Holdings v Du Plessis* 2007(1) All SA 583; *Basson v Chilwan* (note 106 above).

³⁰³ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (2005) 3 SA 205 (N).

³⁰⁴ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above).

³⁰⁵ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 296 above) 209F.

³⁰⁶ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 296 above).

³⁰⁷ As above.

³⁰⁸ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 296 above) 209F. See also *Advtech Resourcing Ltd t/a Communicate Personnel Group v Kuhn* (note 154 above) para 28.

³⁰⁹ *One Capital Sponsor Services (Pty) Ltd and Another v Chellan and Others* (note 60 above).

³¹⁰ As above.

³¹¹ (D683/17) [2017] ZALCD 20 (13 October 2017)

agreement.³¹² The majority of South African cases support *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,³¹³ in relation to the complex question of where the onus of proof lies between the employer and employee.³¹⁴

The issue of onus of proof remains controversial and legal certainty on it is required. In *Laser Junction (Pty) Ltd v Fick*,³¹⁵ the court held that the question of where the burden of proof falls between the employer and employee is a concern.³¹⁶ Pillay J further opined that the above concern calls for constitutional scrutiny.³¹⁷ This is indeed so taking into account the controversies established relating to the issue of onus proof in restraint of trade agreements.

Du Plessis agrees with Kondile J's decision in *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth*³¹⁸ that an employer must bear the burden of proof to prove that the restraint of trade agreement is reasonable and enforceable in limiting the employee's right to freedom of trade.³¹⁹ Du Plessis argues that Kondile J's judgement cannot be faulted on merits as the court was bound to reverse the onus of proof due to the interpretation of Section 22 of the Constitution³²⁰ which provides that everyone has the right to freely practice a trade or profession of their choice.³²¹ Kondile J held that the courts must develop the Common Law with regard to restraint of trade and align it with the Constitution, more particularly in relation to the question of onus of proof.³²² It is no longer correct to impose the burden of proof on the employee.³²³ On a related note, Davis J in *Advtech Resourcing Ltd t/a Communicate Personnel Group v Kuhn*,³²⁴ held that the Common law doctrine of restraint of trade is subject to the Constitution of the Republic of

³¹² *ARB Electrical Wholesalers (Pty) Limited v Ashley* (note 304 above) para 12.

³¹³ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above).

³¹⁴ *Experian South Africa (Pty) Ltd v Haynes and another* 2013 (1) SA 135. See also *Basson v Chilwan and others* (note 106 above) 77611-J; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above); *Reddy v Siemens Telecommunications (Pty) Ltd* (note 134 above); *Den Braven SA (Pty) Ltd v Pillay and another* (note 75 above).

³¹⁵ *Laser Junction (Pty) Ltd v Fick* (note 95 above).

³¹⁶ *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 31.

³¹⁷ *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 32.

³¹⁸ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 296 above) 209F.

³¹⁹ M.A. Du Plessis *Stare Decisis; Is the Onus in Restraints of Trade Hanging on a Thread* (2006) 2 *Tydskrif Vir die Suid Afrikaans Reg* 425.

³²⁰ Du Plessis (note 312 above).

³²¹ Constitution of the Republic of South Africa (note 52 above).

³²² *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 296 above) 209G.

³²³ Du Plessis (note 312 above) 425.

³²⁴ 2008 2 SA 375 (C).

South Africa.³²⁵ Davis J further remarked that the employer who seeks to enforce a restraint of trade must bear onus of proving the reasonableness of limiting the constitutional right to free trade that the employee is entitled to.³²⁶ In the light of the above, the employer must show that the restriction imposed on the employee is a reasonable limitation and that it complies with the Constitution of the Republic South Africa.³²⁷ In *Barkhuizen v Napier*,³²⁸ the Constitutional Court properly emphasised that in the constitutional era, contracts are subject to the Constitution.³²⁹ This means that it is crucial to review the South African jurisprudence on restraint of trade in order to give legal certainty in relation to the controversial issue of onus of proof.

In *Reddy v Siemens Telecommunications (Pty) Ltd*,³³⁰ the Supreme Court of Appeal was presented with an opportunity to settle the debate of whether the current Constitution of the Republic of South Africa reversed the onus of proof to the employer to prove reasonableness of the enforceability of restraint of trade agreement.³³¹ The Supreme Court of Appeal declined to answer the question of where the onus of proof lies.³³² The court reasoned that it shall make no difference whether the onus is reversed to the employer.³³³ In the same vein, Neethling affirms that ‘the outcome of the value judgment would be the same irrespective of whether the burden rested on the covenantor or the covenantee’.³³⁴

In *Dickinson Holdings v Du Plessis*,³³⁵ Ngubane AJ highlighted the conflicting approaches in relation to the issue of onus of proof in matters concerning the enforceability of restraint of trade agreement.³³⁶ In this case, the court however did not answer the question of the

³²⁵ *Advtech Resourcing Ltd t/a Communicate Personnel Group v Kuhn* (note 154 above) para 28.

³²⁶ As above.

³²⁷ *Fidelity Guard Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 2 SA 853 (SE) 862F-H. See also *Lifeguards Africa v Raubenheimer* 2006 5 SA 364 (D&CLD); *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 296 above); *Du Plessis* (note 312 above) 425.

³²⁸ *Barkhuizen v Napier* (note 92 above).

³²⁹ *Barkhuizen v Napier* (note 92 above) para 11.

³³⁰ *Reddy v Siemens Telecommunications (Pty) Ltd* (note 134 above).

³³¹ *Reddy v Siemens Telecommunications (Pty) Ltd* (note 134 above) para 13.

³³² As above.

³³³ *Reddy v Siemens Telecommunications (Pty) Ltd* (note 134 above) para 14.

³³⁴ Neethling, J. 2008. The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants – A Need for Exercising Restraint. *South African Mercantile Law Journal*. 20 (1): 89-94. 94.

³³⁵ *Dickinson Holdings v Du Plessis* (note 295 above).

³³⁶ *Dickinson Holdings v Du Plessis* (note 295 above) 595F.

burden of proof and stated that it is not necessary to debate onus because the matter can be resolved without dealing with the question of onus.³³⁷

2.8 Inequality of the parties' bargaining powers in restraint of trade agreements

In terms of the principle of freedom of contract, parties to a restraint of trade agreement are free to make and enforce against each other whatever terms or bargains they wish.³³⁸ As such, courts do not interfere with agreements of the parties entered voluntarily.³³⁹ The principle of freedom of contract also draws its support from the doctrine of sanctity of contracts.³⁴⁰ However, if an employee can raise a defense that he/she entered into a restraint of trade agreement under undue influence, or without free will, such agreement is not enforceable.³⁴¹ Parties with equal bargaining power must agree to the material terms of the contract.³⁴² Bargaining power is the ability to negotiate, influence or to dictate terms and conditions of an agreement.³⁴³

South African labour jurisprudence maintains that there is equal bargaining power between employers and employees.³⁴⁴ In the light of the above, restraint of trade agreement are *prima facie* valid and enforceable unless the employee can discharge the onus of proof on a preponderance of evidence that the agreement in question is unreasonable and inimical to public interest.³⁴⁵ The imbalance of bargaining power between employers and employees is a factor that would be considered together with other factors in determining public interest.³⁴⁶ In other words, the imbalance of bargaining power can negatively affect the enforceability of restraint of trade agreements.³⁴⁷ Factors

³³⁷ *Dickinson Holdings v Du Plessis* (note 295 above) 595F.

³³⁸ Calitz (note 29 above) 50.

³³⁹ As above.

³⁴⁰ As above.

³⁴¹ *Medscheme Holdings (Pty) Limited & Another v Bhamjee* 2005 (5) SA 339 (SCA) para 18.

³⁴² H. Beale, Inequality of Bargaining Power (1986) 6 *Oxford Journal of Legal Studies* 123, 125. See also R Sharrock 'Relative Bargaining Strength and Illegality Uniting Reformed Church, De Doorns v President of the Republic of South Africa 2013 (5) SA 205 (WCC): cases' (2014) 35 *Obiter* 140.

³⁴³ As above.

³⁴⁴ Calitz (note 29 above) 66. See also *Knox D'Arcy v Shaw* 1996 2 SA 651 (W) 659; *Den Braven SA (Pty) Ltd v Pillay and another* (note 75 above) para 27.

³⁴⁵ *Roffey v Catteral, Edwards & Goudre* (note 25 above) 505 E-F.

³⁴⁶ *Afrox Healthcare BP (Cape) v Strydom* 2002 6 SA 21 (SCA). See also *Barkhuizen v Napier* (note 92 above) para 59.

³⁴⁷ As above.

that should be taken into consideration in determining whether a restraint of trade agreement was entered with equal bargaining power or freewill are the following:

- the experience and skills or lack of experience and skills of the employee;
- the demand in the labour market for the employee's skills;
- whether there is a high rate of unemployment;
- the state of the economy and the unemployment rate;
- personal circumstances such as family responsibilities that would place pressure on an employee in finding a job in a certain area; and
- the age of the employee (young people and people above 50 may find it more difficult to find employment).³⁴⁸

These factors can be summed up as economic duress.³⁴⁹ Economic duress is created by 'illegitimate commercial pressure exerted on a party to a contract, which induces him to enter into the contract and amounts to a coercion of the will which vitiates his consent'.³⁵⁰

The unequal bargaining power between employers and employees is primarily driven by high level of unemployment in South Africa,³⁵¹ which currently stands at 27.5% (6.1 million people without jobs).³⁵² People are in a desperate need of employment and have no bargaining alternatives available to them because they are economically dependent on employers for employment.³⁵³ This puts employees in a vulnerable position of taking employment without negotiating employment terms.³⁵⁴ Employers take advantage of the situation and impose whatever employment contractual terms they wish without due regard of the impact of such terms on employees.

Having regard of the high rate of unemployment, job seekers are in a take-it-or-leave-it situation.³⁵⁵ A standard form contract prepared in advance in favour of employers is

³⁴⁸ Calitz (note 29 above) 65.

³⁴⁹ M.F. Cassim 'Medscheme Holdings (Pty) Limited v Bhamjee: The Concept of Economic Duress' (2005) 122 *South African Law Journals* 528, 528.

³⁵⁰ As above.

³⁵¹ 'SA unemployment rate rises to 27.2% in Q2' Eyewitness News 31 July 2018 available at <https://ewn.co.za/2018/07/31/sa-unemployment-rate-rises-to-27-2-in-q2> (accessed 29 August 2018).

³⁵² As above.

³⁵³ Sharrock (note 340 above) 141.

³⁵⁴ L Hawthorne 'The Principle of Equality in the Law of Contract' (1995) 58 *Tydskrif vir Hedendaagse Romeins – Hollandse Reg* 157, 170.

³⁵⁵ Naude & Lubbe (note 92 above) 368. See also *Barkhuizen v Napier* (note 92 above) para 135.

presented for job seekers to sign.³⁵⁶ If the job seeker is dissatisfied with a particular term, employers are not open to negotiating employment terms.³⁵⁷ An employer in such situation will inform the job seeker to sign an agreement or remain jobless since there are many people wishing to take the vacant position.³⁵⁸ The job seeker succumbs and signs the contract simply to avoid the financial strain associated with joblessness.³⁵⁹ In a bid to balance the bargaining power, the German jurisprudence puts an obligation to employers to compensate employees for agreeing to such restraint of trade deal.³⁶⁰ An unpaid restraint of trade agreement is a one-sided deal which seeks to benefit only the employer to the employee's detriment.³⁶¹ Employees under restraint of trade agreements are prevented from working or opening competing business enterprise with former employers.³⁶² This means that a person under an 18 month restraint of trade agreement will have to suffer economic difficulties for signing a lopsided agreement.

It is unreasonable to impose the burden of proof on employees if they are in a weaker bargaining position in relation to employers.³⁶³ If employees are in a vulnerable position due to their weaker bargaining power, then employers must bear the onus of proof that the restraint of trade agreement is reasonable and enforceable.³⁶⁴ To balance the bargaining position, the law should be developed to impose the burden on employers to compensate their former employees. Unpaid restraint of trade seeks to benefit employers by protecting their business interests and curb competition. On the other hand, former employees gain nothing in return for signing an agreement. Unpaid restraint of trade agreements only make former employees suffer economically since they cannot work or open a competing business enterprise for the duration of the restraint. The reality of unequal bargaining power between employers and employees cannot be swept under the

³⁵⁶ Naude & Lubbe (note 92 above) 368. See also *Barkhuizen v Napier* (note 92 above) para 135.

³⁵⁷ As above.

³⁵⁸ As above.

³⁵⁹ Cassim (note 347 above) 528 and 528. See also G Glover 'Developing a Test for Economic Duress in the South African Law of Contract: A Comparative Perspective' (2006) *South African Law Journal* 287-288

³⁶⁰ *Handelsgesetzbuch of 1897 (HGB)* English translated by: M Pelzer/EA Voigt "German Commercial Code" (2003), Sec 74(2).

³⁶¹ As above.

³⁶² Landis & Grossett (note 17 above) 57.

³⁶³ *Biografic (Pty) Ltd v Wilson* 1974 2 SA 342 (R) 346. See also HJO Van Heerden & J Neethling *Unlawful Competition* Lexisnexis Butterworths Durban 25.

³⁶⁴ Beale (note 340 above) 123 and 125.

carpet. It is commercially unreasonable to assume that all restraint of trade agreements are *prima facie* valid and enforceable in light of the economic pressure that employees face.

2.9 The Constitutionality of restraint of trade agreements

Whether the doctrine of restraint of trade survives constitutional scrutiny remains an important question. In *Reddy v Siemens Telecommunications*,³⁶⁵ the Supreme Court of Appeal remarked that the Bill of Rights applies to all agreements including restraint of trade agreements.³⁶⁶ Similarly in *Den Braven SA (Pty) Ltd v Pillay & another*,³⁶⁷ the court held that the Bill of Rights has horizontal application to contracts in restraint of trade.³⁶⁸ Section 8 (1) reinforces supremacy of the Constitution by stipulating that the Bill of Rights applies to all forms of laws.³⁶⁹ This generally means that all laws are subject to the Constitution. The Constitution further requires its obligations to be diligently performed.³⁷⁰ In addition, Section 172 (1) (a) of the Constitution gives courts the power to interfere and declare 'any law or conduct' that is in conflict with it invalid.³⁷¹

It is for the above reason that agreements, doctrines, conducts and laws should be tested against the constitution to establish if such are in line with the supreme law of the Republic of South Africa. The Bill of Rights applies horizontally to restraint of trade contracts,³⁷² as correctly held in the case of *D & E Trading (Pty) Ltd v Hilton Village Centre CC & others*.³⁷³ The Common law doctrine of restraint of trade must be carefully scrutinized to ensure that the constitutional rights of employees protected in the Bill of Rights are not abrogated by the Common law.³⁷⁴ This study therefore also sought to examine whether the doctrine of

³⁶⁵ (251/06) [2006] ZASCA 135.

³⁶⁶ *Reddy v Siemens Telecommunications* (note 134 above) para 10. See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (note 267 above) para 32.

³⁶⁷ *Den Braven SA (Pty) Ltd v Pillay & another* (note 75 above).

³⁶⁸ *Den Braven SA (Pty) Ltd v Pillay & another* (note 75 above) para 30.

³⁶⁹ Constitution of the Republic of South Africa 1996 (note 52 above).

³⁷⁰ Constitution of the Republic of South Africa 1996 (note 52 above) Sec 237.

³⁷¹ Constitution of the Republic of South Africa 1996 (note 52 above) Sec 172 (1) (a).

³⁷² *D & E Trading (Pty) Ltd v Hilton Village Centre CC & others* (1342/13) [2013] ZAKZPHC 12 (19 March 2013) paras 15-22.

³⁷³ As above.

³⁷⁴ *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 29.

restraint of trade is consistent with the Bill of Rights as the supreme law of the Republic of South Africa.

2.9.1 Freedom of trade as a constitutional protected right

Section 22 of the Constitution of the Republic of South Africa guarantees everyone the right to freely practice a trade or profession of his/her choice.³⁷⁵ A restraint of trade restrains the affected party from exercising his/her freedom of trade or profession, for a particular period, and within a particular geographical area.³⁷⁶ Although the right to freely practice trade is a constitutionally protected right, it is however not an absolute right, it can be limited by reasonable and justifiable restrictions. Restraint of trade agreements are justifiable mechanisms to protect the legitimate interests of the employer, provided that such agreements are reasonable and not against public interest.³⁷⁷ It is for this reason that Section 39 (3) of the Constitution of the Republic of South Africa makes a provision that 'the Bill of Rights does not deny the existence of any rights or freedoms that are recognized or conferred by Common law'.³⁷⁸

However, the Constitutional Court has not had an opportunity to deal with a matter in relation to restraint of trade agreements. Nevertheless, it dealt with the question of whether a contractual limitation is a justifiable limitation of the right considering values underlying the Bill of Rights.³⁷⁹ The Constitutional Court emphasised that:

A contract contrary to public policy is now to be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and therefore unenforceable³⁸⁰

³⁷⁵ Constitution of the Republic of South Africa 1996 (note 52 above).

³⁷⁶ Pretorius (note 21 above) 159.

³⁷⁷ Calitz (note 29 above) 50. See also *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 44 above) 875 H-I.

³⁷⁸ Constitution of the Republic of South Africa 1996 (note 52 above).

³⁷⁹ *Barkhuizen v Napier* (note 92 above).

³⁸⁰ *Barkhuizen v Napier* (note 92 above) para 29-30.

In the case of *Fidelity Guards Holdings (Pty) Ltd v Pearman*,³⁸¹ Liebenberg J held that a restraint of trade agreement limits a constitutional right of the employee.³⁸² Of importance however, is that the court did not find the doctrine of restraint of trade to be inconsistent with the Constitution of the Republic of South Africa.³⁸³

Pillay J in *Laser Junction (Pty) Ltd v Karl Leeson Fick*,³⁸⁴ noted that the Constitution confers protection to employees against unemployment (Section 22) and unfair labour practice (Section 23).³⁸⁵ The court reasoned that the violation of the above constitutional rights inevitably crystallises into the infringement of other constitutional rights such as the right to dignity, and 'to all the rights, goods and services that are accessible only by having decent work to pay for them'.³⁸⁶

2.9.2 Freedom of trade and the Limitation Clause

Since freedom of trade is a fundamental right entrenched in the Constitution of the Republic of South Africa,³⁸⁷ it is therefore, common cause that this right can be limited in terms of the 'law of general application only to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity and freedom'.³⁸⁸ Restraint of trade is a Common law doctrine which is a law of general application and it limits the right to freedom of trade as provided for in Section 22 of the Constitution of the Republic of South Africa.³⁸⁹ It is arguable that after the employee has established that the employer is infringing his freedom of trade as a constitutional protected right, the employer must then be burdened with the onus to prove that such infringement constitutes a legitimate limitation of the right.³⁹⁰ In a nutshell, the employer must show that a restraint of trade agreement which is restricting a former employee from freely practicing his trade is a reasonable and justifiable limitation.

³⁸¹ 1997 (4) All SA 650.

³⁸² *Fidelity Guards Holdings (Pty) Ltd v Pearman* (note 140 above) 658G.

³⁸³ As above.

³⁸⁴ *Laser Junction (Pty) Ltd v Fick* (note 95 above).

³⁸⁵ *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 28.

³⁸⁶ *Laser Junction (Pty) Ltd v Fick* (note 95 above) para 28.

³⁸⁷ Constitution of the Republic of South Africa 1996 (note 52 above) Sec 26.

³⁸⁸ As above.

³⁸⁹ Constitution of the Republic of South Africa 1996 (note 52 above).

³⁹⁰ Constitution of the Republic of South Africa 1996 (note 52 above) sec 36.

In *Barkhuizen v Napier*,³⁹¹ although the Constitutional Court was not asked to enforce a restraint of trade agreement, what is interesting is that the court pointed out that enforceability of contractual obligations which are limited by the Constitution must be reasonable and not contrary to public policy.³⁹² This generally means that whenever a question of the enforceability of restraint of trade arises, it is imperative for courts to hold an inquiry into whether the restraint of trade agreement is compatible with the Constitution in an open and democratic society based on human dignity and freedom.³⁹³

2.9.3 Reasonableness and justifiability in an open and democratic society

The Constitution of the Republic of South Africa requires the limitation of any right entrenched in the Bill of Rights to be justifiable in an open and democratic society based on human dignity, equality and freedom.³⁹⁴ The limitation of the freedom of trade must be reasonable and justifiable in the sense that the court must be satisfied that the restraint of trade does not exceed what is reasonably necessary to protect legitimate business interests of the employer.³⁹⁵ If a restraint of trade agreement is couched in terms that are unreasonably wide in scope of operation, a court can enforce it to the extent that it is fair, reasonable and justifiable.³⁹⁶ It is trite law that an unreasonable restriction of a former employee's freedom of trade maybe found to be against public policy and therefore, unenforceable.³⁹⁷

In addition, the courts are allowed to develop the Common Law.³⁹⁸ The Constitution of the Republic of South Africa demands that when courts develop the Common law, they 'must promote the spirit, purport and objects of the Bills of Rights'.³⁹⁹ Pretorius opines that if the Constitution is applied in restraint of trade agreements, such restraint

³⁹¹ 2007 (5) SA 323 (CC).

³⁹² *Barkhuizen v Napier* (note 92 above) para 11.

³⁹³ *Dickinson Holdings v Du Plessis* (note 295 above) 594F.

³⁹⁴ Constitution of the Republic of South Africa 1996 (note 52 above) Sec 36.

³⁹⁵ *One Capital Sponsor Services (Pty) Ltd and Another v Chellan and Others* (note 60 above) para 23. See also *Den Braven SA (Pty) Limited v Pillay and Another* (note 75 above) para 36; *Sasfin (Pty) Limited v Beukers* (note 76 above) 16G-17A; *EOH Mthombo (Pty) Ltd v Bheekie-Odhav* (note 77 above) para 28.

³⁹⁶ As above.

³⁹⁷ Constitution of the Republic of South Africa 1996 (note 52 above) Sec 36.

³⁹⁸ Constitution of the Republic of South Africa 1996 (note 52 above) Sec 39 (2).

