
WHO SHOULD BEAR THE ONUS IN RESTRAINT OF TRADE DISPUTES?

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

1 Introduction

Canoa Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth (2004 1 BCLR 39 (N), hereafter “the Canon case”) was reported only in 2004 although the judgment had already been handed down on 27 March 2000. The matter before the court concerned the issue of restraint of trade provisions in the light of a constitutionally protected right to freedom of trade as provided for in section 22 of the Constitution of the Republic of South Africa (Act 108 of 1996, hereafter “the Constitution”). Of particular interest is the decision of the court as to who bears the burden of proof in a restraint of trade dispute. It is this aspect that forms the focus of this note.

2 Background

The leading case on matters of restraint of trade in the decade leading up to 1994 was *Magna Alloys and Research (Pty) Ltd v Ellis* (1984 4 SA 874 (A)). In this matter the Appellate Division set out the principles that determine how restraint of trade disputes must be approached. Rabie CJ (897F-898D) summarised the most salient points of the decision. Some of the points most relevant for the purposes of this note are:

- 1 There is no provision in the South African common law that determines that a restraint of trade agreement is invalid and unenforceable.
- 2 It is a principle of the South African common law that agreements that are contrary to the public interest are unenforceable. As a consequence a restraint of trade agreement will be contrary to the public interest and therefore unenforceable if a court finds the particular circumstances of the case to be such that enforcing the agreement would prejudice the public interest.
- 3 It is in the public interest that agreements entered into voluntarily should be complied with. It is also, generally speaking, in the public interest that a person should be allowed, as far as is possible, to freely partake in the commercial and professional world. It may, therefore, be accepted

that an unreasonable limitation of the freedom to trade would probably harm the public interest if that person were held to the restraint.

- 4 The question whether a restraint of trade is enforceable in South African law has to be answered in the light of the question of whether enforcing it will harm the public interest.
- 5 The person who wishes to escape the restraint of trade provision bears the onus to prove that enforcing the restraint will harm the public interest.

The courts, under the common law then, in considering whether or not to enforce a restraint of trade or not had to have regard to two fundamental principles of public policy, namely that

- (a) parties should be held to agreements entered into freely, and
- (b) parties as far as is possible should be allowed to participate freely in the world of commerce or in their profession (893H-894B).

Generally speaking, the courts have applied the principles enunciated in *Magna Alloys and Research (Pty) Ltd v Ellis (supra)* in respect of restraint of trade disputes decided subsequent to the coming into effect of the final Constitution (see, eg, Mukheibir “A Lone Voice in the Desert? *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 2 SA 853 (SE)” 2002 *Obiter* 207 212; and Devenish *A Commentary on the South African Bill of Rights* 1ed (1999) 304).

3 Canon case

3 1 Facts

The applicant in this matter carried on business throughout Kwazulu-Natal as a distributor, supplier and maintainer of office automation equipment, which included amongst others, photocopiers, fax machines, computers and printers. The applicant employed the respondent during 1998 as a branch manager. During 1999 the respondent resigned as branch manager and was then employed by the applicant as a sales representative. Subsequent to this change the parties concluded a new agreement containing the disputed restraint provisions (40C-F).

Clause 20 of the contract contained the restraint provisions. The restraint provisions provided, *inter alia*, that for a period of three years after the termination of his contract of employment the respondent could not be involved in any way in any firm, business or undertaking that carried on business in competition with the applicant (41B-D).

During August 1999 the respondent resigned from the employ of the applicant and in November of that year took up employment with a

competitor of the applicant. The applicant then sought to enforce the restraint provisions of the contract. The respondent disputed the enforceability of the restraint (41F).

3.2 *Decision and reasoning*

On the facts the restraint was held to be invalid. Kondile J found that in the circumstances of the particular matter the respondent had proved on a balance of probabilities that the applicant's interest was eclipsed by the respondent's interest not to be restrained (see in this regard *Basson v Chilwan* 1993 3 SA 742 (A) 767G-H). It therefore would have been unreasonable, unjust and against the public interest to enforce the restraint and in so doing prevent the respondent from earning a living. The court found this to be the case on the facts even on the assumption that the applicant did establish an interest deserving of protection and also assuming that the onus was on the respondent to establish the unenforceability of the restraint (46B-C).