³⁹⁹ Pretorius (note 21 above) 60. See also Constitution of the Republic of South Africa 1996 (note 261 above) Sec 39 (2).

agreements will be invalid and unenforceable, unless the employer shows that the enforceability is reasonable.⁴⁰⁰ Conversely, Rabie CJ held that restraint of trade agreements are *prima facie* valid and enforceable, unless the employee shows that its enforceability is unreasonable.⁴⁰¹ The present study sought to bring certainty to the controversial issue of the enforceability of restraint of trade in the context of the South African Labour law in light of the Constitution. Restraint of trade agreements are constitutional provided they are reasonable between parties and satisfy the limitation clause as enshrined in section 36 of the Constitution.⁴⁰²

2.10 Implied restraint of trade

In *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*,⁴⁰³ the Labour Court dealt with the issue of whether an employer can legally 'interdict and restrain its former employees from taking up employment with a competitor, on the basis of unlawful competition and without relying on a covenant in restraint of trade'⁴⁰⁴ In this case, the applicant sought to restrain Mrs. Jonker from taking up employment with its direct competitor in the absence of restraint of trade agreement.⁴⁰⁵

The contract of employment *inter alia*, stipulated a confidential clause which provided that the employer's confidential information will remain confidential even after termination of the employment contract.⁴⁰⁶ Moreover, the confidential clause expressly demonstrated that the company did not prevent its clients from following an employee to her new similar business or to her employment with its direct competitors, provided clients were not enticed to follow the former employee.⁴⁰⁷ The employee terminated the contract of

⁴⁰⁰ Pretorius (note 21 above) 60. See also Constitution of the Republic of South Africa 1996 (note 261 above) Sec 39 (2).

⁴⁰¹ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 44 above), 875 H-I.

⁴⁰² Constitution of the Republic of South Africa 1996 (note 52 above).

⁴⁰³ (741/17, C742/17) [2017] ZALCCT 57 (17 November 2017) para 1.

⁴⁰⁴ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 1.

⁴⁰⁵ As above.

⁴⁰⁶ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 6.

⁴⁰⁷ As above.

employment.⁴⁰⁸ Consequently, the employer approached the Labour Court, pleading to interdict the employee Mrs. Jonker,⁴⁰⁹ restraining her from taking up employment in the financial advisory sector, for a period of six months in the Republic of South Africa.⁴¹⁰ In this case,⁴¹¹ Steenkamp J held that the applicant, Absa Insurance and Financial Advisors (Pty) Ltd has not proved a clear right to the extraordinary relief it sought.⁴¹² In the light of the above, the interdiction against the respondents from divulging confidential information of the applicant was not granted,⁴¹³ since the respondents were not in possession of the applicant's interests (confidential information) worthy of legal protection by means of implied restraint of trade.⁴¹⁴

The Labour Court reasoned that the best way to prevent an employee from using legitimate protectable interests is by means of a restraint of trade agreement.⁴¹⁵ It is arguable that an existence of restraint of trade agreement which demonstrates confidential information that is subject to nondisclosure with clarity makes it easier for an employee to be granted appropriate relief before the trade secret is actually disclosed. Interdicting a former employee by means of implied restraint of trade is an extraordinary remedy,⁴¹⁶ and courts are reluctant to interdict employees through implied restraint of trade.⁴¹⁷ In other words, courts prefer to enforce actual consent of a former employer and employee that is reduced to writing as a restraint of trade agreement. Restraint of trade agreements are fair because they prevent an employee to work or trade in a particular area, and for a reasonable period in order to protect legitimate commercial interests of an

⁴⁰⁸ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 4.

⁴⁰⁹ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 16.

⁴¹⁰ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 16.

⁴¹¹ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above).

⁴¹² *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 52.

⁴¹³ As above.

⁴¹⁴ As above.

⁴¹⁵ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 23.

⁴¹⁶ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 37.

⁴¹⁷ As above.

employer.⁴¹⁸ It is argued that restraint of trade agreements confer sufficient protection as ‘they go further than the interests protected by general law’.⁴¹⁹ As such, it is advisable that employers should consider to protect their trade secrets by means of restraint of trade agreements as opposed to reliance on protecting commercial interests on general law and implied restraint of trade. It has been shown that courts are reluctant to interdict employees to trade or to be employed relying on implied restraint of trade as it is regarded as an extraordinary remedy.⁴²⁰

The central question here is whether an employee who have legitimate protectable interests who consequently did not enter into a restraint of trade agreement with an employee may only rely on implied restraint of trade for legal protection. In *Reeves and Another v Marfield Insurance Brokers CC and Another*,⁴²¹ the Supreme Court of Appeal explained that an employee who is not prevented by restraint of trade agreement is free to canvass employer’s customers, but subject to certain limitations.⁴²²

The disclosure of trade secrets and confidential information can be restrained in the absence of an actual restraint of trade agreement. The Labour Court emphasised that the granting of an ‘interdict is an extraordinary remedy’.⁴²³ Thus far, an interdict is given out of the discretion of a court.⁴²⁴ Steenkamp J observed that ‘courts are reluctant to include restraints of trade by implication.’⁴²⁵ In this case,⁴²⁶ the Labour Court held that the former employer failed to demonstrate a legitimate protectable interests which merits extraordinary relief it sought.⁴²⁷ The Labour Court refused to grant an interdict on the

⁴¹⁸ *Automotive Tooling System (Pty) Ltd v Wilkens and Other* (note 58 above) 282 E-G.

⁴¹⁹ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 27.

⁴²⁰ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 37.

⁴²¹ 1996 (3) SA 766 (A).

⁴²² *Reeves and Another v Marfield Insurance Brokers CC and Another* (note 326 above) 772E-F. See also *Roberts v Etwell's Engineers Ltd* (1972) 2 All ER 890, 894.

⁴²³ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 37.

⁴²⁴ As above.

⁴²⁵ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 37.

⁴²⁶ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above).

⁴²⁷ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another, Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) paras 27, 37, 41, 52.

basis that the former employees destroyed confidential information in their possession.⁴²⁸ They had destroyed the client data in their possession on their iPhones.⁴²⁹ The respondents argued that they had no other client data in their possession.⁴³⁰ The court established that the applicant had not proved through evidence that the respondents are in possession of confidential information.⁴³¹

The above discussion shows that ordinary rules established to examine reasonableness of restraint of trade agreements are used when resolving disputes in which an employer seeks protection through implied restraint of trade without an actual agreement to restrain former employee in divulging or using employer's trade secrets.⁴³² The case law depicts that implied restraint of trade is a drastic measure.⁴³³ It is desirable that the employer who has protectable commercial interests do so by means of entering into a restraint of trade agreement.⁴³⁴

In *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*,⁴³⁵ the court postulated that employers do not only rely on restraint of trade to protect their protectable interests, they can also rely on:

- (i) 'interdict against unlawful competition; and
- (ii) a delict against unlawful competition'.⁴³⁶

Employers may alternatively rely on the remedies provided for in unlawful competition rather than rendering former employees entirely economically inactive and unproductive

⁴²⁸ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) paras 27, 37, 41, 52.

⁴²⁹ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 20.

⁴³⁰ As above.

⁴³¹ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 20.

⁴³² *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) paras 1, 23.

⁴³³ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) paras 27, 37, 41, 52.

⁴³⁴ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) paras 23.

⁴³⁵ (741/17, C742/17) [2017] ZALCCT 57 (17 November 2017) para 1.

⁴³⁶ *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *Absa Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (note 399 above) para 24

for an inordinately long period.⁴³⁷ The employer may introduce a garden leave clause to an employment contract to protect his confidential information from being used by a former employee. Garden leave is reasonable and fair to both employer and employee since the latter is entitled to remuneration during the subsistence of a period upon which one is prevented from working for the employer and competitors.

2.11. Conclusion

The chapter reviewed the origin and developments of restraint of trade doctrine. It established that both the Roman-Dutch law and English law principles influenced the development of South African Law in relation to the restraint of trade doctrine. South African Courts have been applying conflicting approaches in resolving restraint of trade disputes, and there is still a debate about which approach is the best. The current position in South Africa is that restraint of trade agreements are *prima facie* valid and enforceable, unless the party who wishes to avoid the enforceability can prove that the restraint is not aimed at protecting legitimate business interests of the employer and is contrary to public policy. The issue of onus of proof remains controversial, which essentially merits further legal exploration to achieve the position of legal certainty. The chapter argued that an employer must bear the burden of proof in establishing the reasonableness and justifiability of a restraint of trade agreements. One of the conundrums concerning restraint of trade agreements is that the drafters of restraint agreements prevalently draw agreements with an area or period of restriction that is too wide. A restraint of trade agreement which covers too wide a geographical area, with too long a period of restriction which is unnecessary to protect the legitimate commercial interests of the employer is not enforceable. Care must therefore be exercised when drafting restraint of trade agreements in order to reduce the possibility of the agreement being rendered invalid and unenforceable by the courts. It has been demonstrated that if a restraint of trade agreement is couched in unreasonably wide terms in its scope of operation, a court can enforce it to the extent that it is reasonable in terms of severability clause. The purpose of restraint of trade agreement is not to prevent employees from taking advantage of the good employment opportunities upon leaving employment. It has been reiterated that

⁴³⁷ *Mullane and Another v Smith and Others* [2015] 3 All SA 230 (GJ) paras 10 and 11.

protectable commercial interests of an employer are different from general knowledge, skills and experience, which the employee gleans from his or her employer. The chapter argued that the employer cannot prevent an employee from using his proprietary interests (talents, skills and experience) through restraint of trade without compensation. It was found that employers bear a social obligation to provide training and skills to employees. The chapter also examined the novel issue of whether a former employer can restrain a former employee from being employed by a competitor in the absence of a restraint clause. It was observed that South African Courts are reluctant to accept restraints of trade by implication.

CHAPTER THREE

THE EFFECT OF GARDEN LEAVE ON RESTRAINT OF TRADE AGREEMENTS

3.1 Introduction

This chapter examines the effect of garden leave on restraint of trade agreements. It also explores the nature of the relationship between garden leave and restraint of trade agreements, particularly on how garden leave affects the enforceability of the full period of restraint of trade agreements. The major concern of the present chapter is to investigate the concurrent enforcement of restraint of trade and garden leave despite these two clauses serving the same purpose. The chapter argues that there should be no justification for the subsequent enforcement of a restraint of trade in a case where garden leave sufficiently served the purpose of protecting the legitimate interest of an employer.¹

The chapter is inspired by the Johannesburg Labour Court's observation that 'the concept of garden leave and its relationship, if any, with a restraint of trade agreement has not been the subject of consideration by the South African Courts'.² The South African Labour Court first dealt with the relationship between garden leave and restraint of trade clauses in 2016. Given the novelty of the relationship between garden leave and restraint of trade, it is crucial to review and scrutinise the relationship between these non-competing clauses. The focal issue in this chapter is the examination of the reasonableness of the simultaneous enforceability of both a restraint of trade agreements and garden leave in the South African labour law context. The concurrent enforcement of garden leave and restraint of trade period tends to be tricky.³ The courts must exercise caution when invited to simultaneously enforce garden leave and restraint of trade clauses.

A restraint of trade agreement imposes commercial limitations on the employee's future activities after the termination of employment contract, such as exercising a profession

¹ Y Mupangavanhu The Relationship between Restraints of Trade and Garden Leave (2017) 20 *Potchefstroom Electronic Law Journal* 2.

² *Vodacom (Pty) Ltd v Motsa and Another* (J 74/16) [2016] ZALCJHB 53 para 22.

³ Mupangavanhu (note above 1) 2.

freely, assuming potential employment, divulging confidential information of former employers, and using former employer's trade connections.⁴ In South Africa, a person under restraint of trade is not entitled to any financial compensation during the term of restriction.⁵ This means that the former employer renders his/her former employee jobless for months or years without being considerate of the financial means of survival of the latter. One may argue that unpaid restraint of trade violates employee's right to dignity because former employees cannot afford to pay or access certain goods or services during restraint period.⁶

Whereas the garden leave restricts a person from working for the employer before the termination of employment contract, he/she is nevertheless entitled to full remuneration during the notice period.⁷ Furthermore, employers instruct employees to stay away from work premises, not to contact key co-employees, clients, patients, customers and suppliers for the determined notice period.⁸ Garden leave is enforced to protect legitimate commercial interests like a restraint of trade agreements, but garden leave does not deprive employees of their remuneration.⁹ Clearly, restraint of trade agreement and garden leave prevents employees to unfairly compete with their former employers, using updated trade secrets after the elapse of restriction period.¹⁰

The problem relating to restraint of trade agreements is aggravated by its relationship with 'garden leave'. It is submitted that the simultaneous enforceability of garden leave and restraint of trade agreements is questionable and likely to be abused. Both non-competition clauses serve the same purpose of mitigating the possibility of the employee disclosing confidential information to the employer's direct competitors. Moreover, restraint of trade agreements and garden leave seek to prevent the likelihood of the employee using trade secrets acquired during a period of employment, poaching post

⁴ *Petrofina (Great Britain) Ltd v Martin* 1966 (1) Ch 146.

⁵ L Frahm-Arp, Multi-Country Survey on Covenants Not to Compete, (2018) *Greenberg Traurig and Association of Corporate Counsel* 94.

⁶ *Laser Junction (Pty) Ltd v Fick* (2017) 38 ILJ 2675 (KZD) (28 September 2017) para 28.

⁷ G Van Zyl "Garden leave" (2016) 11 *Without Prejudice* 18.

⁸ J Lewis 'Employment Law Overview 2017' L&E Global <http://www.leglobal.org> 22 (accessed 20 March 2018)

⁹ P Taneja & A Banga Restrictive Covenants: An Indian Approach (year) 3 *International Journal of Law and Legal Jurisprudence Studies* 521.

¹⁰ C.A Sullivan Tending the Garden: Restricting Competition via "Garden Leave" (2016) 37 *Berkeley Journal of Employment & Labour Law* 297.

employer's employees, customers, clients and/or patients to his/her own business or that of a competitor.¹¹

The chapter discusses the rights and obligations of the parties (employer and employee) in garden leave. It also addresses the question of whether an employee can request to be placed on garden leave. The chapter further discusses the effect of employee's desire to spend garden leave at home but instructed to report to work by the employer. Importantly, it examines the relationship between garden leave and restraint of trade agreements. It further questions the reasonableness of the concurrent enforceability of restraint of trade and garden leave in the employment agreements. Finally, the chapter concludes that there should be no justification for the subsequent enforcement of a restraint of trade in a case where garden leave sufficiently serves the purpose of protecting the legitimate interests of an employer.

3.2 Origin of garden leave

Garden leave originated in the United Kingdom.¹² Garden leave was first accepted by the England and Wales Court of Appeal in 1986 as valid law to protect confidential information of an employer from being divulged by an employee¹³ in the case of *Evening Standard Co. Ltd v Henderson*.¹⁴ In this case, the plaintiff (Evening Standard Company Limited) sought to prevent its production manager, Mr. Peter Henderson, from commencing employment with a direct competitor company, in violation of a twelve months' notice provision.¹⁵ The defendant had given a notice period of two months instead of twelve months.¹⁶ The plaintiff learnt quite early that the defendant was resigning with a motive of joining a rival newspaper company.¹⁷ In the light of the above, the plaintiff applied for an interdict to prevent Mr. Henderson from working for a direct competitor newspaper company during the period which the contract of employment still subsisting. In other

¹¹ Mupangavanhu (note 1 above) 3, 6. See also J.T Perri, Garden Leave vs. Covenants Not to Compete (2010) 6 *Review of Law and Economics* 168.

¹² Sullivan (note 10 above) 301

¹³ *Evening Standard Co. Ltd v Henderson* [1987] I.C.R. 588 at 592. Also available at <http://www.bailii.org/ew/cases/EWCA/Civ/1986/9.html> (Accessed 23 May 2018)

¹⁴ As above.

¹⁵ *Evening Standard Co. Ltd v Henderson* (note 13 above) 592.

¹⁶ As above.

¹⁷ As above.

words, the plaintiff was challenging its employee not to repudiate the contract of employment which was still legally in existence. Although the employer prevented the employee from reporting for work, the latter owed the former the legal duty not to serve its commercial rivals. The employer, guaranteed its intention to maintain paying the employee's full salary and other contractual benefits for the subsistence of the full notice period of twelve months, regardless of whether he worked for it or not.¹⁸ The plaintiff argued that taking into account that the defendant worked for its company for 17 years in the production department, he had acquired what was deemed as confidential information, and was privy to the processes of how the company produced its newspaper.¹⁹ In all fairness, Lawton LJ acknowledged that the employer would suffer substantial harm if the employee was not restrained from taking up employment with his employer's competitors.²⁰ The court approved this type of restriction after being satisfied that the employee would not suffer financial prejudice during the notice period because he would be granted his full salary and enjoying other contractual benefits although not working for the employer.²¹ In the light of the above, it is quite clear that the case of *Evening Standard Co. Ltd v Henderson*,²² set a precedent on garden leave rules because it made 'previously unenforceable restraint enforceable'.²³

3.3 Rationale for introducing garden leave in employment contracts

The rationale for garden leave in contracts of employment is to 'sterilise' the confidential and legitimate proprietary information which is in possession of an employee who is intending to leave an employment.²⁴ The primary goal of subjecting employees to garden leave is to restrain them from using relevant confidential and legitimate proprietary information to the former employer's detriment and thereby prevent unfair competition after termination of contract of employment.²⁵ Garden leave prevents an employee from

¹⁸ *Evening Standard Co. Ltd v Henderson* (note 13 above) 592.

¹⁹ *Evening Standard Co. Ltd v Henderson* (note 13 above) 593.

²⁰ *Evening Standard Co. Ltd v Henderson* (note 13 above) 594.

²¹ As above.

²² *Evening Standard Co. Ltd v Henderson* (note 13 above).

²³ GT Lembrich, Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants, (2002) 102 *Columbia Law Review* 2309. See also Sullivan (note 10 above) 301.

²⁴ B Patterson & A Johnson "Gardening leave" and the enforceability of restraints of trade.

<https://www.golegal.co.za/gardening-leave-and-the-enforceability-of-restraints-of-trade/> (accessed 23 May 2018).

²⁵ Patterson & Johnson (note 24 above).

instantly taking up employment with the former employer's direct competitors at a time in which such commercial confidential information is still fresh to an employee's knowledge.

Garden leave is normally included in the employment contracts of senior employees.²⁶ The reason for the above is that garden leave is reasonably enforced in a case where an employee has gained an employer's legitimate commercial interests such as trade secrets, and trade connections.²⁷ A garden leave must be reasonable and necessary to protect the legitimate commercial interests of an employer.²⁸ Furthermore, the period of garden leave should not be too long or more than necessary to protect employer's business interests.²⁹ A long garden leave period is justifiable if an employee was exposed to a very sensitive employer's trade secrets.³⁰ Senior employees who gained experience and expertise on a particular trade or business of an employer possess a great potential of unfairly competing with the latter.³¹ Accordingly, it is rational for courts to enforce garden leave that aims to take employees 'out of the market place long enough for any information they have to go out of date, or to enable that employee's successor to establish themselves', with regard to customers/clients/patients and suppliers, in order to protect employer's goodwill.³² Garden leave decrease the risk of any prospect of damage to the business by outgoing employees.³³ The success of a business depends on customers/clients/patients and employees. Putting an outgoing employee who is intending to commence a competing business on garden leave prevents him/her from poaching customers/clients/patients of his/her former employer.³⁴ Therefore, an employee who is subject to garden leave cannot begin to work for competitors during a notice period.³⁵

²⁶ H Spruce 'Gardening Leave: When Does it Apply & Why?' <https://www.highspeedtraining.co.uk/hub/gardening-leave/> (accessed 23 May 2018).

²⁷ Taneja & Banga (note 9 above) 521.

²⁸ Sullivan (note 10 above) 324.

²⁹ Sullivan (note 10 above) 301.

³⁰ P.A. Steinmeyer & L.F. Rasnick, Garden Leave Provisions in Employment Agreements (2017) *Thomson Reuters* 4.

³¹ Taneja & Banga (note 9 above) 521.

³² Lewis (note 8 above) 22.

³³ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 May 2018).

³⁴ Spruce (note 26 above). See also Lewis (note 8 above) 22.

³⁵ S Anand *et al*/State Enforceability of Noncompete Agreements: Regulations that Stifle Productivity! (2018) 57 *Human Resource Manage* 342. See also Mupangavanhu (note 1 above) 6.

A garden leave restrains an employee from being in the employment premises, particularly in his/her office where such employee have access to sensitive confidential information, contacts with customers/patients/clients and other co-employees.³⁶ It is a common cause that an employee on garden leave is prone to be instructed to give back laptop, smart phones, vehicle and any other digital devices belonging to his/her employer.³⁷ The above is done for the purpose of restraining an employee from having access to sensitive confidential information that could help such employee or potential competitors.³⁸ A good garden leave clause will *inter alia*, stipulate that for a determined notice period an employee should desist from contacting any customers, patients, clients and colleagues.³⁹

3.4 Effects of garden leave

Garden leave affect both employer and employee. It is submitted that once an employee has tendered a notice of termination of an employment contract, he/she is 'no longer obligated to do any work' for an employer.⁴⁰ Furthermore, garden leave restrict employees from commencing with work for competitors or in a self-employed capacity during the subsistence of a notice period.⁴¹ It is a noteworthy that garden leave is fairly reasonable since an employee is entitled to full remuneration and other relevant contractual benefits despite the fact that such an employee is not assigned to do any work for an employer.⁴² In view of the above, employees are discouraged to commence or join a rival business venture due to the fear of lawsuits at the behest of their former employers.⁴³ To that extent, it is clear that restraint of trade and garden leave are similar forms of employment restrictions which seeks to protect legitimate business interests (confidential information, trade secrets and trade connections) of an employer. The difference between restraint of trade agreements and garden leave is that the former is enforceable after termination of the employment contract, while the latter is enforceable months before termination of the

³⁶ Lembrich (note 23 above) 2292.

³⁷ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 May 2018).

³⁸ Lembrich (note 23 above) 2292.

³⁹ L Cartwright Garden leave - still in the armoury? (2014) 121 *Employment Law Bulletin* 1.

⁴⁰ Anand *et al* (note 35 above) 342.

⁴¹ As above.

⁴² As above.

⁴³ As above.

employment contract.⁴⁴ During garden leave an employee receives monthly remuneration.⁴⁵ However, in restraint of trade it is a standard practice in South Africa that a former employer does not have an obligation to pay a former employee during the restraint of trade period.⁴⁶

An employee who is party to an employment contract with a garden leave will still be employed and bound by the terms of his/her employment contract until the notice period expires.⁴⁷ It then follows that an employee who is subject to garden leave is entitled to a monthly salary during the notice period.⁴⁸ In terms of garden leave rules, an employer incurs financial costs of rendering an employee economically inactive as opposed to South African unpaid restraint of trade agreements.⁴⁹ This could be the reason why South African business entities do not generally put employees on garden leave if the latter in his/her employment duties was not exposed to sensitive material that could prejudice legitimate business interest of a company.⁵⁰ In other words, considering the knowledge (trade secrets) that a departing employee has, the employer should be threatened to the extent of not minding to bear garden leave costs in order to protect the interests in question. The employer must perceive that he/she will suffer substantial harm if the employee is not placed on garden leave.⁵¹ The financial costs of garden leave make employers to alternatively propose unpaid restraint of trade clauses in the employment contracts.⁵²

In terms of garden leave rules, an employee who intends to commence or start a business venture in competition with the former employer will be restrained by court order, so as to prevent such an employee from breaching garden leave clause.⁵³ However, courts must give an order to protect legitimate commercial interests of an employer only in an appropriate case where it is clear that there is a perceived risk that the employer's

⁴⁴ Mupangavanhu (note 1 above) 11, 12.

⁴⁵ Mupangavanhu (note 1 above) 6.

⁴⁶ Frahm-Arp (note 5 above) 94.

⁴⁷ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 May 2018).

⁴⁸ Taneja & Banga (note 9 above) 521.

⁴⁹ Sullivan (note 10 above) 302.

⁵⁰ Sullivan (note 10 above) 304.

⁵¹ Mupangavanhu (note 1 above) 12.

⁵² As above.

⁵³ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above).

legitimate commercial interests would be used to his/her detriment. Ultimately, during the garden leave period, there is nothing in law that prevents an employee to commence looking for other job opportunities,⁵⁴ provided that such an employee intends to begin working for competitor's business after the expiry of garden leave period.⁵⁵

Technically, garden leave is used by an employer requiring an employee not to perform any service for such employer, not to be in the employment premises, refrain from using employer's equipment and desist from business contact with customers, suppliers and co-employees.⁵⁶ To that extent, an employer is not bound to provide work to an employee during the garden leave period.⁵⁷

Although it is a general principle of law that in terms of garden leave, an employer is not obligated to provide work to an employee who is subject to garden leave, it should however be noted that an employer may assign employment duties to an employee to work at home or call him/her to office from time to time.⁵⁸ In light of this view, garden leave should not be construed and treated as a holiday in which an employee utilises as an opportunity to travel abroad.⁵⁹ Accordingly, a party upon whom a garden leave is executed is still technically an employee of his/her respective employer. This means that if such employee is requested to be in the office at a particular time to assist with a particular duty, he/she must be readily available. The above is still the case even when an employee is called in order to provide relevant information or for inquiries. In other words, the employee must be willing to assist an employer since he/she is still paid as a normal employee.

In the matter concerning garden leave, careful attention is given to the question of what could be the worse harm that may be suffered by an employee who is subject to garden clause. It is submitted that regardless of the fact that an employee is remunerated for not using his/her skills for the period of continuance of garden leave, such an employee is

⁵⁴ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 May 2018).

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ As above.

unfortunately affected by not keeping his/her skills sharp and relevant.⁶⁰ Furthermore, employees who are subject to garden leave become unproductive members of society, although not denied full remuneration for not being commercial active.

The notion of garden leave is a newcomer in South African jurisprudence.⁶¹ It is therefore important to determine whether garden leave should be celebrated as commendable practice which strikes a balance of protecting the interests of both an employer and an employee. Clearly, granting an employee a monthly salary while preventing such employee to perform any employment duties to protect commercial interests of an employer seems reasonable and justifiable than unpaid restraint of trade agreements.⁶² Furthermore, the reasonableness and fairness of garden leave stems from the fact that as long as person is still an employee of the employer, such person owes the latter the duty of loyalty.⁶³ This means that an employee cannot compete with his/her employer or do anything which would be to the detriment of the commercial interests of an employer.

At a first glance, garden leave is appealing to employees since a monthly salary is guaranteed despite not performing employment duties for that period.⁶⁴ In this sense, garden leave is better than the unpaid principle of restraint of trade agreements.

Despite its advantages, the notion of garden leave has been criticised.⁶⁵ The most common criticism is that an employee who is subject to garden leave even if it is for a period of 'six months might seriously impair her attractiveness to other employers,⁶⁶ thus raising essentially the same concerns over limiting employee mobility that drive restraint of trade law'.⁶⁷

⁶⁰ Sullivan (note 10 above) 324.

⁶¹ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above).

⁶² Sullivan (note 10 above) 299.

⁶³ As above.

⁶⁴ Sullivan (note 10 above) 312.

⁶⁵ Sullivan (note 10 above) 324.

⁶⁶ As above.

⁶⁷ As above.

3.5 Enforceability of garden leave

The notion of garden leave is enforced in a similar way like restraint of trade agreement.⁶⁸ Whenever the enforceability of garden leave is in dispute, courts have to answer the question of whether such clause is necessary and reasonable to protect the legitimate commercial interests of an employer.⁶⁹ Just like restraint of trade agreements, garden leave clauses are incorporated into a contract of employment to prevent employees, mostly seniors, who would be in possession or acquired knowledge of the confidential information, which if utilised or divulged to competitors could cause immense commercial damage to the employer.⁷⁰ On the other hand, garden leave clauses signed by employees who poses no danger to employers are not reasonable and therefore unenforceable.⁷¹

In summary, the reasonableness of garden leave depends on the employer having a commercial interest deserving legal protection, and whether or not the length of the period of restriction in which an employee would remain idle is too long.⁷² A garden leave clause that is couched in a manner which appears to cover a restriction period which is too long or unnecessary to protect the legitimate commercial interests of the employer is not enforceable.⁷³ Garden leave is only enforced if they are reasonable *inter partes* (between both employer and employee).⁷⁴ If the employee has a notice period which exceeds six months, the employer may not be permitted to enforce garden leave for the full period.⁷⁵ This is because a court may consider such a period as one which is longer than necessary to protect the employer's commercial interests.⁷⁶ It is arguable case that employees have the 'psychological and material need to maintain their skills and talents.⁷⁷ As such, employers should not place employees on a garden leave for a period that is too long.⁷⁸

⁶⁸ Sullivan (note 10 above) 324.

⁶⁹ As above.

⁷⁰ Taneja & Banga (note 9 above) 522

⁷¹ Sullivan (note 7 above) 301.

⁷² *Den Braven SA (Pty) Ltd v Pillay and Another* (2899/2008) [2008] ZAKZHC 22 para 55. See also K Calitz *Restraint of Trade Agreements in Employment Contracts: Time for Pacta Sunt Servanda to Bow Out?* (2011) 22 *Stellenbosch Law Review* 53.

⁷³ *Sasfin (Pty) Limited v Beukers* 1989 (1) SA (A) 1, 16G-17A.

⁷⁴ *Mozart Ice Creams Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C), 1751 A-B. See also *World Net Express (A division of World Net Logistics (Pty) Ltd) v Aucamp and Another* (J1794/17) [2017] ZALCJHB 324 (12 September 2017) para 22.

⁷⁵ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 may 2018).

⁷⁶ As above.

⁷⁷ *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373, para 20.

⁷⁸ As above.

It stands to reason that a long period of garden leave has negative effects of rendering employee's skills weak through idleness.⁷⁹

The legal position in South Africa is that an employer who seeks to prevent an employee from divulging what he deems as the legal protectable interest or trade secret must show the court that the information acquired by the employee is 'unique to its business and it is not in the public domain and is not accessible to the public'.⁸⁰ The question of whether information is confidential or constitutes a trade secret depends on special facts of the case.⁸¹ It is further submitted that for information to be treated as confidential, it must be 'capable of application in trade or industry.'⁸² Furthermore, confidential information must be of such a nature that it could put the employer's competitors at an advantage over the employer.⁸³ It worth repeating that protectable commercial interests of an employer are different from general knowledge, skills and experience, which the employee gleans from his/her employer.⁸⁴

3.6 Fairness of garden leave to employees

In South Africa, employers are reluctant to include garden leave on employment contracts, they alternatively, opt for restraint of trade clauses. This is largely because in the South African jurisprudence an employee subject to garden leave is entitled to a monthly remuneration until the period of such leave runs out.⁸⁵ On the other hand, an employee who is subjected to restraint of trade is not entitled to remuneration but may still be restricted from taking up employment for two or more years.

Notably, although garden leave has its shortcomings, it cannot be worse than unpaid restraint of trade agreement. Therefore, it stands to reason that garden leave is an improvement to noncompeting arrangements that could be reached between an employer

⁷⁹ *Sunrise Brokers LLP v Rodgers* (note 77 above) para 20.

⁸⁰ *David Crouch Marketing v Du Plessis* (2009) 30 ILJ 1828 (LC) para 21.

⁸¹ *Laser Junction (Pty) Ltd v Fick* (note 6 above) para 37.

⁸² *Waste Products Utilisation (Pty) Ltd v Wilkes and another* 2003 (2) SA 515 (W) at 577B C. See also *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (C516/2017) [2017] ZALCCT 44 (4 October 2017) para 34; J Grey *Restraint of trade and confidentiality* (2008) 2 *Enterprise Risk* 34.

⁸³ *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (note 82 above) para 33.

⁸⁴ Grey (note 82 above) 35.

⁸⁵ Lewis (note 8 above) 22.

and an employee since it is considerate of the financial hardship that could be incurred by employees to the subsistence of noncompeting clause. The primary concern which makes employers to be reluctant to alternatively protect their commercial interests by garden leave than restraint of trade clauses is because an employer in the latter, has an obligation to pay an employee despite the fact that he/she is technically not working.⁸⁶ Another reason could be that garden leave is shorter than restraint of trade agreements, since garden leave cannot subsist for more than six months.⁸⁷ It should however be noted that in terms of South African jurisprudence, the doctrine of restraint of trade confers an employer with an outmost freedom to propose whatever reasonable unpaid restriction period he/she deems fit to protect its legitimate commercial interests. In view of the above, it is opined that the financial costs that an employer may incur by subjecting an employee to garden leave are the main reason why employers are reluctant to include garden leave than restraint of trade clauses in the employment contracts.

3.7 Restrictions that may be imposed on an employee by employer through garden leave

Garden leave impose certain restrictions on employees. In view of that fact it is necessary as a point of departure to outline the restrictions that employer could subject an employee into through garden leave. The prominent restriction that is placed by garden leave in the protection of employer's commercial interests is to prevent such employees from accessing particular business information.⁸⁸

A good garden leave clause could inter alia, restrain an outgoing senior employee from attending employment duties and meetings.⁸⁹ An employee who is undertaking work and attending business meetings will be exposed to critical business sensitive information that can be used by him/her as potential competitor or successive employer. It is therefore prudent to prevent an employee under garden leave from attending usual business duties and any business meetings that could give him/her advantages in the form of an up-to-

⁸⁶ K Kemp, *The Significance of Consideration Paid for Post-Employment Restraints in England and Germany* (2005) 2 *Stellenbosch Law Review* 266 and 271.

⁸⁷ As above. See also Mupangavanhu (note 1 above) 6.

⁸⁸ Spruce (note 26 above).

⁸⁹ As above.

date confidential information about his/her employer. An employer should also repossess company issued items such as laptops, smart phones, or vehicles from an employee who is on garden leave.⁹⁰

Garden leave prevents employees from having access to the employer's clients, patients, customers, colleagues and suppliers.⁹¹ The rationale behind such denial is to curtail an outgoing employee from poaching former employer's clients, patients, customers, colleagues and suppliers. It is beyond dispute that an outgoing employee possess a threat to his/her employer of enticing clients, patients, customers, suppliers and colleagues to go with him to his new business or employment. Legally speaking, it is necessary for senior employees who are in possession of employer's business confidential information to be placed on garden leave for a reasonable time, so as to render such information stale.⁹²

In law, a person who is on garden leave is still an employee. To that extent, such person is entitled to full remuneration, although not doing any work for his/her employer.⁹³ Therefore, a person placed on garden leave is prevented from working or to be employed elsewhere until the garden leave period elapses.⁹⁴ It should be noted that since the person on garden leave is still employed, then it follows that such a person is bound by a duty of loyalty not to compete with his/her employer until the garden leave period runs out.⁹⁵ By virtue of the above, an employee bound by garden leave could, then, stay at home and look after his garden.⁹⁶

It is an arguable case that an outgoing employee who is resigning with a plan of commencing a competing business or taking employment with a competitor of his/her current employer may not talk good or advance the interest of such employer if required to make statements about his/her employer to the media. It is therefore rational that

⁹⁰ 'Gardening Leave' <https://www.investopedia.com/terms/g/gardening-leave.asp> (accessed 23 May 2018).

⁹¹ Spruce (note 26 above).

⁹² Mupangavanhu (note 1 above) 12. See also *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 22.

⁹³ Spruce (note 26 above).

⁹⁴ As above.

⁹⁵ Sullivan (note 10 above) 295.

⁹⁶ As above.

garden leave should prevent outgoing employees from making statements about their employer to the media.⁹⁷

3.8 Rights and obligations of employers and employees in garden leave

When studying about garden leave, it is indispensable to understand the rights and obligations of the parties. Garden leave confer certain rights and obligations to both employer and employee. For example, any of the parties to the employment contract bound by garden leave will be entitled to legal recourse if his/her rights are infringed upon. This section will therefore discuss the rights of both employer and employee *seriatim*.

3.8.1 Rights and obligations of employer during garden leave period

As already indicted, the whole point of garden leave is to prevent competition by protecting the employer's legitimate commercial interests such as confidential information, poaching of clients, patients, customer and colleagues.⁹⁸ For a garden leave to be enforced it must entirely seek to protect employer's interests so as to avoid prospects of unfair competition that can flow from employee exploiting interests such trade secrets or trade connections.⁹⁹

Garden leave confer an employer with a right of whether to enforce such a leave, depending on the existence of threat believed to likely emanate from information that an employee is exposed to.¹⁰⁰ It is always the employer's option to invoke his/her rights under garden leave to prevent an employee from working for a particular period with full remuneration.¹⁰¹ An employee cannot demand to be put on garden leave if the employer believes that there is no potential risk of such employee to be exposed to confidential information if he/she continues reporting for work until the end of the employment contract.¹⁰²

⁹⁷ Spruce (note 26 above).

⁹⁸ Sullivan (note 10 above) 319.

⁹⁹ Sullivan (note 10 above) 318.

¹⁰⁰ Sullivan (note 10 above) 314.

¹⁰¹ As above.

¹⁰² Sullivan (note 10 above) 314.

It is trite that employees on garden leave are prevented from entering the workplace and to commence working elsewhere during the period of leave.¹⁰³ Then the central question that one could ask relates to the remedies that employers could rely on in case of breach of garden leave. An employer whose garden leave clause has been breached may seek an interdiction, damages, rescind the garden leave contract and recover in restitution.¹⁰⁴ It may be the case that a former employer may even claim compensation paid by the new employer to such employee who violated the garden leave.¹⁰⁵ The good thing with any of these remedies is that they depend on the validity of the garden leave.¹⁰⁶ Accordingly, a garden leave which is unreasonable and illegal cannot be enforced.¹⁰⁷ As such, an employer cannot be entitled for any legal remedy.¹⁰⁸

3.8.2 Rights and obligations of employees during garden leave period

From a legal standpoint, an employee who is subject to garden leave does not have a right to work.¹⁰⁹ This means that employers cannot be held to be breaching contract of employment if they do not provide work to the employees.¹¹⁰ However, it is of the outmost importance to reiterate that the period of garden leave should not be too long so as to deprive the 'public of the benefits of competition' and unnecessarily preventing employee to pursue other employment advantages.¹¹¹ In any event, a garden leave clause crafted with a restriction period which is too long aiming at preventing an employee to pursue better employment elsewhere is invalid and therefore, unenforceable.¹¹²

It stands to reason that as long as a person is an employee, he/she owes an employer a duty of loyalty.¹¹³ In that sense, an employee cannot compete with his/her employer while serving a period of garden leave. Furthermore, an employee cannot divulge confidential

¹⁰³ Spruce (note 26 above).

¹⁰⁴ Sullivan (note 10 above) 314.

¹⁰⁵ Sullivan (note 10 above) 316.

¹⁰⁶ As above.

¹⁰⁷ P. Havenga *et al General Principles of Commercial Law* (2011) 238.

¹⁰⁸ Sullivan (note 10 above) 316.

¹⁰⁹ Patterson & Johnson (note 24 above).

¹¹⁰ As above.

¹¹¹ Sullivan (note 10 above) 320.

¹¹² As above.

¹¹³ Sullivan (note 10 above) 320.

information of his/her employer to business competitors.¹¹⁴ During the course of employment, an employee must protect the legitimate commercial interests of an employer by all reasonable means.¹¹⁵ In simple terms, an employee must be loyal, promote the business of the employer, and avoid harming the business interests of such an employer.¹¹⁶

It should be noted that a person on garden leave is technically an employee until the period of leave elapses.¹¹⁷ An employer has a primary common law duty to remunerate an employee.¹¹⁸ An employee on garden leave is entitled to receive the same pay and contractual benefits although not doing any work for his/her employer.¹¹⁹ Moreover, an employee under garden leave is also entitled to receive company bonus if there is any.¹²⁰ Legally speaking, a garden leave which denies an employee his/her usual remuneration is invalid and unenforceable.¹²¹

An employee who is on garden leave may be required to be available if the employer needs such a person to provide 'information, support, or even to resume working'.¹²² Having regard to the above, an employee should not utilise garden leave period to travel, unless if such has been approved by his/her employer.¹²³ In terms of employees' common law duties, an employee is required to obey the employer's reasonable and lawful instruction.¹²⁴ An employee on garden leave is technically still under the control and authority of an employer.¹²⁵ Consequently, if an employee is required to come to provide certain assistance, he/she must be available as per instruction.¹²⁶ Employees who are insubordinate to employers may be considered to have breached the contract of

¹¹⁴ C. Visser, *et al South African Mercantile and Company Law* (2003) 600.

¹¹⁵ S kopel *Guide to Business Law* (2012) 338.

¹¹⁶ Havenga (note 107 above) 238.

¹¹⁷ Van zyl (note 7 above) 18.

¹¹⁸ Havenga (note 107 above) 236.

¹¹⁹ 'Gardening Leave' <https://www.investopedia.com/terms/g/gardening-leave.asp> (accessed 23 May 2018).

¹²⁰ As above.

¹²¹ Mupangavanhu (note 1 above) 6.

¹²² 'Gardening Leave' <https://www.investopedia.com/terms/g/gardening-leave.asp> (accessed 23 May 2018).

¹²³ As above.

¹²⁴ Havenga (note 107 above) 238.

¹²⁵ Kemp (note 86 above) 257.

¹²⁶ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 May 2018).

employment.¹²⁷ It is an employee's primary duty to 'place his or her labour potential at the disposal of the employer'.¹²⁸

3.9 Requesting garden leave

Garden leave serves the best interests of employers despite the fact that employees normally serve this leave in the comfort of their homes.¹²⁹ An employee may request to be put on garden leave once he/she served notice of termination of employment contract.¹³⁰ However, an employer may construe such request negatively 'as an attempt to have some paid time off'.¹³¹ Therefore, it is in the discretion of an employer to place an employee on garden leave and 'subject to either a contractual right or policy or custom and practice'.¹³² Employers only place outgoing employees on garden leave if they perceive the sense of an employee joining competitor as threat to its legitimate commercial interests (trade secrets and trade connections).¹³³ It is worth repeating that employees that are on garden leave are still subject to the employers' control and authority.¹³⁴ To that extent, employers may change their mind at any point during garden leave and request employees to return to work.¹³⁵

For some reasons, it may happen that an employee has a desire to be placed on garden leave. In that case, in the resignation letter an employee must include the fact that he/she is intending to be employed by a rival company, the role, and the responsibilities he/she will be taking.¹³⁶ This will obviously convince the employer that such an employee should be placed on garden leave so as to protect its legitimate commercial interests.¹³⁷ It is necessary at this juncture to reiterate that the whole point of garden leave is to protect the employers' interests.

¹²⁷ J Grogan (10th ed) *Workplace Law* (Juta: Cape Town 2009) 51. See also Havenga (note 107 above) 238.

¹²⁸ Havenga (note 107 above) 238.

¹²⁹ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 May 2018).

¹³⁰ As above.

¹³¹ As above.

¹³² Van zyl (note 7 above) 18.

¹³³ Mupangavanhu (note 1 above) 6.

¹³⁴ Kemp (note 86 above) 261.

¹³⁵ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 May 2018).

¹³⁶ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 May 2018).

¹³⁷ As above.

3.10 Employee reporting for work during garden leave

It worth repeating that garden leave confers an employer with a right of whether to enforce such a leave, depending on the existence of potential threat believed to likely emanate from the type of information that an employee possess.¹³⁸ It is crucial not to lose sight of the fact that employees are bound to observe common law duty to obey employer's reasonable and lawful instructions.¹³⁹ To that extent, if an employee is required to provide certain assistance, he/she must be available as per instruction. The intriguing question that one may ask is what happen in a case where an employee gives notice of termination of employment contract with a hope to be placed on a garden leave and the employer decides not to put such employee on leave, and the employee opt to absent himself/herself to work until the employment contract legally terminated. Will such employee entitled to claim remuneration as per garden leave rules. It is beyond dispute that resignation by an employee is a unilateral act that 'unlike normal contracts' does not require acceptance by the employer.¹⁴⁰ If an employee lost interest to work for a particular employer, courts or such employer cannot force the outgoing employee to continue working.¹⁴¹

An employee who gave notice of termination of employment, who is not placed on garden leave and declines to continue working until the notice period elapses, is not entitled to remuneration.¹⁴² An employee's right to remuneration depends on such a person's doing or willingness to do the work that he/she is employed to do.¹⁴³ In the light of the above, if an employee declines to work, the employer is not under obligation to pay such employee, relaying on the principle of no work no pay.¹⁴⁴ However, an employee who gave notice of termination of employment contract and refuses to continue to be in employer's service is in law prevented to commence subsequent employment relationship with competitors or practice a similar trade.¹⁴⁵ In such a case, an interdictio may be granted enforcing

¹³⁸ Sullivan (note 10 above) 314.

¹³⁹ Havenga (note 107 above) 238.

¹⁴⁰ Kopel (note 115 above) 342.

¹⁴¹ As above.

¹⁴² *Sunrise Brokers LLP v Rodgers* (note 77 above) para 18, 33 and 40.

¹⁴³ As above.

¹⁴⁴ As above.

¹⁴⁵ *Sunrise Brokers LLP v Rodgers* (note 77 above) para 18, 33 and 40.

garden leave without requiring an ‘employer to pay the employee at a time when the employee was refusing to work’.¹⁴⁶ Of importance, if an employee decide to return to work to serve notice period, an employer must honour his/her promise to pay such an employee in accordance with the employment contractual terms.¹⁴⁷

3.11 The Relationship between garden leave and restraint of trade agreements

The South African Labour Courts have, until 2016, not had the opportunity to consider what impact, if any, garden leave have on the enforceability of restraint of trade agreements.¹⁴⁸ This issue, *inter alia*, came before the Labour Court in Johannesburg in the case of *Vodacom v Godfrey Motsa and Another* in the year 2016.¹⁴⁹ In this case the court opined that there is uncertainty about the relationship between garden leave and restraint of trade agreements.¹⁵⁰ Van Niekerk J further observes that ‘the concept of garden leave and its relationship, if any with a restraint of trade agreement has not been the subject of consideration by the South African Courts.’¹⁵¹ There is a direct nexus between restraint of trade agreements and garden leave.¹⁵² Mupangavanhu contends that the concurrent enforcement of garden leave and restraint of trade period tends to be problematic.¹⁵³

In the case of *Vodacom (Pty) Ltd v Motsa and Another*¹⁵⁴ Van Niekerk J was called to concurrently enforce garden leave and restraint of trade agreement.¹⁵⁵ In this case, the employer sought to enforce six months of garden leave and another six months of restraint of trade agreement.¹⁵⁶ The respondent argued that the combination of ‘garden leave’ and restraint of trade period was unreasonable and therefore, unenforceable.¹⁵⁷

¹⁴⁶ *Sunrise Brokers LLP v Rodgers* (note 77 above) para 69.

¹⁴⁷ *Sunrise Brokers LLP v Rodgers* (note 77 above) para 21.

¹⁴⁸ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above).

¹⁴⁹ Patterson & Johnson (note 24 above).

¹⁵⁰ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 22.

¹⁵¹ As above.

¹⁵² Mupangavanhu (note 1 above) 3.

¹⁵³ Mupangavanhu (note 1 above) 2.

¹⁵⁴ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above).

¹⁵⁵ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 1.

¹⁵⁶ As above.

¹⁵⁷ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 22.

The court questioned the reasonableness of the combined period and the relationship between restraint of trade agreements and garden leave.¹⁵⁸

It is difficult to construe the relationship between restraint of trade and garden leave in exclusion of examining the purpose of these two clauses. As already expounded, the primary purpose of garden leave is to make an employee spend a whole or part of the garden leave at home just before the termination of the employment contract so that trade connections and 'the confidential information to which the employee had access to become stale',¹⁵⁹ and this also keeps 'the employee out of the clutches of competitors'.¹⁶⁰ Garden leave seeks to make the employee forget the confidential information he/she acquired during the course of employment.¹⁶¹ In the same light, restraint of trade clauses seek to protect the employer's confidential information, trade secrets and trade connections.¹⁶² In simple terms, the whole point of restraint of trade agreement is to prevent employees from using, or making available any trade secrets and trade connections to the direct competitors of the employer for a specified time in a defined geographical area upon termination of employment contract.

Practically speaking, it seems clear that the purpose of a garden leave is the same with that of a restraint of trade agreement which is to restrain an employee from benefiting out of the confidential information of the employer. It is beyond dispute that a restraint of trade and garden leave differs on the time upon which they each becomes enforceable.¹⁶³ Restraint of trade becomes operational after the termination of employment contract, while garden leave is enforced at about the termination of employment contract.¹⁶⁴ An emphasis should however be placed on the fact that the purpose of both garden leave and restraint of trade clauses is to protect the confidential information of the employer against the risk of such information being used by the employee or competitors.

¹⁵⁸ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 23.

¹⁵⁹ *Mupangavanhu* (note 1 above) 12. *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 22

¹⁶⁰ As above.

¹⁶¹ *Mupangavanhu* (note 1 above) 12 see also *Vodacom (Pty) Ltd v Motsa* (note 2 above) paras 22, 39.

¹⁶² *Mupangavanhu* (note 1 above) 12. See also *Vodacom (Pty) Ltd v Motsa* (note 2 above) para 39.

¹⁶³ As above.

¹⁶⁴ As above.

Specifically, garden leave applies where there is a clause in the employment contract which provides that either party shall be entitled to terminate a contract by giving the other contracting party a notice of termination within less than a determined period.¹⁶⁵ In that event, the employer may opt to enforce garden leave and prevent employee from doing work for him/her.¹⁶⁶ During the subsistence of garden leave, the employee is legally entitled to full remuneration until the termination of the employment contract.¹⁶⁷ Unlike garden leave, the doctrine of restraint of trade agreements allows employers to prevent competition without paying the cost of the former employee's salary during the sit-out period.¹⁶⁸ The sense of remunerating an employee during a restricted period reduces any hardship that he/she would incur for being prevented to get employment elsewhere. The fact that during garden leave employees are only restrained from working while they are entitled to a full salary makes it unlikely that employees would challenge the reasonableness of this arrangement. Of course, the costs of garden leave, are also a reason why employers may opt not to include it in the employment contracts, alternatively relying on the postemployment restraint of trade to achieve the same goal.¹⁶⁹

The whole point of garden leave is the same with that of restraint of trade agreements which is to prevent competition by someone who is not, in reality, working for the employer.¹⁷⁰ In garden leave, an employee remains employed for the period of the leave but is not expected to do any work for his/her employer.¹⁷¹ Therefore, a person in garden leave is bound by a duty of loyalty not to compete and divulge confidential information of his/her employer.¹⁷² Employees on garden leave are restrained from competition without the complications of the more traditional post-employment restraint of trade agreements.¹⁷³ However, the purpose of both is the same which is to protect legitimate commercial interests (trade secrets and trade connections) of current or former

¹⁶⁵ J. Van Wyk "Garden Leave" and restraint of trade agreements <http://www.polity.org.za/article/garden-leave-and-restraint-of-trade-agreements-2016-05> 27/searchString:garden+leave (accessed on 10 June 2017)

¹⁶⁶ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 5. See also <http://www.polity.org.za/article/gardening-leave-and-the-enforceability-of-restraints-of-trade>. (accessed on 14 February 2016)

¹⁶⁷ As above.

¹⁶⁸ Sullivan (note 10 above) 296.

¹⁶⁹ As above.

¹⁷⁰ Sullivan (note 10 above) 319. See also Perri (note 11 above) 168.

¹⁷¹ Sullivan (note 10 above) 295.

¹⁷² As above.

¹⁷³ Sullivan (note 10 above) 296.

employer.¹⁷⁴ Both garden leave and restraint of trade clauses prevent an employee from taking up any other employment for a determined period.

Since both garden leave and restraint of trade serve a similar objective one wonders why any rational South African employer would incur the increased compensation cost of garden leave to achieve essentially the same goal. Whenever garden leave go to South African Courts for consideration, the same criteria of reasonableness applied in restraint of trade agreements must be adopted.¹⁷⁵ The reasonableness of both post-employment restraint of trade and garden leave depends on the employer having a protectable interest deserving legal protection,¹⁷⁶ and the length of the period of restriction.¹⁷⁷ The test to be applied in noncompetition clauses (restraint of trade and garden leave) is that such clauses should not be couched in a manner which on the face of it, appears to have, a restriction period which is too long or unnecessary to protect the legitimate commercial interests of the employer.¹⁷⁸

3.12 Concurrent enforceability of restraint of trade and garden leave

The present section seeks to determine whether it is reasonable to concurrently enforce restraint of trade and garden leave despite these two clauses serving the same purpose. This issue, *inter alia*, came before the Labour Court in the case of *Vodacom (Pty) Ltd v Motsa and Another*,¹⁷⁹ in the year 2016. In this case, Mr. Godfrey Motsa was employed by Vodacom (Pty) Ltd in January 2007.¹⁸⁰ He was later appointed as a director of Vodacom.¹⁸¹ On October 2015, Mr. Motsa informed CEO of Vodacom that he had received better employment opportunity in MTN Group Ltd (second respondent) as vice-president of its Southern and East Africa region and tendered a resignation.¹⁸² The CEO of Vodacom advised him not to resign and offer to improve his remuneration '(4.3 million,

¹⁷⁴ Sullivan (note 10 above) 319. See also Taneja & Banga (note 9 above) 522; Perri (note 11 above) 168.

¹⁷⁵ Mupangavanhu (note 1 above) 12.

¹⁷⁶ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 875 H-I.

¹⁷⁷ *Den Braven SA (Pty) Ltd v Pillay and Another* (note 72 above) para 55. See also Calitz (note 72 above) 53.

¹⁷⁸ *Sasfin (Pty) Limited v Beukers* (note 73 above) 16G-17A. See also *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* (1991) (2) SA 482.

¹⁷⁹ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above).

¹⁸⁰ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 1.

¹⁸¹ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 4.

¹⁸² *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 4.

plus additional shares)¹⁸³ However, on 23 December 2015 he resigned.¹⁸⁴ Vodacom brought an application to Johannesburg Labour Court, seeking to enforce a garden leave period of six months and further six months of restraint of trade clause upon the expiry of garden leave period.¹⁸⁵ Motsa argued *inter alia*, that Vodacom waived its right to enforce garden leave.¹⁸⁶ However, after consideration of arguments from both parties the court found that Vodacom did not waive its right to enforce garden leave period.¹⁸⁷

In this case,¹⁸⁸ Mr. Motsa *inter alia*, contended that although the Labour Court may enforce garden leave period and pronounce his conduct of commencing an employment with MTN as one constituted a breach of restraint of trade agreement, Vodacom should not be given a right to enforce the restraint of trade agreement for a further period of six months after the termination of the employment contract.¹⁸⁹ It was argued on behalf of Mr. Motsa that whatever confidential and proprietary information that he possessed would effectively be stale after the expiry of garden leave period.¹⁹⁰ Mr. Motsa further argued that it would be unreasonable to also enforce restraint of trade agreement for a further period of six months after the garden leave period had elapsed.¹⁹¹ However, Vodacom, challenged the above submissions, and argued that both garden leave period and the restraint of trade agreement should be enforced.¹⁹² The court held that having regard to the nature of the information Mr. Motsa had access to, there was no basis on which it could be concluded that concurrently enforcing six months of garden leave and six months of restraint of trade agreement is unreasonable.¹⁹³

The Johannesburg Labour court considered international authorities in answering the question of the existence of any relationship between garden leave and restraint of trade agreements since the issue was novel in South African labour jurisprudence.¹⁹⁴ The Court

¹⁸³ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 4.

¹⁸⁴ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 1.

¹⁸⁵ As above.

¹⁸⁶ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 2 and 27.

¹⁸⁷ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 35.

¹⁸⁸ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above).

¹⁸⁹ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 21.

¹⁹⁰ As above.

¹⁹¹ As above.

¹⁹² As above.

¹⁹³ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 41 and 42.

¹⁹⁴ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 23-25.

referred, with approval, to the decision of New Zealand Employment Court.¹⁹⁵ In the case of *Air New Zealand Limited v Grant Kerr*,¹⁹⁶ the Court held that the proper approach to be adopted in enforcing a restraint of trade agreement, is that garden leave should be taken into account in determining the reasonableness of restraint of trade period.¹⁹⁷ It is fair for courts to have regard to a period of garden leave that an employee have already served to determine whether it is reasonable and necessary to further enforce restraint of trade in full, in part, or not at all.¹⁹⁸ Van Niekerk J subscribed to the above principle and found no reason justifying adopting a different approach in South Africa.¹⁹⁹ In simple terms, the principle to be applied in a case where an employer seeks to enforce both restraint of trade and garden leave is that courts should decline to grant any further protection based on restraint of trade clauses if a long period of garden leave fully served the purpose of protecting the confidential information of employers.

Mr. Motsa contended that any restriction that may be imposed against him extending beyond six months is unreasonable, and that garden leave alone was enough to protect Vodacom's legitimate trade secrets.²⁰⁰ After considering all the related facts of the case, Van Niekerk J held that Vodacom had a confidential and proprietary interest worthy of legal protection for six months of garden leave and further six months of a restraint of trade agreement.²⁰¹ In that event, Van Niekerk J found it reasonable and necessary to enforce both restraint of trade and garden leave periods.

Employees are well within their rights to terminate employment with former employers in order to explore better employment opportunities, business ventures, or to enhance their careers.²⁰² As such, employers cannot seek to concurrently enforce garden leave and long restraint of trade period to abuse the departing employee not to take other available job opportunities or to start an enterprise.²⁰³ Employers should not construe the rationality

¹⁹⁵ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 25.

¹⁹⁶ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above).

¹⁹⁷ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 25.

¹⁹⁸ As above. See also Patterson & Johnson (note 24 above); C Lindsey, Garden leave - still in the armoury? (2014) 121 *Employment Law Bulletin* 2.

¹⁹⁹ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 26.

²⁰⁰ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 21.

²⁰¹ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 40-42.

²⁰² Taneja & Banga (note 9 above) 515.

²⁰³ Kemp (note 86 above) 257.

of restraint of a trade agreement and garden leave as a means to prevent competition *inter partes* (between employer and departing employee).²⁰⁴ It goes without saying that employees are entitled to strive for progress and career, as such, any unreasonable restrictions imposed by employers are unconscionable and therefore, unenforceable. Unreasonable restrictions imposed to the departing employees destroys one's career and ability to continue playing a role as a bread-winner (financially maintaining children and spouse, paying bills, and debts).

3.13 Conclusion

Garden leave originated in United Kingdom.²⁰⁵ The rationale of garden leave in the contracts of employment is to 'sterilise' the confidential and legitimate proprietary information which is in possession of an employee who is intending to leave employment.²⁰⁶ It has been observed that garden leave is normally included in the employment contract of senior employees who would have gained an employer's legitimate commercial interests such as trade secrets and trade connections.²⁰⁷ Garden leave is fairly reasonable since an employee is entitled to full remuneration and other relevant contractual benefits despite the fact that such an employee is not assigned to do any work for an employer. Unlike traditional restraint of trade agreements, garden leave rules are considerate of the financial hardship that could be incurred by an employee to the subsistence of such leave. For that reason, garden leave cannot be painful or worse than unpaid restraint of trade agreement. Garden leave restricts employees to commence working for competitors during subsistence of a notice period.²⁰⁸ The notion of garden leave is enforced in a similar way like restraint of trade agreements. Whenever the enforceability of garden leave is in dispute, courts answer the question of whether such a clause is necessary and reasonable to protect the legitimate commercial interests of an employer.²⁰⁹ Garden leave is only enforced if they are reasonable between both the employer and employee. It is in the discretion of an employer to place an employee on

²⁰⁴ Kemp (note 86 above) 257.

²⁰⁵ Sullivan (note 10 above) 301.

²⁰⁶ Patterson & Johnson (note 24 above).

²⁰⁷ Spruce (note 26 above).

²⁰⁸ Anand *et al* (note 35 above) 342.

²⁰⁹ Sullivan (note 10 above) 324.

garden leave.²¹⁰ An employee who gave notice of termination of employment, who is not placed on garden leave and declines to continue going to work until the notice period elapses, is not entitled to any remuneration.²¹¹ An employee's right to remuneration depends on the sense that such a person is doing or willing to do the work that he/she is employed to do.

The aim of this chapter as already demonstrated is to examine the relationship between restraint of trade agreements and garden leave in the context of South African Labour law. The Johannesburg Labour Court opined that there is uncertainty about the relationship between garden leave and restraint of trade agreements.²¹² The relationship between restraint of trade agreements and garden leave cannot be fully understood without examining the purpose of these two clauses. The primary purpose of garden leave is to make an employee forget the confidential information he/she acquired during the course of employment.²¹³ It is not objectionable that restraint of trade agreement makes a former employee to forget updated confidential information of the former employer after the termination of employment contract, whilst garden leave make an employee forget the updated confidential information of his/her employer before the termination of employment contract. The whole point of garden leave is the same as that of restraint of trade agreements which is to prevent competition by someone who is not, in reality, working for the employer.²¹⁴ The study submits that costs of garden leave are also a reason why employers may opt not to include garden leave in employment contracts, and alternatively relying on the postemployment restraint of trade to achieve the same goal.²¹⁵

The chapter sought to determine the reasonableness of concurrently enforcing restraint of trade and garden leave when they in fact serve the same purpose. The proper approach to be adopted in determining the reasonableness of a restraint of trade agreement, the period of garden leave should also be taken into account.²¹⁶ South

²¹⁰ <https://www.elliswhittam.com/what-is-garden-leave> (accessed 23 may 2018).

²¹¹ *Sunrise Brokers LLP v Rodgers* (note 77 above) paras 18, 33 and 40.

²¹² *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 22.

²¹³ Mupangavanhu (note 1 above) 12. See also *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) paras 22, 39.

²¹⁴ Sullivan (note 10 above) 319.

²¹⁵ Sullivan (note 10 above) 296.

²¹⁶ *Vodacom (Pty) Ltd v Motsa and Another* (note 2 above) para 25.

African Courts must have regard to the period of garden leave that an employee has already served to determine whether it is reasonable and necessary to further enforce restraint of trade in full, in part, or not at all.²¹⁷ The study endorses the notion that there should be no justification for the subsequent enforcement of a restraint of trade in a case where the garden leave sufficiently serves the purpose of protecting the legitimate interest of an employer.²¹⁸ Employers should therefore not seek to concurrently enforce garden leave and long restraint of trade period to prevent the departing employee from taking other available job opportunities or to start an enterprise.

²¹⁷ As above. See also Patterson & Johnson (note 24 above).

²¹⁸ *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13 para 89.

CHAPTER FOUR

COMPARATIVE PERSPECTIVES ON RESTRAINT OF TRADE AND GARDEN LEAVE

4.1 Introduction

This chapter outlines comparative perspectives on restraint of trade agreements including aspects relating to garden leave and lessons South Africa may learn from England and Germany. England uses the English Common law system,¹ which largely influenced South African legal jurisprudence,² While Germany applies Roman-Dutch law (Civil law) which equally influenced the development of the South African legal system.³ South Africa's legal system is a mixture of Roman-Dutch and English Common law.⁴ The Constitution of the Republic of South Africa encourages courts to consider foreign and international law when interpreting the Bill of Rights.⁵ In the light of the above, lawyers, legislatures and courts adopt a comparative legal approach to develop, make, and find the law. Importantly, South African Courts often seek guidance from foreign judicial precedents.

Although the South African jurisprudence in relation to restraint of trade agreements has some similarities with its counterparts in England and Germany, there are several important distinctions. The two selected jurisdictions differ, particularly on who bears onus of proof between employers and employees; whether there is a balance of bargaining power *inter partes*; the duration of a restraint of trade after the termination of employment agreement; and the obligation to pay former employees for rendering them idle (jobless) during restraint of trade period.

In South Africa and Germany, restraints of trade in employment contracts are *prima facie* valid and enforceable. On the other hand, in England a contract in restraint of trade is

¹ I. Farlam, Some reflections on the study of South African legal history 2003 (9) *Fundamina: A Journal of Legal History* 3. See also "Australias Legal System." <https://www.lawteacher.net/free-law-essays/australian-law/australias-legal-system.php?cref=1>.

² Farlem (note 1 above) 3. See also R Van den Bergh The Remarkable Survival of Roman-Dutch Law 2012 (18) *Fundamina: A Journal of Legal History* 73-74.

³ Van den Bergh (note 2 above) 89. See also J.H.A. Lokin Harmonisation in Roman, Roman-Dutch and South African law (2008) 14 *Fundamina: A Journal of Legal History* 34

⁴ L.WH. Ackermann, Constitutional Comparativism in South Africa 2006 *South African Law Journal* 500.

⁵ Constitution of the Republic of South Africa 1996, Sec 39(1).

regarded as *prima facie* invalid and unenforceable.⁶ In England, employers bear the onus to prove that the restraint of trade agreement is reasonable and enforceable.⁷ However, in South Africa and Germany, the onus of proof falls on employees.⁸ Interestingly, in terms of German jurisprudence, the validity of a restraint of trade agreement depends on whether the parties agreed on the specific monthly monetary compensation,⁹ while South African and English Common law do not impose the burden on employers to bear the costs of rendering former employees economically inactive.¹⁰ In Germany and South Africa, restraint of trade rules are premised on the assumption that there is equal bargaining power between the employers and employees,¹¹ while England rules are based on unequal bargaining power between the parties.¹²

Common to all three jurisdictions is the fact that after the termination of the employment relationship between parties, the former employer cannot prevent commercial competition with the former employee unless they entered into a restraint of trade agreement. Importantly, for a restraint of trade agreement to be enforceable, the employer must have a protectable commercial interest worthy of legal protection. Furthermore, restraint of trade agreements must be reasonable *inter partes* with regard to duration and geographical area of operation. In the event of courts being invited to concurrently enforce restraint of trade and garden leave periods, all three jurisdictions determine the reasonableness of a restraint of trade agreement in the light of a garden leave period. In other words, a lengthy garden leave period may reduce the possibility of a court enforcing the full period of a restraint of trade agreement on the basis that a garden leave period achieved the protection sought. In the light of the above, all three jurisdictions construe

⁶ S. Colin, Non-competition clauses in labour contracts. XIVth Meeting of European Labour Court Judges 4 September 2006 Cour de cassation Paris 1. See also C.J. Pretorius Covenants in Restraint of Trade: A Synthesis of Traditional, Common Law and Constitutional Approaches (2009) 30 *Obiter* 156; H Landis & L Grossett 2006. Restraint of trade: what effect does it have today? (2006) 22 *Management Today* 55.

⁷ L. Russell, Multi-Country Survey on Covenants Not to Compete, (2018) *Greenberg Traurig and Association of Corporate Counsel* 111. See also Colin (note 6 above).

⁸ *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A), 893A, 898C-D.

⁹ K. Kemp, The Significance of Consideration Paid for Post-Employment Restraints in England and Germany. (2005) 2 *Stellenbosch Law Review*, 264.

¹⁰ Russell (note 7) 111. See also *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 8 above).

¹¹ A.H. Angelo & E.P. Ellinger, Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States, (1992) 14 *Loyola of Los Angeles International and Comparative Law* 484.

¹² G. H. L. Fridman, Freedom of Contract (1967) 2 *Ottawa Law Review* 19. See also *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co* 1894 AC 535, 566.

the relationship between restraint of trade and garden leave in more or less the same manner.

4.2 The Legal Position in England

4.2.1 Preliminary Remarks and Overview

In England, a restraint of trade agreement is entered into, and enforceable between an employer and employee to the extent that such agreement is reasonable to protect commercial legitimate interests of the employer.¹³ However, the restraint of trade law is not codified.¹⁴ Thus, there is no legislation governing the restraint of trade law. It suffices to say that in England, restraint of trade jurisprudence is a Common law doctrine that is developed by judges through case law.¹⁵ There is no Common law requirement that restraint of trade agreements must be in writing.¹⁶ However, for practical purposes, the courts in England are unlikely to enforce verbal restraint of trade agreements.¹⁷

In terms of the English law, restraint of trade agreements are *prima facie* invalid and unenforceable, unless the employer can discharge the onus that such agreement is reasonable and not against public interest.¹⁸ In any event, restraint of trade agreements are entered into with a purpose of protecting commercial legitimate interests of employers.¹⁹ Therefore, restraint agreements should go no further than is reasonably necessary to protect the commercial interests of employers.²⁰ Restraint of trade agreements must with a reasonable degree of certainty, specify commercial activities which an employee is prevented from engaging in.²¹ Furthermore, when a restraint of

¹³ C.P. Matthew, Restrictive Covenants from a UK perspectives, ABA International Labor & Employment Law Committee (2010) Midyear Meeting, The Bosphorus Istanbul, Turkey, 5. See also *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co, Ltd* (note 12 above).

¹⁴ Colin (note 6 above) 2. See also C.P. Matthew (note 13) 2.

¹⁵ Russell (note 7 above) 112.

¹⁶ Colin (note 6 above) 3.

¹⁷ Russell (note 7 above) 112.

¹⁷ As above.

¹⁸ Colin (note 6 above) 1. See also Pretorius (note 6 above) 156; Landis & Grossett (note 6 above) 55; *Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781.

¹⁹ *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co, Ltd* (note 12 above). See also, Matthew (note 13 above) 5.

²⁰ Matthew (note 13 above) 5.

²¹ Matthew (note 13 above) 7.

trade dispute is before an English Court, employers are expected to identify the alleged commercial legitimate interest worthy of legal protection.²² Restraint of trade agreements protect and recognise the following interests as legitimate commercial interests worthy of legal protection: trade connections; trade secrets and other commercial confidential information.²³

Trade connections are commercial relationships that an employer has in order to keep the business running.²⁴ This typically includes, customers, clients, patients, suppliers and other recognised employer's business relationships.²⁵ The doctrine of restraint of trade recognises trade connections as legitimate commercial interests worthy of legal protection in order to prevent outgoing employees from enticing or poaching former employer's employees, customers, clients, patients, and suppliers to go with him/her to the new employer's business.²⁶ Restraint of trade agreement may also prevent a former employee from attracting trade connections to his/her own new incorporated competing business entity.²⁷

Restraint of trade agreements also seek to protect an employer's trade secrets and other commercial confidential information.²⁸ This is divided into three parts namely, (1) confidential commercial information (2) technical commercial information; and (3) know-how processes.²⁹ Confidential commercial information typically includes business financial information, business plans, business customer (clients, patients) lists, and similar information concerning the operation of a business' affairs.³⁰ Technical commercial information includes industrial processes, formulae, blueprints, and related information regarding technology.³¹ The last category of trade secrets is know-how processes which typically include information about methods, steps and processes for

²² Matthew (note 13 above) 5.

²³ M. Schultz, & D. Lippoldt (2014), "Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper", OECD Trade Policy Papers, No. 162, OECD Publishing, Paris 311. Available at <http://dx.doi.org/10.1787/5jz9z43w0jnw-en>.

²⁴ Schultz, & Lippoldt (note 23 above).

²⁵ As above.

²⁶ P.I. Sutherland, "The restraint of trade doctrine in England, Scotland and South Africa" (1997) 52.

²⁷ As above.

²⁸ Schultz, & Lippoldt (note 23 above) 16.

²⁹ As above.

³⁰ As above.

³¹ As above.

attaining efficient outcomes.³² However, an employer cannot reasonably prevent a former employee from utilising talents, knowledge and skills acquired during the employee's service.³³

Restraint of trade agreements which do not protect an employer's legitimate commercial interest are unreasonable and therefore, unenforceable.³⁴ Thus, if a former employee in his/her position before termination of employment relationship was not privy or exposed to the employer's legitimate commercial interest (trade secrets and trade connections), then such restraint of trade agreement is unreasonable.³⁵ Furthermore, a restraint of trade agreement is unreasonable and unenforceable if the period of restriction is too long and/or area of restriction is too wide.³⁶ Whenever the question of the enforcement of a restraint of trade agreement arises, courts seek to strike a balance between the employer's need to protect his/her commercial legitimate interest and the right of an employee to freely exercise his/her trade (profession).³⁷ In other words, courts also consider the detrimental consequences of a restraint of trade agreement on an employee who is not allowed to freely exercise his/her profession and earn a living.³⁸ In principle, restraint of trade agreements must be reasonable *inter partes* and reasonable in the public interest.³⁹ It is a general principle of law that a restraint of trade agreement preventing an employee from joining a business that is not a rival of the employer is not enforceable.⁴⁰

In order for a restraint of trade agreement to be enforceable, it must *inter alia*, prevent an employee from exercising trade in a reasonable scope of territorial or geographical area.⁴¹ In other words, a restraint of trade agreement should not be too broad to cover unreasonable geographical area of restriction. Accordingly, regard must be had to a

³² Schultz, & Lippoldt (note 23 above) 16.

³³ *Attwood v Lamont* [1920] 3 K.B. 690.

³⁴ Matthew (note 13 above). See also *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co, Ltd* (note 12 above).

³⁵ P Bredin *et al* (2016) Post-contractual Restrictions on Competition in Employment Relationships in the UK, France and Germany. https://www.hengeler.com/fileadmin/news/BF_Letter/15_Labour_Law_2016_12.pdf (accessed 23 May 2018) 7.

³⁶ As above.

³⁷ As above.

³⁸ As above.

³⁹ As above.

⁴⁰ Russell (note 7 above) 117.

⁴¹ Russell (note 7 above) 116

space (geographical area) constituting a reasonable restraint of trade. As already mentioned, in England restraint of trade law is not codified.⁴² Nevertheless, litigants find guidance from case law.⁴³ However, even case law does not prescribe the limit of a reasonable period of restriction. It is settled law that reasonableness of a geographical area of restriction depends on the special circumstance of each case.⁴⁴ Having regard to the above, in one case, a court may enforce a restraint of trade agreement with a wide geographical area, and similarly, enforcing shorter one in the other, depending on the nature of legitimate commercial interests worthy of protection.⁴⁵ When courts determine the reasonableness of a geographical area of restriction, they consider two factors. Firstly, whether an employer carried on business in the area of restriction before the termination of employment relationship with an employee.⁴⁶ Secondly, whether an employee served his/her material employment duties in the area of restriction before the termination of employment agreement.⁴⁷ It goes without saying that a restraint of trade agreement restraining an employee from trading outside the geographical area in which he/she materially served employment duties before the termination of employment is unreasonable and therefore, unenforceable.

The reasonableness of period of a restriction also differs from case to case.⁴⁸ However, courts consider the nature of commercial information that an agreement is protecting, and the seniority of an employee.⁴⁹ In deciding the reasonableness of a restraint of trade period, courts find guidance from case law.⁵⁰ Of importance is that restraint of trade agreements must specify the period of restriction beforehand.⁵¹ Restraint of trade agreements in England seem to run for the period of 12 months for senior employees and

⁴² Colin (note 6 above) 2. See also Matthew (note 13) 2.

⁴³ Russell (note 7 above) 116.

⁴⁴ Russell (note 7 above) 117.

⁴⁵ As above.

⁴⁶ Russell (note 7 above) 116.

⁴⁷ As above.

⁴⁸ Russell (note 7 above) 117.

⁴⁹ As above.

⁵⁰ As above.

⁵¹ As above.

three to six months for junior employees.⁵² Courts find it difficult to enforce restraint of trade agreements exceeding 12 months.⁵³

The prime remedy that employers rely on in case of a breach of restraint of trade agreement is the application for an interdict to enforce the agreement.⁵⁴ An interdict consequently, prevents an employee from competing or being employed by direct commercial rivals.⁵⁵ An employer is likely to suffer commercial damages (financial loss) due to an employee's competing behaviour in breach of a restraint of trade agreement.⁵⁶ In such a case, an employer may ultimately seek damages from the employee.⁵⁷ To claim damages, the employer makes an application to the court for an employee to compensate him/her for the loss suffered due to the breach of a restraint of trade agreement.⁵⁸

4.2.2 Onus of Proof

In terms of English jurisprudence, a restraint of trade agreement is *prima facie* invalid and unenforceable unless an employer can discharge the onus of proof on a preponderance of evidence that the agreement in question is reasonable and not inimical to public interest.⁵⁹ The party bringing the action seeking to enforce a restraint of trade agreement is encumbered with the onus of proving that such an agreement is reasonable and therefore, enforceable.⁶⁰ Furthermore, an employer must show that he/she has a legitimate commercial interest worthy of protection, and that such protection is not more than is reasonably necessary, taking into account the interests of both parties and public interest.⁶¹

It is submitted that the law is reasonable in burdening an employer with the onus of proof since the doctrine of restraint of trade seeks to limit the employee's right to freedom of trade and profession. It does not make sense to impose the onus of proof on employees

⁵² Russell (note 7 above) 117.

⁵³ As above.

⁵⁴ Bredin *et al* (note 35 above) 12. See also Russell (note 7 above) 115.

⁵⁵ As above.

⁵⁶ Bredin *et al* (note 35 above) 12.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ Colin (note 6 above) 4. See also *Mason v Provident Clothing and Supply Co, Ltd* 1913 AC 724.

⁶⁰ Russell (note 7 above) 111.

⁶¹ Russell (note 7 above) 112.

to prove the unreasonableness of a restraint of trade agreement since the restraint is an unjustifiable limitation of his/her right to freedom of trade. The employer must bear the burden to prove that the restraint of trade agreement is a reasonable, enforceable and a justifiable limitation of the employee's right to freedom of trade. Employers must bear the burden of proving a justifiable limitation of an employee's right to freedom of trade not the other way around, since the employer is the one who seeks to enforce a restraint of trade. This is in line with the long-standing view that he who alleges must prove.⁶²

4.2.3 Bargaining power

Courts ordinarily do not interfere with a bargain (agreement) of the parties entered into voluntarily, and will not change its terms.⁶³ The notion of freedom of contract anchors sanctity of contracts which also entails that agreement voluntarily entered into should be enforced between parties.⁶⁴ However, if an employee can raise a defence that he/she entered into a restraint of trade agreement under undue influence, or without free will such agreement is not enforceable.⁶⁵

It is untenable in the contemporary economical dispensation to argue that there is a balance or equal bargaining power between employers and employees.⁶⁶ The 'emergence of large monopolistic companies' has also aggravated the imbalance of bargaining power between employers and employees.⁶⁷ Employees are not in an equal negotiation capacity with employers.⁶⁸ One may argue that employees are in a take-it or leave-it situation because they are begging for employment.⁶⁹ It is well-known that most restraint of trade agreements are drafted by employers with one-sided terms, aimed at avoiding commercial competition.⁷⁰ Employees are economically depended on giant companies for employment.⁷¹ As such, these monopolistic companies take advantage of

⁶² *Miller v Minister of Pensions* [1947] 2 All ER 372.

⁶³ As above.

⁶⁴ Angelo & Ellinger (note 11 above) 456.

⁶⁵ As above.

⁶⁶ Angelo & Ellinger (note 11 above) 457.

⁶⁷ As above.

⁶⁸ As above.

⁶⁹ Angelo & Ellinger (note 11 above) 468.

⁷⁰ Angelo & Ellinger (note 11 above) 457.

⁷¹ Angelo & Ellinger (note 11 above) 458.

desperate individuals begging for employment by introducing harsh contractual restraint of trade terms in order to reap maximum profit.⁷²

The reality of unequal bargaining power between employers and employees cannot be ignored. It is commercially unreasonable to assume that all restraint of trade agreements are *prima facie* valid and enforceable under such economic pressure that employees suffer. In the light of the above, English Courts come to the rescue of weaker parties (employees).⁷³ An employee who ‘willingly, though foolishly, accepts a bargain that includes oppressive terms, or where the stronger party exercises its rights under the contract in a manner that is harsh or unfair’, then English Courts pronounce such agreements unreasonable and unenforceable.⁷⁴

Desperate employees who are in extreme need of employment often knowingly sign restraint of trade agreements tainted by one-sided terms favouring employers.⁷⁵ Employees who are in a take-it or leave-it situation agree to unreasonable restraint of trade terms in order to immediately relieve themselves from unemployment.⁷⁶ It is standard practice that employers give employees a standard printed form contract which the latter has a choice to accept without qualification or reject.⁷⁷ In the light of the above, it is fair to argue that the only choice that employees have is between signing and not signing an agreement with whatever terms.⁷⁸ Thus, if an employee fails to sign an agreement would continue to be unemployed.⁷⁹ The employee’s freedom of choice and enjoyment of equal bargaining power is a fairy-tale in these circumstances.⁸⁰

It is an arguable case that in England, restraint of trade rules were developed taking into account unequal bargaining position of employees.⁸¹ In *Nordenfelt v Maxim Nordenfelt Guns & Ammunition*,⁸² Lord MacNaghten emphasised that there is no equal bargaining

⁷² Angelo & Ellinger (note 11 above) 458.

⁷³ Angelo & Ellinger (note 11 above) 457.

⁷⁴ Angelo & Ellinger (note 11 above) 460.

⁷⁵ Angelo & Ellinger (note 11 above) 467.

⁷⁶ As above.

⁷⁷ Fridman (note 12 above) 19.

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ As above.

⁸¹ As above. See also *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co, Ltd* (note 12 above).

⁸² *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co, Ltd* (note 12 above).

power between employers and employees as opposed to a sale agreement between a buyer and seller.⁸³ Similarly, in *Mason v Provident Clothing Co Ltd*,⁸⁴ the court held that employers have more bargaining power than desperate employees seeking for employment.⁸⁵

The high rate of unemployment is a global problem in the current economical dispensation.⁸⁶ There are many other circumstances that can make an unemployed person to involuntarily sign restraint of trade agreement such as, family dependency (if he/she is a bread winner),⁸⁷ age of a person looking for employment (young people find it difficult to secure employment since companies want experienced people),⁸⁸ whether the skills possessed by a person are in demand in the market place,⁸⁹ family responsibilities can equally put pressure to an unemployed person to find a job in a particular town or city next to his/her home,⁹⁰ and many others. It is beyond dispute that employees are economically dependent on employers for jobs, and this compromises their position of enjoying equal bargaining power. Furthermore, restraint of trade agreements are drafted by employer's lawyers as standard documents for all employees of the company irrespective of their positions, as opposed to the sense of drafting each agreement for each employee.⁹¹ This is also the basis of treating restraint of trade agreements as *prima facie* invalid and unenforceable save for employer proving its enforceability.

4.2.4 Prescribed duration of restraint of trade agreements

The English Jurisprudence does not prescribe or set a maximum period that an employee can be placed under a restraint of trade.⁹² It is a general principle of the English law that

⁸³ *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co, Ltd* (note 12 above).

⁸⁴ 1913 AC 724.

⁸⁵ *Mason v Provident Clothing Co Ltd* (note 84 above).

⁸⁶ A Helena *et al* World Economic Situation and Prospects Monthly Briefing. No.111 1 feb 2018 *Global Economic Monitoring Unit*, 1.

⁸⁷ K Calitz Restraint of Trade Agreements in Employment Contracts: Time for *Pacta Sunt Servanda* to Bow Out? (2011) 22 *Stellenbosch Law Review* 65.

⁸⁸ As above.

⁸⁹ As above.

⁹⁰ As above.

⁹¹ Friedman (note 12 above) 19.

⁹² Russell *et al* (note 7 above) 113.

any restraint of trade agreement preventing former employees from trading or practicing their profession in a particular geographical area for a period exceeding twelve months is potentially very difficult to enforce.⁹³ To that extent, employers opt to propose shorter period of six months as a measure to make a restraint agreement survive reasonableness scrutiny.⁹⁴ A long period of restriction disadvantages employees. Therefore, in England, a reasonable period of restraint of trade agreement is limited to a maximum duration of a year.⁹⁵

4.2.5 Obligation to pay former employees for rendering them idle (jobless) during restraint of trade period

There is no statute demanding that for a restraint of trade agreement to be valid and enforceable an employer must pay a former employee for rendering that person idle during the restraint period.⁹⁶ There is no practice of payment under English jurisprudence.⁹⁷ Intriguingly, the courts in England are more readily persuaded to find restraint of trade agreements reasonable and enforceable in cases where employers are determined or agreed to pay employees for the duration of restraint.⁹⁸ In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co, Ltd*,⁹⁹ Lord MacNaghten held that payment and other considerations play a good role in the determination of reasonableness of restraint of trade agreements.¹⁰⁰ Although there is no requirement of payment during the subsistence of a restraint of trade agreement, employers must offer specific consideration as a return for employees agreeing to a restraint of trade such as the ‘opportunity of employment or a new incentive scheme’.¹⁰¹ It is noteworthy that payment for a restraint of trade agreement does not make unreasonable agreement (too long period of restriction, too wide geographical area of restriction or absence of legitimate commercial

⁹³ Bredin *et al* (note 35 above) 8. See also Colin (note 6 above) 3; N. Robertson A global guide to ‘restrictive covenants’ Mayer Brown Practices Mayer Brown International LLP 95; Russell (note 7 above) 113.

⁹⁴ Matthew (note 13 above) 6. See also, Bredin *et al* (note 35 above) 8.

⁹⁵ Colin (note 6 above) 3 See also N. Robertson A global guide to ‘restrictive covenants’ Mayer Brown Practices Mayer Brown International LLP 95.

⁹⁶ Colin (note 6 above) 3.

⁹⁷ As above. See also Bredin *et al* (note 35 above) 10.

⁹⁸ *Attwood v Lamont* (note 33 above) 571, 589. See also, S. Colin Non-competition clauses in labour contracts. XIVth Meeting of European Labour Court Judges 4 September 2006 Cour de cassation Paris 3.

⁹⁹ *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co, Ltd* (note 12 above).

¹⁰⁰ *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co, Ltd* (note 12 above) 565.

¹⁰¹ Bredin *et al* (note 35 above) 10.

interest worthy of protection) enforceable.¹⁰² The present study argues that unpaid restraint agreement is painful and unreasonable. When enforcing restraint agreements, courts must have regard to the fact that the former employee may starve, be unable to pay bills, and be unable to maintain his/her children during the subsistence of such restraint of trade agreement.

4.2.6 Relationship between restraint of trade agreements and garden leave

In England, employees have Common law duties such as the duty to place their personal services at the disposal of employers,¹⁰³ the fiduciary duty to act in good faith which entails that an employee should further his/her employers interests,¹⁰⁴ and avoid having conflicting interests during employment relationship.¹⁰⁵ Importantly, employees have an obligation not to disclose the confidential information of employers.¹⁰⁶ Employers may use garden leave to ensure that towards the termination of the employment relationship, employees are kept away from commercial confidential information and business contacts (clients, patients, customers, and suppliers).¹⁰⁷

In terms of English jurisprudence, it is acceptable to concurrently enforce the restraint of trade and the garden leave.¹⁰⁸ In England, employers draft restraint of trade agreements in light of garden leave.¹⁰⁹ As such, a long garden leave period may reduce the possibility of a court to enforce the restraint of trade agreement on the basis that garden leave achieved the protection sought.¹¹⁰ It should be borne in mind that garden leave restricts employees from accessing the employer's trade secrets, confidential information, trade connections or having any relationship with the employers' commercial competitors.¹¹¹ Having regard to the above, courts consider this to be an effective restriction in the same way as a restraint of trade.¹¹² It is not surprising that any period spent on garden leave is

¹⁰² Bredin *et al* (note 35 above) 10.

¹⁰³ Colin (note 6 above) 3.

¹⁰⁴ As above.

¹⁰⁵ As above.

¹⁰⁶ As above.

¹⁰⁷ Bredin *et al* (note 35 above) 14.

¹⁰⁸ As above.

¹⁰⁹ As above.

¹¹⁰ As above.

¹¹¹ Bredin *et al* (note 35 above) 14.

¹¹² As above. See also Matthew (note 13 above) 6.

deducted from the length or lifespan of the restraint of trade agreement.¹¹³ In the light of the above, a lengthy period of garden leave may persuade English Courts to pronounce restraint of trade agreement unenforceable or reduce such period.¹¹⁴ The garden leave period normally does not exceed six months.¹¹⁵ Having regard to legitimate commercial interests of an employer, if a court finds the garden leave period of six months to be unreasonable on the ground of being too long, such a court may reduce the period instead of rendering the whole clause unenforceable.¹¹⁶

4.2.7 Summary of Similarities and Differences between England and South Africa

Summary of similarities

In South Africa and England, restraint of trade agreements are entered into, and enforceable between an employer and employee to the extent that such agreements are reasonable to protect legitimate commercial interests of the employer. Restraint of trade agreements must be reasonable *inter partes* and reasonable in the public interest. Furthermore, restraint of trade law is not codified in both jurisdictions. As such, there is no legislation governing the restraint of trade law. There is no Common law requirement that restraint of trade agreements must be in writing. However, for practical purposes, courts are unlikely to enforce verbal restraint of trade agreements in both jurisdictions. The major remedy that an employer may rely on in case of a breach of restraint of trade agreement is an interdict to enforce the agreement and prevent an employee to compete or to be employed by its direct commercial rivals. In a situation where an employer suffered commercial damages (financial loss) due to employee's competing behaviour in breach of restraint of trade agreement, an employer may ultimately seek damages from the employee.

In both jurisdictions, for a restraint of trade agreement to be enforceable, it must be reasonable. To be reasonable, a restraint of trade agreement must be limited to the area

¹¹³ Russell (note 7 above) 120. See also Matthew (note 13 above) 6; Bredin *et al* (note 35 above) 14; *William Hill Organisation Limited v Tucker* [1998] IRLR 313.

¹¹⁴ Bredin *et al* (note 35 above) 15.

¹¹⁵ Russell (note 7 above) 120.

¹¹⁶ As above.

in which the employee was serving employment duties and the place in which employer's business is based. Furthermore, the law does not prescribe or set a maximum period of restraint of trade agreements. Courts determine restricted duration of restraint of trade agreements based on special facts of each case.

In both jurisdictions, there is no requirement of the law demanding that for a restraint of trade agreement to be valid and enforceable an employer must pay a former employee for rendering that person idle during the restraint period. Interestingly, courts in both jurisdictions are more readily inclined to find restraint of trade agreements reasonable and enforceable in cases where employers are determined or agreed to pay employees for the duration of the restraint. Importantly, payment for a restraint of trade agreement does not make an unreasonable agreement reasonable and enforceable.

In England and South Africa, employers may use garden leave to ensure that towards the termination of the employment relationship, employees are kept away from commercial confidential information and business contacts (clients, patients, customers, and suppliers). It is acceptable in both jurisdictions to concurrently enforce restraint of trade and the garden leave. Garden leave affects the enforceability of a full period of restraint of trade agreements. A lengthy period of garden leave may reduce the possibility of a court to enforce the restraint of trade agreement on the basis that a garden leave achieved the protection sought. As such, any period spent on garden leave is deducted from the length or lifespan of the restraint of trade agreement. In the light of the above, a lengthy or long period of garden leave may make courts in both jurisdictions to pronounce restraint of trade agreement unenforceable or reduce such period of restraint of trade. In both jurisdictions, the garden leave period normally does not exceed a period of six months.

Summary of differences

In terms of English jurisprudence, when a restraint of trade dispute arises, employers bear the onus of proof on a preponderance of evidence that the agreement in question is reasonable and not inimical to public interest.¹¹⁷ In other words, a party bringing the

¹¹⁷ Colin (note 6 above) 4. See also *Mason v Provident Clothing and Supply Co, Ltd* (note 59 above) 711.

action, seeking to enforce a restraint of trade agreement is encumbered with the onus of proving that such agreement is reasonable and therefore, enforceable.¹¹⁸ Moreover, an employer must show that he/she has legitimate commercial interests worthy of protection, and that such protection is not more than reasonably necessary, taking into account interests of both parties (employer and employee) and public interest.¹¹⁹ This is in line with the long standing view that he who alleges must prove.¹²⁰ It is the general rule that the employer who is alleging must prove the facts in issue.¹²¹ In other words, the employer must prove the existence of a restraint of trade agreement, alleged breach, reasonableness of agreement, and that the restraint goes no further than is reasonably necessary to protect the said business interests. Conversely, in South Africa, the onus of proof rests on an employee who is avoiding the enforceability of restraint of trade agreement.¹²² In terms of South African labour jurisprudence, employees must show on a preponderance of evidence that the agreement in question is unreasonable, inimical to public interest, and therefore, unenforceable.¹²³ The issue of onus of proof remains controversial under South African law.¹²⁴ Some scholars and courts hold a view that employers who seek the enforceability of a restraint of trade agreement must bear onus of proving the reasonableness of limiting the constitutional right to freedom of trade that the employee is entitled to have.¹²⁵

South African labour jurisprudence maintains that there is equal bargaining power between employers and employees.¹²⁶ In the light of the above, restraint of trade agreement are *prima facie* valid and enforceable unless the employee can discharge the onus of proof on preponderance of evidence that the agreement in question is

¹¹⁸ Russell (note 7 above) 112.

¹¹⁹ As above.

¹²⁰ *Miller v Minister of Pensions* (note 62 above) 372.

¹²¹ As above.

¹²² *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 8 above).

¹²³ *Roffey v Catteral, Edwards & Goudre (pty) Ltd* 1977 (4) SA 494 (N), 505 E-F.

¹²⁴ *Laser Junction (Pty) Ltd v Fick* (2017) 38 ILJ 2675 (KZD) (28 September 2017) para 31. See also Calitz (note 87 above) 57; J Neethling *The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants – A Need for Exercising Restraint* (2008) 20 *South African Mercantile Law Journal* 94.

¹²⁵ *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C) para 28. See also *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth Booth* (2005) 3 SA 205 (N), 209F; M.A. Du Plessis *Stare Decisis; Is the Onus in Restraints of Trade Hanging on a Thread* (2006) 2 *Tydskrif Vir die Suid Afrikaans Reg* 425.

¹²⁶ Calitz (note 87 above) 66. See also *Knox D'Arcy v Shaw* 1996 2 SA 651 (W) 659; *Den Braven Ltd v Pillay* 2008 6 SA 229 (D) para 27.

unreasonable and inimical to public interest.¹²⁷ This is the position in South Africa, because the principle of *pacta sunt servanda* is given prominence in restraint of trade disputes.¹²⁸ The principle of *pacta sunt servanda* generally means that parties who voluntarily entered into an agreement must be bound to honour their agreements.¹²⁹ Thus, South African Courts are always prepared to enforce restraint of trade agreements because that is actual consent of employers and employees, unless it can be shown that the bargain in question is unreasonable and against public interest.¹³⁰

The English jurisprudence accepts that it is unjustifiable in the contemporary economical dispensation to argue that there is a balance or equal bargaining power between employers and employees.¹³¹ Employees are not in equal negotiation capacity with employers,¹³² because people are economically depended on giant companies for employment.¹³³ As such, these monopolistic companies take advantage of desperate people begging for employment by introducing harsh contractual restraint of trade terms in order to gain maximum profit.¹³⁴ Acknowledging the reality of unequal bargaining power between employers and employees makes English Courts to treat restraint of trade agreements as *prima facie* invalid and unenforceable.¹³⁵ It is an arguable case that in England, restraint of trade rules were developed taking into account the unequal bargaining position of employees.¹³⁶

¹²⁷ *Roffey v Catteral, Edwards & Goudre (pty) Ltd* (note 123 above) 505 E-F.

¹²⁸ Calitz (note 87 above) 50.

¹²⁹ As above.

¹³⁰ RH Christie & V McFarlane (5thedi) *The Law of Contract in South Africa* (2005) 12. See also R Kelbrick, *Restraints of trade and the Constitution* (2006) 14 *Juta Business Law* 133.

¹³¹ Angelo & Ellinger (note 11 above) 457.

¹³² As above.

¹³³ Angelo & Ellinger (note 11 above) 458.

¹³⁴ As above.

¹³⁵ *Nordenfeldt v The Maxim Nordenfeldt Guns* (note 12 above) 535, 566. See also Colin (note 6 above) 1; Pretorius (note 6 above) 156.

¹³⁶ Fridman (note 12 above). See also *Nordenfeldt v Maxim Nordenfeldt Guns & Ammunition Co, Ltd* (note 12 above).

4.4 The Legal Position in Germany

4.4.1 Preliminary remarks and overview

In Germany, restraint of trade law is basically codified. As such, rules guiding restraint of trade agreements are laid down in different pieces of legislation.¹³⁷ The law of post-employment restraint of trade agreements is laid down in the German Commercial Code (Handelsgesetzbuch),¹³⁸ Civil Code (Bürgerliches Gesetzbuch),¹³⁹ and German Constitution ('Grundgesetz').¹⁴⁰

Section 12 of the German Constitution ('Grundgesetz') guarantees everyone the right to freedom of occupation.¹⁴¹ Having regard to the above, contractual employment clauses prohibiting competition affect employees' constitutional rights to freedom of occupation.¹⁴² However, the German Constitution equally protects freedom of contract.¹⁴³ In a nutshell, the principle of freedom of contracts binds parties who freely entered into contracts to honour terms of their contracts. The German Constitutional Court reiterated that restraint of trade agreements should conform to the limits of the constitution.¹⁴⁴ Emphasis is placed on the fact that employers should take cognisance that employees have the right to freedom of occupation.¹⁴⁵ In the light of the above, employers need to be considerate of employee's freedom of occupation when drafting restraint of trade agreements. In the same vein, Section 241 (2) of the German Civil Code makes a provision that parties to a restraint of trade agreement should have regard to 'other party's rights, legally protected interests and other interests'.¹⁴⁶

¹³⁷ Handelsgesetzbuch of 1897 (HGB) English translated by: M Pelzer/EA Voigt "German Commercial Code" (2003). See also Bürgerliches Gesetzbuch of 18 August 1896 (BGB) [Civil Code] as amended, translated by the Langenscheidt Translation Service; Grundgesetz of 1949 (GG) [German Constitution] Translated by C. Tomuschat, D.P. Currie, D.P. Kommers *et al* (2018).

¹³⁸ Handelsgesetzbuch [German Commercial Code] (note 137 above).

¹³⁹ Bürgerliches Gesetzbuch [Civil Code] (note 137 above).

¹⁴⁰ Grundgesetz [Constitution] (note 137 above).

¹⁴¹ As above.

¹⁴² Grundgesetz [Constitution] (note 137 above) Article 12.

¹⁴³ Grundgesetz [Constitution] (note 137 above) Article 2.

¹⁴⁴ '*Handelsvertreterentscheidung*'; judgment of February 7th, 1990, BVerfG 81,242.

¹⁴⁵ As above.

¹⁴⁶ Bürgerliches Gesetzbuch [Civil Code] (note 137 above).

German jurisprudence requires that restraint agreements must be in writing.¹⁴⁷ Restraint of trade agreements must be specifically agreed between an employer and employee.¹⁴⁸ Furthermore, a restraint of trade agreement is null and void if it does not seek to protect legitimate commercial interests of employers.¹⁴⁹ In Germany, the only commercial interest justifying preventing competition between former employer and employee is the protection of trade secrets, and trade connections.¹⁵⁰ The enforceability of restraint of trade agreement is limited to areas in which employers carried on business prior the termination employment agreement.¹⁵¹ Whenever German courts are invited to enforce restraint of trade agreements, they take into account the interests of both parties.¹⁵² In other words, restraint of trade agreements must strike a reasonable balance between the employer's commercial interests, and employee's interests to advance his/her career.¹⁵³ Restraint of trade agreements should not unreasonably curb an employee from exploring better employment opportunities. In the light of the above, the employer's interest alone is not sufficient to restrict commercial competition. To this extent, employers cannot seek protection from ordinary fair competition in the absence of showing that an employee possesses trade secrets, or knowledge of trade connections which may be used to such employer's detriment.¹⁵⁴

Moreover, restraint of trade agreements are null and void if they do not include compensation consideration for taking employees out of employment market place.¹⁵⁵ Restraint of trade agreements should clearly specify activities that employees are restrained to delve into after termination of employment agreement.¹⁵⁶ In terms of Section 74(1) (a) (i) of the Commercial Code, restraint of trade agreements should precisely specify the period and geographical area from which employees are restrained to

¹⁴⁷ Sec 74(i) Commercial Code.

¹⁴⁸ Bredin *et al* (note 35 above) 1.

¹⁴⁹ Handelsgesetzbuch [German Commercial Code] (note 137 above) 74(a) (1).

¹⁵⁰ (Judgment BAG August 1st, 1995 – AP HGB § 74 a Nr.5) see also E Mario Non-competition clauses in labour contracts – Germany. XIVth Meeting of European Labour Court Judges 4 September 2006 *Court de cassation Paris*, 4. See also Bredin *et al* (note 35 above) 6.

¹⁵¹ D. Von Einem, Multi-Country Survey on Covenants Not to Compete, (2018) *Association of Corporate Counsel* 33.

¹⁵² Mario (note 150 above) 4.

¹⁵³ Bredin *et al* (note 35 above) 7.

¹⁵⁴ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(a) (1).

¹⁵⁵ Bredin *et al* (note 35 above) 5.

¹⁵⁶ Handelsgesetzbuch [German Commercial Code] (note 137 above) 74(a) (i). See also Bredin *et al* (note 35 above) 5.

practice.¹⁵⁷ In any event, restraint of trade agreement cannot legally prevent an employee to practice his/her profession anywhere around the globe. In the same light, restraint of trade agreements cannot restrain employees to practice their profession indefinitely.

The crucial question that one may raise is what are the forms of remedies that can be relied on in case of breach of restraint of trade agreements? In Germany an employer must financially compensate an employee for preventing him/her to exercise a particular trade (profession).¹⁵⁸ The employer does not have to pay compensation to an employee for the period of a breach of the restraint of trade agreement.¹⁵⁹ The employer may also apply for interdiction to prevent an employee from commencing similar business or being employed by its competitors.¹⁶⁰ If the employer has a reason to believe that an employee who is subject to a restraint of trade agreement has commenced employment or business entity in breach of the restraint of trade agreement, such former employer may in law require a former employee to provide information about new employment, and position.¹⁶¹ In a case where a former employer can prove that the new employer had knowledge of the fact that such an employee is subject to restraint of trade agreement but recklessly employed the employee regardless, an interdiction order and damages may be raised against the new employer.¹⁶² Section 280 of Civil Code,¹⁶³ makes a provision that an employer may claim damages against an employee.¹⁶⁴ The employer may also invoke penalty claim if parties also included contractual term to that effect.¹⁶⁵

In terms of German jurisprudence, if an employer dismisses an employee, such an employee may therefore relieve him/herself from restraint of trade agreement.¹⁶⁶ In the light of the above, it is not surprising that such an employee may subsequently be employed by his/her former employer's business rivals or immediately incorporating the same business enterprise. However, section 75 (2) of Commercial Code makes it clear

¹⁵⁷ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(a) (i).

¹⁵⁸ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(b) (1).

¹⁵⁹ Bredin *et al* (note 35 above) 12. See also Mario (note 150 above) 5.

¹⁶⁰ Bürgerliches Gesetzbuch [Civil Code] (note 137 above) Sec 823, 1004.

¹⁶¹ Bredin *et al* (note 35 above) 12.

¹⁶² As above.

¹⁶³ Bürgerliches Gesetzbuch [Civil Code] (note 137 above).

¹⁶⁴ As above. See also Bredin *et al* (note 35 above) 12.

¹⁶⁵ As above.

¹⁶⁶ Mario (note 150 above) 5.

that employees who are dismissed on the ground of breaching employment contractual duties or for other misconducts cannot relieve themselves from restraint of trade agreements.¹⁶⁷

4.4.2 Onus of Proof

In terms of German jurisprudence, the onus of proof falls on an employee who seeks to escape the enforceability of restraint of trade agreement.¹⁶⁸ To this extent, an employee bears the onus of proof to prove the unreasonableness of restraint of trade agreement.¹⁶⁹ If an employee contends that the restraint agreement is unreasonable he/she must show that the restriction in question is too vague, too wide, or against public policy.¹⁷⁰ If the employee wants to argue that the restraint is too wide, too vague or void, he has the onus of proof.¹⁷¹ Whenever an employer seeks the enforceability of restraint of trade agreement he/she is only required to prove that there is an existing restraint agreement between two parties (employer and employee).¹⁷² Notably, the same applies to a case where an employee is claiming restraint of trade compensation, he/she must prove that there is such a binding restraint agreement.¹⁷³

4.4.4 Bargaining power

In Germany, restraint of trade agreements are *prima facie* valid and enforceable, because of the doctrine of freedom to contract, which enjoys protection in Article 2140 of the German Constitution.¹⁷⁴ Restraint of trade rules are premised on the assumption that there is equal bargaining power between employers and employees.¹⁷⁵ Article 138 of German Civil Code provides that an agreement is unreasonable and unenforceable if one party is exploiting the need, carelessness or inexperience of another.¹⁷⁶ The above provision aims at protecting employees in a weaker bargaining position against stronger

¹⁶⁷ Mario (note 150 above) 3.

¹⁶⁸ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74.

¹⁶⁹ As above.

¹⁷⁰ As above.

¹⁷¹ As above.

¹⁷² As above.

¹⁷³ As above

¹⁷⁴ Grundgesetz [Constitution] (note 137 above).

¹⁷⁵ Angelo & Ellinger, (note 11 above) 484.

¹⁷⁶ Bürgerliches Gesetzbuch [Civil Code] (note 137 above).

employers who take advantage of people who are in a desperate need of securing employment. German courts are vigilant of the realities of unequal bargaining power between employers and employees. It is tenable to argue that employers may take advantage of unemployed people begging for employment to induce them to sign unreasonable restraint of trade agreements.¹⁷⁷ There is no equal bargaining power between employers and employees in restraint of trade agreements, because employers 'control the economic freedom' of employees.¹⁷⁸ Employers often take advantage of employees known desperate need for employment as a weakness compromising equal bargaining position *inter partes*.¹⁷⁹ Accordingly, employers have a stranglehold on desperate people who are in the verge of securing employment to sign agreements with whatever terms.¹⁸⁰ It seems that German legislatures recognise that there is no clear equal bargaining power between employers and employees. This is because they created a legislation making it an obligation that employers should pay employees for preventing them to earn a living during the subsistence of restraint of trade agreement,¹⁸¹ and that the period of restriction should not exceed two years.¹⁸²

4.4.5 Prescribed duration of restraint of trade agreements

In Germany, the maximum period that former employees should be restrained to compete, freely exercise their profession, or employed by former employer's direct commercial competitors is two years.¹⁸³ Under German jurisprudence, restraint of trade agreement that seeks to prevent an employee to exercise his/her freedom of trade for more than two years after the termination of employment agreement is void and therefore, unenforceable.¹⁸⁴ It follows that a restraint of trade agreement exceeding the maximum

¹⁷⁷ Angelo & Ellinger (note 11 above) 484.

¹⁷⁸ As above.

¹⁷⁹ As above.

¹⁸⁰ Angelo & Ellinger (note 11 above) 489. See also, Report prepared by Task Force for Abuse of Superior Bargaining Position, Report on Abuse of Superior Bargaining *Position ICN Special Program for Kyoto 7th Annual Conference International Competition Network* 6.

¹⁸¹ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(2).

¹⁸² Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(a) 1.

¹⁸³ As above.

¹⁸⁴ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(1).

period of two years confers employees with a discretion of either electing to be bound or disregard such void agreement and subsequently, be in liberty to compete.¹⁸⁵

4.4.6 Obligation of paying former employees for rendering them idle (jobless) during restraint of trade period

In German, a restraint of trade agreement is null and void and therefore, unenforceable if it does not stipulate compensation for a restraint of competition to employees.¹⁸⁶ By virtue of Section 74 (b) (1) of Commercial Code, an employer who placed an employee on restraint of trade must pay the latter half of the remuneration he/she was recently receiving.¹⁸⁷ Restraint of competition compensation is payable in monthly instalments.¹⁸⁸ On this basis, discretion remains upon employees whether to agree to receive lower restraint of trade compensation or to immediately compete with a former employer upon termination of employment relationship.¹⁸⁹

In terms of Section 74 (b) (1) of Commercial Code, the compensation for a restraint of competition includes bonuses.¹⁹⁰ Moreover, in determining restraint of trade compensation, courts take into account all elements of compensation under employment agreement into account, including fixed monthly salary, 'commission payments', and other employment benefits.¹⁹¹ For variable compensation elements such as performance-related payments, the average amount payable during the last three years of employment are taken into account.¹⁹² When considering employment agreement benefits, courts take into account the company car, company house that an employee was using, and payments in kind.¹⁹³ As already submitted, restraint of trade agreements that do not include compensations are not binding and therefore, unenforceable.¹⁹⁴ Similarly, restraint of trade agreements that provide for insufficient compensation are not

¹⁸⁵ Bredin *et al* (note 35 above) 8.

¹⁸⁶ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(2).

¹⁸⁷ Handelsgesetzbuch [German Commercial Code] (note 137 above).

¹⁸⁸ Bredin *et al* (note 35 above) 8. See also Von Einem (note 151 above) 3.

¹⁸⁹ Mario (note 150 above) 3.

¹⁹⁰ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(1).

¹⁹¹ Bredin *et al* (note 35 above) 9.

¹⁹² As above.

¹⁹³ As above.

¹⁹⁴ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(1).

binding.¹⁹⁵ However, an employee has a discretion of accepting to comply with such restraint of trade agreement, negotiate for fair adequate compensation, or whether not to be bound at all.¹⁹⁶

The reasonableness of restraint of trade agreement differs from case to case. Restraint of trade agreement, which prevents an employee to exercise his/her trade for a short period, and in a small geographical area may justify minimum compensation amount.¹⁹⁷ An employer may offer higher restraint of trade compensation to make wider scope of restriction reasonable.¹⁹⁸ However, the amount of compensation should comply with 50% of the usual salary that a former employee used to get before the termination of the employment relationship.¹⁹⁹

4.4.7 Deduction of other earnings from the restraint of trade compensation

In terms of Section 74 (c) of Commercial Code,²⁰⁰ a former employee who is subjected to a restraint of trade agreement may work elsewhere provided that it is not in violation of such restraint agreement. If a former employee is receiving remuneration from the new employer not in violation of restraint of trade agreement, then such former employee should allow the former employer to deduct earnings from the competition compensation due to him/her.²⁰¹ Furthermore, an employee has a duty to inform the former employer about the amount of his earnings when he makes claims for restraint of trade compensation.²⁰²

In terms of section 74 (c) of Commercial Code,²⁰³ when employers make deductions to the compensation due to employees, they should not deduct social security contributions.²⁰⁴ The intrinsic question that one may raise is whether unemployment benefits are deducible from the restraint of trade compensation due to a former employee.

¹⁹⁵ Bredin *et al* (note 35 above) 9.

¹⁹⁶ As above.

¹⁹⁷ As above.

¹⁹⁸ Bredin *et al* (note 35 above) 7.

¹⁹⁹ Handelsgesetzbuch [German Commercial Code] (note 137 above) 74(2).

²⁰⁰ Handelsgesetzbuch [German Commercial Code] (note 137 above).

²⁰¹ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(c) (2).

²⁰² As above.

²⁰³ As above.

²⁰⁴ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74.

The grammatical interpretation of Section 74 (c) of Commercial Code clearly shows that unemployment benefits should not be deducted from the compensation due to employees.²⁰⁵ The reason for the above stems from the fact that employees receive unemployment benefits by virtue of being unemployed. Courts held that unemployment benefits should be deducted from the restraint of trade compensation.²⁰⁶ Although unemployment benefits are not earnings received by people currently working, the Federal Labour Court held that such benefits have effect to substitute salary, and therefore, should be deducted from the restraint of trade compensation due to former employees.²⁰⁷

4.4.8 Relationship between restraint of trade agreements and garden leave

In Germany, employers may use garden leave to ensure that towards the termination of employment relationship, employees are kept away from commercial confidential information and business contacts.²⁰⁸ In terms of Section 60 and 61 of Commercial Code,²⁰⁹ employees are prohibited from working for their employer's competitors for as long as the employment relationship still exist.²¹⁰ As a general principle, employees are not allowed to use or disclose trade secrets or confidential information of their employers.²¹¹ Section 17 (1) of German Act against Unfair Competition,²¹² makes a provision that divulging confidential data and trade secrets during the subsistence of employment relationship is a punishable offence.²¹³ Furthermore, section 18 makes it an obligation for employees to return written documents to employers at the termination of employment relationship.²¹⁴

²⁰⁵ Handelsgesetzbuch [German Commercial Code] (note 137 above).

²⁰⁶ As above.

²⁰⁷ Handelsgesetzbuch [German Commercial Code] (note 137 above) 74(c).

²⁰⁸ Mario (note 150 above) 2.

²⁰⁹ Handelsgesetzbuch [German Commercial Code] (note 137 above).

²¹⁰ As above.

²¹¹ Sec 17 (1) Unfair Competition Act. See also S Matheson *et al* AIPPI Group Q247- Trade secrets: Overlap with Restraint of Trade, Aspects of Enforcement 3.

²¹² The German Act against Unfair Competition 2004.

²¹³ As above.

²¹⁴ As above.

During garden leave, employees are entitled to monthly remuneration since the person is still in law an employee.²¹⁵ In case of concurrent enforcement of restraint of trade and garden leave, employers place employees on garden leave towards the end of termination of employment agreement, prior the period of restraint of trade agreement commences to run.²¹⁶ The main point of enquiry here is to explore the nature of a relationship between garden leave and restraint of trade agreements, particularly on how garden leave affects the enforceability of the full period of restraint of trade agreements. A lengthy period of garden leave makes German courts to reduce the period of restraint of trade or to pronounce the whole restraint of trade unenforceable,²¹⁷ if the garden leave period adequately protected the employer's legitimate interests.²¹⁸

4.4.9 Summary of Similarities and Differences between Germany and South Africa

Summary of Similarities

In both jurisdictions the position of the jurisprudence is that such restraint agreements are *prima facie* valid and enforceable, unless the party who wishes to avoid its enforceability can prove that the restraint is not aimed at protecting legitimate business interests of the employer and is contrary to public policy. Restraint of trade agreement may not be enforced if an employee may prove that the agreement is in fact, not aimed at protecting legitimate business interests of the employer. In both jurisdictions the law acknowledges that employer's legitimate commercial interest must be protected against any exploitation. Similarly, labour jurisprudence in both jurisdictions confers employees the freedom of trade which includes the right to choose his/her profession freely and make a living through the chosen career. Restraint of trade agreements are only enforced if they are reasonable *inter partes* (between both employer and employee).

In Germany, post-restraint of trade is imposed by a written employment agreement. Although there is no legislative requirement that a restraint of trade agreement should be

²¹⁵ Von Einem (note 151 above) 39

²¹⁶ As above.

²¹⁷ Bredin *et al* (note 35 above) 15.

²¹⁸ As above.

in writing in South Africa, courts enforce written restraint agreements. In the light of the above, after termination of employment agreement an employer has no right to prevent former employees to compete or be employed by his/her direct commercial competitors, unless they entered into a valid written restraint of trade agreement.

In both jurisdictions, restraint of trade agreements restraining employees to trade outside the geographical area in which employees materially served employment duties before termination of employment agreement is unreasonable and therefore, unenforceable. In other words, the geographical space of restriction should be limited to a place in which employers carried out business before termination of the employment agreement, and area in which employees carried material employment duties.

Common to two jurisdictions, employers may use garden leave to ensure that towards the termination of employment relationship, employees are kept away from commercial confidential information and business contacts. Employers may put employees on garden leave towards the end of termination of employment agreement. Garden leave is enforceable prior the period of restraint of trade agreement commences to run. People under garden leave should receive their monthly remuneration because they are legally recognised as employees.²¹⁹ A lengthy period of garden leave makes courts in both jurisdictions to reduce the period of restraint of trade or decide to make the whole restraint of trade unenforceable because the garden leave provision sufficiently protected employer's legitimate commercial interests.

In both jurisdictions, restraint of trade agreements are *prima facie* valid and enforceable because of the doctrine of freedom to contract. Restraint of trade agreements are premised upon the assumption that there is equal bargaining power between parties in restraint of trade agreement. Both jurisdictions maintain that there is equal bargaining power between employers and employees in restraint of trade agreements. Interestingly, the German Civil Code offers protection to employees that could be in a weaker bargaining position.²²⁰ The time is ripe for South Africa and Germany to be vigilant of the

²¹⁹ Von Einem (note 151 above) 39.

²²⁰ Bürgerliches Gesetzbuch [Civil Code] (note 137 above) Article 138.

realities of unequal bargaining power between employers and employees. There is no equal bargaining power between employers and employees in restraint of trade agreements because employers 'control the economic freedom' of employees.²²¹ Employers utilise employees known desperate need for employment as a weakness compromising equal bargaining position *inter partes*.²²² In a bid of striking equal bargaining power between parties in restraint of trade agreements, German legislatures created a legislation making it an obligation that employers should pay employees for preventing them to earn a living during the subsistence of restraint of trade agreement,²²³ and that the period of restriction should not exceed two years.²²⁴

Summary of differences

In Germany, restraint of trade law is codified. Rules guiding restraint of trade agreements are laid down in statutes.²²⁵ However, South African restraint of trade doctrine is regulated by Common law. There is no legislative provision in South Africa guiding the enforceability of restraint of trade agreements. South African Courts are drawing guidance on how this Common law doctrine applies from the judicial precedents.

In Germany, the maximum period of trade restriction is limited to two years.²²⁶ Thus, any restraint of trade agreement preventing former employees to compete, freely exercise their profession, or to be employed by former employer's direct commercial rivals for more than two years is unreasonable and therefore, unenforceable.²²⁷ However, in South Africa there is no set maximum term applicable to the enforceability of restraint of trade agreements. Thus, an employer may propose a restraint of trade agreement of a period exceeding three years, and desperate employees who are in a weak bargaining position may sign this type of agreement. The above may be the case considering the high level of unemployment in South Africa, which currently stands at 27.5% (6.1 million people

²²¹ Angelo & Ellinger (note 11 above) 489.

²²² As above.

²²³ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(2).

²²⁴ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(a) (1).

²²⁵ Handelsgesetzbuch [German Commercial Code] (note 137 above). See also Burgerliches Gesetzbuch [Civil Code] (note 137 above); Grundgesetz [Constitution] (note 137 above).

²²⁶ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(a) 1.

²²⁷ As above.

without jobs).²²⁸ Fortunately, South African Courts find it difficult to restrain former employee's freedom of trade for a period exceeding two years, taking into account the fact that a restraint agreement deprives former employees their right to earn a living.

In Germany, employers have an obligation of paying former employees for rendering them jobless during restraint of trade period.²²⁹ Accordingly, German jurisprudence takes cognisance of the fact that people under unpaid restraint of trade may starve due to financial straits. Thus, restraint of trade agreement is null and void and therefore, unenforceable if it does not include compensation for a restraint of competition to employees. This competition compensation is payable in monthly instalments, and it includes consideration of employment contractual benefits. Unfortunately, South African jurisprudence does not take cognisance of the economic suffering that employees incur during the subsistence of restraint of trade period. It is unthinkable to put a bread winner on restraint of trade for a period of one year eight months without being considerate of how such a person will pay bills, debts, children and spousal maintenance. One may argue that unpaid restraint of trade agreement brings suffering to families of former employees, and that employers may abuse the doctrine of restraint of trade to gain an advantage of avoiding competition.

4.5 Outline of Lessons for South Africa from the two Jurisdictions

In England, the burden of proving the reasonableness of the enforceability of a restraint of trade agreement rests on an employer who seeks to enforce a restriction.²³⁰ In this jurisdiction, the enforceability of restraint of trade law is in line with the long standing view that he who alleges must prove.²³¹ There is a compelling need for South African labour jurisprudence to reverse the onus of proof to employers, to prove that restraint of trade agreement is reasonable and not against public policy. The issue of onus of proof remains controversial in South Africa, and this requires a legal certainty. This study contends that it is unconstitutional to impose the onus of proof on employees to prove the

²²⁸ 'SA unemployment rate rises to 27.2% in Q2' *Eyewitness News* 31 July 2018 available at <https://ewn.co.za/2018/07/31/sa-unemployment-rate-rises-to-27-2-in-q2> (accessed 29 August 2018)

²²⁹ *Handelsgesetzbuch* [German Commercial Code] (note 137 above) Sec 74(b) 1.

²³⁰ Colin (note 6 above) 4. See also *Mason v Provident Clothing and Supply Co, Ltd* (note 59 above) 711.

²³¹ *Miller v Minister of Pensions* (note 62 above).

unreasonableness of restraint of trade agreements. Section 22 of the Constitution of the Republic of South Africa provides that everyone has the right to freely practice trade or profession of their choice.²³² The Constitution South Africa encumbers employers with the burden of proof to prove that the restraint of trade agreement is reasonable and enforceable as it is a reasonable limitation of the employee's constitutional right to freedom of trade.²³³ Freedom of trade as a constitutional right should be limited in terms of section 36 of the Constitution of South Africa.²³⁴ Having regard of the above, it is no longer correct to impose the burden of proof on employees. Like England, South African jurisprudence should impose burden of proof on employers not employees. This will also conform to the supreme Constitution of the Republic of South Africa.

In England, it is accepted that there is no equal bargaining power between employers and employees.²³⁵ This is the basis of considering restraint of trade agreements as *prima facie* unreasonable and unenforceable. However, South African restraint of trade agreements are premised upon the assumption that there is equal bargaining power between employers and employees.²³⁶ Accordingly, restraint of trade agreements are *prima facie* valid and enforceable.²³⁷ South Africa should also acknowledge that there is no equal negotiation capacity between employers and employees. There is no dispute that people are economically depended on companies for employment, and there is high rate of unemployment in South Africa.²³⁸ Employees do not negotiate restraint of trade agreements because of the fear that challenging any term may make them to remain unemployed. In fact, a person looking for employment is in a take-it-or-leave-it situation. In other words, one has two choices, either one signs an agreement as it is, or one leaves it. South African jurisprudence should also be developed having regard of the imbalance of bargaining power between employers and employees. In a bid of striking a balance bargaining power between employers and employees, Germany jurisprudence makes it an obligation that employers pay their former employees for rendering them jobless during

²³² Constitution of the Republic of South Africa 1996 (note 5 above).

²³³ Constitution of the Republic of South Africa 1996 (note 5 above) Sec 22.

²³⁴ Constitution of the Republic of South Africa 1996 (note 5 above).

²³⁵ Angelo & Ellinger (note 11 above) 457.

²³⁶ Calitz (note 87 above).

²³⁷ *Roffey v Catteral, Edwards & Goudre (pty) Ltd* (note 123 above) 505 E-F.

²³⁸ Angelo & Ellinger (note 11above) 458.

the restraint of trade period. In the light of the above, one may argue that German legislatures understand that employees are not in an appropriate position to negotiate their bargains in this regard.

In Germany, the restraint of trade law is codified in various statutes.²³⁹ However, in South Africa, restraint of trade agreements are regulated by Common law.²⁴⁰ There is no legislation guiding the enforceability of restraint of trade agreements. South African Courts are finding guidance on how this Common law doctrine applies from judicial precedents. This study submits that there is a need in South Africa that restraint of trade law should be codified. There are number of controversies created by South African Courts, particularly on who bears onus of proof between employers and employees.²⁴¹

In Germany, the maximum period of restriction regarding restraint of trade is limited to two years.²⁴² It should be noted that in South Africa, there is no set maximum term applicable to the enforceability of restraint of trade agreements. South African Courts determine the reasonableness of restraint of trade period based on special facts of each case.²⁴³ It is good for South African Courts to do that, but, like Germany, it will be better for South African labour law to be developed and to set a maximum reasonable period of restriction of two years. It is now time for South African law to be clear on what is the reasonable maximum period of restriction concerning restraint of trade agreements. In any event, restraint of trade agreements preventing former employees to compete, freely exercise their profession, or employed by former employer's direct commercial competitors for more than two years is unreasonable.

In Germany, employers bear an obligation of paying former employees for taking them out of the employment market during the restraint of trade period.²⁴⁴ This competition compensation is payable in monthly instalments, and it includes consideration of

²³⁹ Handelsgesetzbuch [German Commercial Code] (note 137 above). See also Bürgerliches Gesetzbuch [Civil Code] (note 137 above); Grundgesetz [Constitution] (note 137 above).

²⁴⁰ Calitz (note 87 above) 50.

²⁴¹ Calitz (note 87 above) 54.

²⁴² Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(a) 1.

²⁴³ *EOH Mthombo (Pty) Ltd v Bheekie-Odhav* (C177/12) [2012] ZALCCT 10 Para 17.

²⁴⁴ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(1).

employment contractual benefits.²⁴⁵ This means that German law has a due regard that people under unpaid restraint of trade period may starve due to financial difficulties.²⁴⁶ However, South African jurisprudence does not take cognisance of the economic suffering that employees incur during the subsistence of restraint of trade period. It can be argued that South African employers may abuse the doctrine of restraint of trade to gain an advantage of avoiding competition.²⁴⁷ It is submitted that if it also becomes an obligation in South Africa that employers must compensate employees during restraint of trade period, then employers would not loosely propose to enter into restraint of trade agreements unless there is a serious commercial interest worthy of legal protection. Most importantly, former employees that are under restraint period will be able to pay their bills, financially maintain their families and take their children to school. It is unreasonable and inhuman to restrain a person from working or opening an enterprise without considering how that person will survive during the period of restriction. South Africa should learn from Germany and start to impose an obligation to employers to pay former employees a monthly salary of 50 percent of the remuneration that they were receiving prior to the termination of employment agreement.²⁴⁸ It is a common cause that unpaid restraint of trade agreements brings suffering to former employees and their families. Furthermore, unpaid restraint of trade lures employers to abuse these agreements to avoid fair competition since they have nothing to lose in putting people under restraint. However, if employers incur financial costs of putting their former employees on restraint trade agreements, obviously, employers will enter into these agreements with the sole motive of protecting their serious legitimate business interests that are worthy of legal protection.

4.6 Conclusion

Common to all three jurisdictions is the fact that restraint of trade agreements can be imposed by employers on employees, provided that such employer has legitimate commercial interests worthy of legal protection. The restraint goes no further than is reasonably necessary to protect the said business interests and it is not against public

²⁴⁵ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(1).

²⁴⁶ As above.

²⁴⁷ Kemp (note 9 above) 257.

²⁴⁸ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(1).

interest in restricting the employee's freedom of trade or to work. Furthermore, in all three jurisdictions, after the termination of employment contract the employee's obligation of avoiding competition with the employer ceases. He/she can attract his/her former employer's customers, clients, or patients unless there is a restraint of trade agreement entered with such a former employer. Significantly, in all three jurisdictions, the purpose of restraint of trade agreements is to protect the employers' trade secrets and trade connections, not to prevent the former employee from using his/her experiences acquired during previous employment.

Notably, it is acceptable in all selected jurisdictions to concurrently enforce restraint of trade and garden leave. The chapter *enter alia*, explored the nature of the relationship between garden leave and restraint of trade agreements, particularly on how garden leave affects the enforceability of the full period of restraint of trade agreements. Employers draft restraint of trade agreements in light of garden leave. The chapter established that a lengthy garden leave period may reduce the possibility of courts in all the three jurisdictions to enforce the full period of restraint of trade agreement on the basis that a garden leave period achieved the sought protection. It should be borne in mind that garden leave restrict employees from accessing the employer's trade secrets, confidential information, trade connections or having any relationship with the employer's business rivals. The restraint of trade agreements serves the same purpose. Any period spent on garden leave is deducted from the length of the restraint of trade agreement.

In Germany and South Africa, an employee who seeks to escape the enforceability of restraint of trade agreement bears onus of proof that the agreement in question is unreasonable and therefore, unenforceable. In contrast, the English jurisprudence imposes the burden of proof on employers to prove that the agreement in question is reasonable and enforceable. This chapter submitted that South African jurisprudence should reverse the onus of proof to employers who seek to enforce restraint of trade agreement. Employers must show that limiting employee's constitutional right to freedom of trade or work is a justifiable limitation of the right.²⁴⁹

²⁴⁹ Constitution of the Republic of South Africa 1996 (note 5 above), sec 36.

In South Africa and Germany, restraint of trade agreements are *prima facie* valid and enforceable. This is based on the assumption that parties (employers and employees) to a restraint of trade agreement are in an equal bargaining position. The chapter supports the English jurisprudence which accepts that in light of contemporary economical dispensation, there is no equal bargaining power between employers and employees.²⁵⁰ In England, restraint of trade law was developed taking into account the unequal bargaining power between employers and employees. It has been argued that employees are in a take-it or leave-it situation because they are begging for employment.²⁵¹ As such, these monopolistic companies take advantage of individuals who are desperate for employment by introducing harsh contractual restraint of trade terms without negotiating with employees in order to reap maximum profit.²⁵² Desperate people who are in extreme need of employment often knowingly sign restraint of trade agreements tainted by one-sided terms favouring employers,²⁵³ so that they will immediately relieve themselves from unemployment straits.²⁵⁴ Employers give employees lopsided employment printed contract, which employees have a choice of signing or decline to sign, because negotiating contractual terms will make an employer to offer employment to someone else who is equally desperate for employment.²⁵⁵ In an attempt to maintain balance of bargaining power between restraint of trade parties, German jurisprudence put an obligation to employers to pay employees during restraint period in return of agreeing to this agreement.

In Germany, the maximum prescribed period of restraint of trade agreements is two years. In other words, an employer cannot prevent an employee to compete, or to be employed by his/her direct commercial competitors for a period exceeding two years.²⁵⁶ However, England and South African jurisprudence does not prescribe or set a maximum period of restraint of trade agreements. In these two jurisdictions, courts determine the reasonableness of restraint of trade period based on special facts of each case. Common

²⁵⁰ Angelo & Ellinger (note 11 above) 457.

²⁵¹ Angelo & Ellinger (note 11 above) 468.

²⁵² Angelo & Ellinger (note 11 above) 458.

²⁵³ Angelo & Ellinger (note 11 above) 467

²⁵⁴ As above.

²⁵⁵ Friedman (note 12 above) 19.

²⁵⁶ Handelsgesetzbuch [German Commercial Code] (note 137 above) Sec 74(a) (1).

to all the three selected jurisdictions is that courts find it difficult to enforce restraint of trade agreements with a period exceeding twelve months.

In terms of German jurisprudence, a restraint of trade agreement is null and void and therefore, unenforceable if it does not include monthly compensation during the subsistence of restraint of trade agreement. However, common to England and South African jurisdictions, there is no requirement of law demanding that for a restraint of trade agreement to be valid and enforceable an employer must pay a former employee for rendering that person idle during the restraint period. South Africa and England should consider to commerce putting an obligation to employers to compensate former employees during restraint of trade period

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study examined the relationship between restraint of trade agreements and garden leave in the context of South African labour law and critically analysed the controversial issues of the enforceability of restraint of trade agreements. The study addressed the following objectives: outlined the controversies and explained the confusion relating to the enforceability of restraint of trade agreements; explored common arguments advanced to justify the doctrine of restraint of trade; evaluated and assessed the relationship between restraint of trade agreements and garden leave; examined the issue of burden of proof in matters involving the enforceability of restraint of trade agreements; and assessed the constitutionality of restraint of trade agreements. This chapter commences by giving a brief overview of the research problem, aims and objectives. Secondly, the chapter gives a general conclusion of the study. Lastly, the chapter recommends legal and policy solutions to mitigate identified legal lacunae below.¹

5.2 A brief overview of the research problem, aims and objectives

Restraint of trade agreements have become common in most modern employment contracts. The enforceability of restraint of trade agreements has remained controversial, raising conflicting debates within the context of South African labour jurisprudence. South African Courts have used controversial approaches in dealing with the question of the enforceability of restraint of trade agreements.² In the light of the above, the researcher found it necessary to conduct an in-depth assessment and further critically analyse the enforceability of restraint of trade agreements under South African labour jurisprudence.

¹ See section 5.4 of this chapter.

² M Van Jaarsveld The Validity of a Restraint of Trade in an Employment Contract (2003) 15 *South African Mercantile Law Journal* 331.

As already indicated in Chapter One, the problem relating to the enforceability of restraint of trade agreements is aggravated by its relationship with garden leave.³ The enforceability of a combination of garden leave and restraint of trade agreements is 'problematic' and 'open to abuse'.⁴ The researcher *inter alia*, drew an inspiration to conduct in-depth study from South African Labour Court observation that the 'concept of garden leave and its relationship, if any, with a restraint of trade agreement has not been the subject of consideration by the South African Courts'.⁵ Given the novelty of the relationship between garden leave and restraint of trade, it was essential to further review and scrutinise the relationship.

As shown in the research problem in Chapter One of this study, there is a conflicting debate about the question of who bears the onus of proof in issues of a restraint of trade agreements in South Africa.⁶ This debate strikes at the heart of the constitutionality of restraint of trade agreements. The Appellant Division was presented with an opportunity to settle the issue of whether the current Constitution of South Africa reverses the onus of proof to the employer to prove reasonableness of the enforceability of restraint of trade agreements.⁷ The court did not answer the question directly but reasoned that it makes no difference whether the onus is reversed to the employer or not.⁸ However, there is a need for the courts to clearly settle the issue of onus of proof in restraint of trade agreements.

The study confirmed that there is a direct nexus between restraint of trade agreements and garden leave and that there is no agreement on the issue of who bears onus of proof between the employer and employee.⁹

³ Y Mupangavanhu The Relationship between Restraints of Trade and Garden Leave (2017) 20 *Potchefstroom Electronic Law Journal* 3.

⁴ Mupangavanhu, (note 3 above) 2.

⁵ *Vodacom (Pty) Ltd v Motsa and Another* (J 74/16) [2016] ZALCJHB 53 para 22.

⁶ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (2005) 3 SA 205 (N), 209G. See also *Magna alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 893A-B, 898C-D.

⁷ *Reddy v Siemens Telecommunications (Pty) Ltd* (251/06) [2006] ZASCA 135 para 13.

⁸ *Reddy v Siemens Telecommunications (Pty) Ltd* (note 7 above) para 14.

⁹ *Laser Junction (Pty) Ltd v Fick* (2017) 38 ILJ 2675 (KZD) (28 September 2017) para 31. See also K Calitz Restraint of Trade Agreements in Employment Contracts: Time for *Pacta Sunt Servanda* to Bow Out? (2011) 22 *Stellenbosch Law Review* 57; J. Neethling The Constitutional Impact on the Burden of Proof in Restraint of Trade Covenants – A Need for Exercising Restraint 2008 (20) *South African Mercantile Law Journal* 94.

In achieving the above aims, the study addressed the six objectives. The first objective was to outline the controversies and explain the confusion relating to the enforceability of restraint of trade agreements. The above objective was accomplished in the discussions laid out in Chapter Two, particularly in the question of who bears onus of proof between employer and employee in a restraint of trade dispute.¹⁰ Chapter Two also indicated that the issue of onus of proof remains controversial, which essentially merits further legal exploration to achieve legal certainty.¹¹ On this aspect, the South African position is controversial guidance may be sought from its English counterpart by imposing burden of proof to employers.

The second objective was to explore common arguments advanced to justify the doctrine of restraint of trade. This objective was addressed in chapter two of the study.¹² The rationale of restraint of trade agreements is not to prevent employees from taking advantage of the good employment opportunities upon leaving employment, but to protect legitimate commercial interest of employers.¹³ It has been reiterated that protectable commercial interests of an employer are not general knowledge, skills and experience gained by the employee during the employment relationship¹⁴ but rather trade connections, and trade secrets.¹⁵ On this aspect, the South African position is in line with its English and German counterparts.

The third objective was to evaluate and assess the relationship between restraint of trade agreements and garden leave. This was accomplished in Chapter Three of the study,¹⁶ by engaging the reasoning of the South African Labour Court in *Vodacom (Pty) Ltd v Motsa and Another*,¹⁷ in which the court dealt with the issue of the relationship between garden leave and restraint of trade. This case demonstrated that there is a direct

¹⁰ See chapter 2, section 2.7.

¹¹ As above.

¹² See chapter 2, section 2.3.

¹³ R McGuirk & A. Scott. Confidential Information: Lessons from a failed injunction (2017) 182 *Employment Law Journal* 13. See also *Automotive Tooling V Wilkens and Other* 7(2007) 2 SA 282 E-G.

¹⁴ J Grey Restraint of trade and confidentiality (2008) 2 *Enterprise Risk* 35.

¹⁵ *Aramex South Africa (Pty) Limited v Van Schalkwyk and Another* (C516/2017) [2017] ZALCCT 44 (4 October 2017) para 22.

¹⁶ See chapter 3.11.

¹⁷ (J 74/16) [2016] ZALCJHB 53 para 22.

relationship between restraint of trade agreements and garden leave.¹⁸ The chapter further demonstrated that the relationship between restraint of trade and garden leave can be fully understood by looking at the differences and similarities between the two. The main difference between restraint of trade agreements and garden leave lies on the time upon which each is enforceable.¹⁹ Restraint of trade agreements are enforceable after termination of the employment contract, whereas garden leave is enforceable months before termination of the employment contract.²⁰ An employee placed on garden leave is entitled to receive monthly remuneration.²¹ Conversely, in restraint of trade agreements it is a standard practice in South Africa that a former employer does not have an obligation to pay former employees during the subsistence of restraint of trade period.²² However, on the relationship between restraint of trade and garden leave, the South African position is in line with its English and German counterparts.

Both the garden leave and the restraint of trade agreements seek to protect the employer's trade secrets and trade connections by someone who is not, in reality, working for a particular employer.²³ The garden leave's objective is to make employees forget the legitimate confidential information he/she acquired during the course of employment.²⁴ Like restraint of trade agreements, garden leave is also intended to make employees lose touch with the employer's trade connections.²⁵ Therefore, the same criteria used to enforce a restraint of trade agreement is equally used to enforce garden leave.²⁶ In cases where employers seek the enforceability of garden leave, courts determine whether such a clause is necessary and reasonable to protect the legitimate commercial interests of the employer.²⁷ The costs accompanying garden leave are mainly the reason why

¹⁸ Mupangavanhu, (note 3 above) 3.

¹⁹ As above.

²⁰ Mupangavanhu (note 3 above) 11, 12.

²¹ Mupangavanhu (note 3 above) 6.

²² L Frahm-Arp, Multi-Country Survey on Covenants Not to Compete, (2018) *Greenberg Traurig and Association of Corporate Counsel* 94.

²³ C.A Sullivan Tending the Garden: Restricting Competition via "Garden Leave" (2016) 37 *Berkeley Journal of Employment & Labour Law* 319.

²⁴ Mupangavanhu (note 2 above) 12. See also *Vodacom (Pty) Ltd v Motsa and Another* (note 5 above) paras 22, 39.

²⁵ Sullivan (note 23 above) 296. See also Mupangavanhu (note 3 above) 6.

²⁶ Mupangavanhu (note 3 above) 12.

²⁷ Sullivan (note 23 above) 324.

employers may not include it in the employment contracts. Instead, they rely on the unpaid post-employment restraint of trade agreements to achieve the same goal.²⁸

The fourth objective was to examine the issue of the burden of proof in matters involving the enforceability of restraint of trade agreement.²⁹ The contemporary South African legal position is that the onus of proof falls on an employee who is avoiding the enforceability of restraint of trade agreement.³⁰ This objective was achieved in chapter two of the study. On the issue of the onus of proof, the South African position is controversial, others argue that the employer who seeks to enforce a restraint of trade agreement must bear onus of proving the reasonableness of limiting the constitutional right to freedom of trade that the employee is entitled to.³¹ Chapter Four *inter alia*, compared South African law and English law. The comparative study indicated that South African Courts may find guidance from its English counterpart by imposing burden of proof to employers.

The fifth objective was to assess the constitutionality of restraint of trade agreements. The study tested the Common law doctrine of restraint of trade against the Constitution to establish if such is in line with the supreme law of the Republic of South Africa. It was established that restraint of trade agreements are justifiable mechanisms to protect the legitimate interests of the employer, provided that such agreements are reasonable and not against public interest.³² The Constitution of South Africa confers protection to employees against unemployment (section 22) and unfair labour practice (section 23).³³ The constitutional right to freedom of trade can be limited in terms of the 'law of general application only to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity and freedom'.³⁴ It was submitted that where an employer seeks to prevent or limit an employee's constitutional right to

²⁸ Sullivan (note 23 above) 296.

²⁹ See chapter 2.7.

³⁰ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 6 above) 893A, 898C-D. See also *Dickinson Holdings v Du Plessis* 2007(1) All SA 583; *Basson v Chilwan* 1993 3 SA 742 (A).

³¹ *Fidelity Guard Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 2 SA 853 (SE) 862F-H; *Lifeguards Africa v Raubenheimer* 2006 5 SA 364 (D&CLD); *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 6 above); M.A. Du Plessis *Stare Decisis; Is the Onus in Restraints of Trade Hanging on a Thread* (2006) 2 *Tydskrif Vir die Suid Afrikaans Reg* 425.

³² Calitz (note 9 above) 50. See also *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 6 above) 875 H-I.

³³ *Laser Junction (Pty) Ltd v Fick* (note 9 above) para 28.

³⁴ Constitution of the Republic of South Africa 1996, Sec 36.

freedom of trade, the employer must then be vested with onus to prove that such infringement constitutes a legitimate, reasonable and justifiable limitation of the right.³⁵

In *Magna Alloys and Research (SA) Pty Ltd v Ellis*,³⁶ the Appellant Division held that the onus of proof falls on an employee who is avoiding the enforceability of restraint of trade agreement.³⁷ Judgements of the South African Appellant Division guide all lower courts on the issue of the burden of proof in restraint of trade matters.³⁸ This case was decided before the advent of the democratic Constitution of the Republic of South Africa. So far, the South African Constitutional Court has never had an opportunity to deal with this matter. Diligent care must be exercised whenever constitutional rights of an individual are limited. It is further argued that constitutional rights should only be limited when it is exceptionally necessary to do so. The Constitution therefore shifted the burden of proof to employers.³⁹

The last objective of the study was to recommend legal and policy solutions to mitigate identified legal lacunae. And this has been accomplished below.⁴⁰

In achieving the above objectives, the study answered one key research question, namely: Is the simultaneous enforceability of periods of a restraint of trade agreement and garden leave reasonable? This question was answered in chapter three and four.

Regarding research methodology, the study adopted a qualitative research method which is concerned with exploratory research, in which in-depth inquiry was conducted through observation and interpretation of texts.⁴¹ The researcher employed case law, statutes, journal articles and text books in order to gain an in-depth understanding of the study

³⁵ Constitution of the Republic of South Africa 1996, Sec 36.

³⁶ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 6 above).

³⁷ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 6 above) 893A, 898C-D. See also *Dickinson Holdings v Du Plessis* (note 30 above); *Basson v Chilwan* (note 30 above).

³⁸ Calitz (note 9 above) 57.

³⁹ Constitution of the Republic of South Africa 1996 sec 36.

⁴⁰ See Section 5.4 of this Chapter.

⁴¹ C Satnam Doing Ethnographic Research: Lessons from a Case Study in M McConville & WH Chui *Research Methods for Law* (2007) 84.

problem.⁴² Comparative law was also used, and the position obtaining in South African was compared to England and Germany. This study developed a clear understanding of the problem relating to the simultaneous enforceability of restraint of trade agreements and garden leave. Subsequently, recommendations on how the issue may be addressed were made.⁴³ The selected research methodology was therefore appropriate for the study.

5.3 Overall Conclusion

The study confirms that there is a direct relationship between restraint of trade agreements and garden leave.⁴⁴ Garden leave and restraint of trade agreements are enforced against a person who gained an employer's legitimate commercial interests during employment such as trade secrets and trade connections. The purpose of garden leave is the same as that of restraint of trade agreements which is to protect the employer's trade secrets and trade connections from someone who is not, in reality, working for the employer.⁴⁵ On the question of simultaneous enforceability of restraint of trade and garden leave, South African Courts consider the period of garden leave that an employee has already served in determining the reasonableness of enforcing the full period of a restraint of trade agreement.⁴⁶ On this aspect, the South African position is in line with its English and German counterparts. This is fair as it discourages employers from abusing employees by concurrently enforcing garden leave and long restraint of trade period.

The study also discussed the question of who bears the onus of proof in issues of a restraint of trade agreements in South Africa.⁴⁷ There is a compelling need for the courts to unequivocally settle the issue of onus of proof in restraint of trade agreements. In 1984,

⁴² Atlas.ti Data Analysis Comparison of Qualitative and Quantitative Research. <http://atlasti.com/quantitative-vs-qualitative-research/> (accessed on 08 June 2017). J Frecknall-Hughes Research methods in taxation history. (2016) 3 *Review Methods in Taxation History* 5.

⁴³ See section 5.4 of this chapter.

⁴⁴ Mupangavanhu (note 3 above) 3.

⁴⁵ Sullivan (note 23 above) 319.

⁴⁶ *Vodacom (Pty) Ltd v Motsa and Another* (note 5 above) para 25. See also B Patterson & A Johnson "Gardening leave" and the enforceability of restraints of trade. <https://www.golegal.co.za/gardening-leave-and-the-enforceability-of-restraints-of-trade/> (accessed 23 May 2018).

⁴⁷ *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* (note 6 above) 209G. See also *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 6 above) 893A-B, 898C-D,

the South African Appellant Division held that employees bear the burden of proof to prove that restraint of trade agreement is not reasonable and against public interest.⁴⁸ However, it is unconstitutional to impose the burden of proof on employees to prove the unreasonableness and unjustifiable limitation of his/her constitutional right to freedom of trade. It was submitted that in a case where an employer seeks to prevent or limit the employee's constitutional right to freedom of trade, the employer must then be vested with the onus to prove that such an infringement constitutes a legitimate and justifiable limitation of the right.⁴⁹ There is a need for certainty of onus of proof regarding restraint of trade agreements.⁵⁰ The South African position on the burden of proof is controversial and guidance may be sought from its English counterpart by imposing onus of proof on employer. The study submits that a constitutional right should only be limited when it is exceptionally necessary to do so. The constitution indisputably shifted the burden of proof to employers.

The study established that the drafters of restraint of trade agreements generally draw agreements that involve an area or period of restriction that is too wide.⁵¹ There is no equal bargaining power between employers and employees.⁵² Employees are in a weaker bargaining position. As such, South African jurisprudence should be developed to fully protect employees. On this aspect, the South African position is not in line with its English and German counterparts. Thus, South Africa should commence to accept the realities of unequal bargaining power between employers and employees.

Chapter Four provided lessons that South Africa may learn from selected foreign jurisdictions such as England and Germany. The first lesson that South Africa may learn is to develop the law by imposing burden of proof on employers and not employees. The second lesson from the English jurisprudence is that South Africa should conform to the realities of unequal bargaining power between employers and employees.⁵³ Employees

⁴⁸ *Magna Alloys and Research (SA) Pty Ltd v Ellis* (note 6 above) 893A-B, 898C-D.

⁴⁹ Constitution of the Republic of South Africa 1996 (note 39 above) sec 36.

⁵⁰ Calitz (note 9 above) 57. See also Neethling (note 9 above) 94.

⁵¹ *Den Braven S.A. (Pty) Limited v Pillay and Another* (note 39 above) para 36.

⁵² See chapter 2, section 2.8.

⁵³ A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, (1992) 14 *Loyola of Los Angeles International and Comparative Law* 458.

are in weaker bargaining positions since they are economically dependent on employers for employment.⁵⁴ This weakens employee's ability to negotiate or to dictate terms and conditions of an agreement.⁵⁵ It is undisputed that employees are often in a take-it-or-leave-it situation because they are usually desperate for employment.⁵⁶

There are two lessons that South Africa may learn from Germany. The first one is that an employer must pay an employee 50% of his/her monthly remuneration during the period of restriction. In Germany, a restraint of trade agreement is invalid and therefore, unenforceable if an employer would not pay a former employee monthly during restraint of trade period.⁵⁷ Unpaid restraint of trade agreement is unreasonable for employees. For example, one cannot prevent a former employee to work for months or years without being considerate of how the person under restraint of trade period will survive and maintain his/her family. The second lesson that South Africa may learn from German jurisprudence is to set the maximum prescribed period of two years that a former employee may be restrained from competing after the termination of employment.⁵⁸ In Germany, a restraint of trade agreement is characterised as unreasonable and unenforceable if it seeks to prevent an employee from competing or taking employment opportunities with the employer's competitor for a period exceeding two years.⁵⁹

5.4 Recommendations

In the light of the above findings, the study proposes the following recommendations:

5.4.1 *Shifting the burden of proof to employers*

As already outlined, the current position is that employees bear the burden of proof on a preponderance of evidence that the restraint of trade agreement is unreasonable and therefore, unenforceable.⁶⁰ In terms of the South African Constitution, it is not correct to

⁵⁴ Angelo & Ellinger (note 53 above) 457.

⁵⁵ As above.

⁵⁶ Angelo & Ellinger (note 53 above) 468.

⁵⁷ *Handelsgesetzbuch* of 1897 (HGB) English translated by: M Pelzer/EA Voigt "German Commercial Code" (2003) Sec 74(1).

⁵⁸ *Handelsgesetzbuch* [German Commercial Code] (note 57 above) Sec 74(a) 1.

⁵⁹ *Handelsgesetzbuch* [German Commercial Code] (note 57 above) Sec 74(a) 1.

⁶⁰ *Magna alloys and Research (SA) (Pty) Ltd v Ellis* (note 6 above) 893A, 898C-D. See also *Dickinson Holdings v Du Plessis* (note 30 above); *Basson v Chilwan* (note 30 above).

impose the burden of proof on employees.⁶¹ The study proposes that South African jurisprudence should reverse the onus of proof to employers who seek to enforce a restraint of trade agreement. Freedom of trade is a constitutional right,⁶² and it should be limited in terms of Section 36 of the Constitution of South Africa.⁶³ Having regard of the above, the Constitution of South Africa burdens employers with the onus of proof to prove that the restraint of trade agreement is reasonable and enforceable as it is a reasonable limitation of the employee's constitutional right to freedom of trade.⁶⁴ In other words, the employer must prove the existence of a restraint of trade agreement, alleged breach, reasonableness of an agreement, and that the restraint goes no further than is reasonably necessary to protect the commercial interests. The Common Law requires development in terms of sections 8(3) and 39(2) of the Constitution.⁶⁵

In case where the employer seeks to concurrently enforce restraint of trade and garden leave, he/she must incur the onus of proof to prove that the simultaneous enforcement of both periods is reasonable and necessary to protect the legitimate commercial interests. Furthermore, an employer must prove that a period of garden leave did not or cannot fully protect his/her business confidential information which justify subsequent enforcement of the restraint of trade period.

5.4.2 Imposition of an obligation on Employer's to pay former employees for rendering them jobless

There is no requirement in South Africa that former employers should financially compensate former employees for rendering them jobless during a restraint of trade period. In the light of the above, South African jurisprudence does not take into consideration the economic suffering that former employees incur during the subsistence of a restraint of trade period. Unpaid restraint of trade doctrine makes some employers to abuse employees in order to gain an advantage of avoiding competition.⁶⁶ This study

⁶¹ Constitution of the Republic of South Africa 1996 (note 39 above) Sec 22 and 36.

⁶² Constitution of the Republic of South Africa 1996 (note 39 above) Sec 22.

⁶³ Constitution of the Republic of South Africa 1996 (note 39 above).

⁶⁴ As above.

⁶⁵ As above.

⁶⁶ Kemp (note 9 above) 257.

proposes that employers must compensate former employees during the restraint of trade period. The obligation of financial compensation must make employers pay former employees a monthly compensation of at least 50% of the remuneration that they were receiving prior to the termination of employment agreement. For example, a former employee who was earning R30 000 before the termination of employment must at least receive a monthly compensation of R15 000 until the period of restriction elapses. However, through a restraint of trade agreement, an employer and employee may agree on a higher percentage of restraint of trade compensation.

A former employee who is bound by a restraint of trade agreement may work elsewhere provided that is not in breach of the restraint agreement. Moreover, one should bear in mind that the proposed restraint of trade compensation is intended to make an employee not to starve during the subsistence of a period of restriction. Having regard of the above, if a former employee is receiving remuneration from the new employer but not in violation of a restraint of trade agreement, then the former employer must deduct earnings from the restraint of trade compensation due to such former employee. For example, a former employer who is required to pay a former employee R15 000, if the latter is currently working elsewhere not in violation of restraint of trade agreement, earning R5000. In this case, a former employer must deduct R5 000 from R15 000. A former employee should have an obligation to disclose to the former employer that he/she she is working but not in violation of a restraint of trade agreement and disclose monthly amount of his/her earnings.

As already shown, unpaid restraint of trade doctrine tempts employers to abuse these agreements to avoid fair competition and punish departing employees without a clear legitimate commercial interest to be protected.⁶⁷ The reason of the above is that unlike garden leave, employees have nothing to lose in subjecting former employees to a restraint of trade. The cost of placing a former employee on a restraint of trade will make former employers not to lightly propose entering into restraint of trade agreements unless there is a serious commercial interest worthy of legal protection. It is unreasonable and

⁶⁷ Kemp (note 9 above) 257.

inhuman to restrain a person from working or opening an enterprise without considering how that person will survive during the period of restriction. Unpaid restraint of trade agreements bring suffering to former employees and their families since they would not afford to pay bills, children's school fees and buy food. In the light of the above, unpaid restraint of trade agreement must be invalid and unenforceable.

5.3.3 Setting a maximum period that an employee can be prevented to compete or be employed by employer's competitors

It was observed that some employers misuse the doctrine of restraint of trade as a mechanism to discourage employees from fair competition.⁶⁸ This is because some restriction periods are longer than necessary to protect the legitimate commercial interest of the employer and make the employee economically inactive for a period which is inordinately long.⁶⁹ There is no requirement in South Africa setting the maximum duration that an employee can be kept out of the employment market or from competing with former employer's commercial rivals. As such, an employer may be inclined to propose a restraint of trade agreement of a period exceeding 30 months. Considering the high rate of unemployment where 6.1 million people are jobless,⁷⁰ a desperate job-seeker in a weak bargaining position may sign an agreement restricting him to work after termination of employment contract for a period exceeding two years. The high rate of unemployment in South Africa is a major factor which compromises employees bargaining position to negotiate or dictate terms of restraint of trade agreements.⁷¹ A hungry job-seeker presented with an opportunity of employment provided he/she sign a restraint of trade agreement of a period of 30 months may sign such agreement in order to immediately relieve himself from suffering as a jobless person. This is because employees do not suffer the effects of restraint of trade immediately after signing an agreement or during the subsistence of an employment relationship, but immediately after the termination of employment agreement.

⁶⁸ *Montego Pet Nutrition (Pty) Ltd v Bouwer and Another* (16575/15) [2016] ZAGPPHC 791, para 25.

⁶⁹ L Kohn. Restraint of Trade Agreements (2008) 1 *without Prejudice* 6.

⁷⁰ 'SA unemployment rate rises to 27.2% in Q2' Eyewitness News 31 July 2018 available at <https://ewn.co.za/2018/07/31/sa-unemployment-rate-rises-to-27-2-in-q2> (accessed 29 August 2018).

⁷¹ As above.

Employers make job-seekers to sign very broad restraint of trade agreements in order to avoid competition.⁷² Employees mostly comply without contesting the validity of restraint of trade agreements.⁷³ Furthermore, employers know that the majority of employees are not in a good financial position for a legal representation to challenge the legitimacy of post-employment restraint due to expensive legal costs.⁷⁴ In the light of the above, South African jurisprudence should consider setting a maximum period of 24 months (two years) that a person may be prevented from competing or work for his/her employer's commercial competitors.

There is also no requirement of the law in South Africa setting the maximum duration that an employee may be placed on garden leave. The study proposes that South African jurisprudence must make it a requirement that a garden leave period should not exceed a maximum period of six (6) months. In case of the concurrent enforcement of garden leave and restraint of trade, then both periods added together must not exceed 24 months.

⁷² Kemp (note 9 above) 257.

⁷³ Kemp (note 9 above) 258.

⁷⁴ *Mason v Provident Clothing and Supply Co Ltd* 1913 AC 724 734

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