Despite the above finding the court specifically raised for decision the issue of where the burden of proof lies (41G). The court referred to *Magna Alloys and Research (Pty) Ltd (supra)* and *Basson v Chilwan (supra)* and reaffirmed that the position under the common law was that the onus rested on the party wishing not to have the restraint of trade provision enforced (41G-42A). The court then dealt with the question of whether the common law position had been changed as a result of the introduction of section 22 of the Constitution. Section 22 reads as follows:

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

Referring to section 39(2) of the Constitution and the duty of every court, tribunal and forum to promote the spirit, purport and objects of the Bill of Rights when developing, amongst others, the common law, the court *in casu* summarily concluded as follows (42D-E):

“The restraint of trade clause in the contract constitutes a limitation on first respondent's fundamental right to freedom of trade, occupation and profession. It is inconsistent with the constitution to impose the onus to prove a constitutional protection on the first respondent. Accordingly applicant, which seeks to restrict first respondent's fundamental right, has the duty of establishing that first respondent has forfeited his right to constitutional protection.”

The court accordingly found that the covenantee (*ie* the party wishing to uphold the restraint and *in casu* the applicant) bears the onus to prove:

- the existence of the agreement of restraint (contract);
- a breach of the agreement; and
- in view of the finding that a restraint of trade provision limits a fundamental right, then in terms of section 36(1) of the Constitution the

covenantee must also show that the restraint (limitation of the fundamental right) is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (42E).

The court *in casu* rejected the traditional common law position regarding the onus as enunciated in *Magna Alloys and Research (Pty) Ltd v Ellis* (*supra*). The finding of the court that the common law rule burdening the party seeking to escape the restraint provision was in conflict with a constitutional provision, allowed the court to amend the (unconstitutional) rule of common law and reformulate it in the light of the provisions of the Constitution (see, *eg*, in this regard *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) 39B-C).

4 Support for the approach in *Canon*

The view that the onus in restraint of trade disputes should be on the party wishing to uphold the restraint has received notable support.

In *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* (2001 2 SA 583 (SE) also reported as [1997] 4 All SA 650 (SE)), Liebenberg J, with regards to the onus in restraint of trade disputes, stated *obiter*:

“It seems that the position in terms of the Constitution may now be that the onus will be on the party wishing to enforce it to show that it complies with the provisions of the Constitution.”

Mukheibir (2002 *Obiter* 216) in discussing the *obiter dictum* in *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* (*supra*) expressed support for reverting the onus in restraint disputes to the party wishing to uphold the restraint.

Pretorius (“Covenants in Restraint of Trade: An Evaluation of the Positive Law” 1997 *THRHR* 6 24) in considering the influence of the interim and final Constitutions on restraint of trade provisions, stated:

“There is, however, one area where it is submitted that both the interim and the final Constitution should have an influence, and that is the question of onus. Since the right to free economic activity is regarded as a fundamental right, the onus should revert to the covenantee as was the case before *Magna Alloys*. It should be up to the covenantee to indicate why the infringement of a fundamental right is reasonable in the circumstances.”

Tladi (“Breathing Constitutional Values into the Law of Contract: Freedom of Contract and the Constitution” 2002 *De Jure* 306 314) submits that the consequences of developing the common law in respect of restraint of trade provisions in the light of section 22 of the Constitution should be a return to the pre-*Magna Alloys* position (meaning that the onus will be on the party wanting to enforce the restraint).

Kondile J is therefore not alone in placing the onus on the party wanting to enforce the restraint.

In reaching its conclusion about the onus the court *in casu* accepted that an agreement between two parties to limit the ability of one to trade in a specified manner constitutes a limitation of that party's fundamental right to trade as specifically provided for in section 22 of the Constitution. Therefore the party wanting to uphold the limitation must prove such limitation to be a reasonable and justifiable one in an open and democratic society based on human dignity, equality and freedom (see also Devenish 304). This is of course the correct approach, provided that the point of departure is correct, namely that a restraint of trade agreement constitutes a limitation of the fundamental right to trade. It is this aspect that warrants some attention.

5 Discussion

5.1 Public policy

Under the common law the question of whether or not to enforce a restraint of trade agreement had to be answered with reference to public policy, particularly the principles of freedom of trade and freedom of contract. Public policy has been called a number of names. For example, in *Sasfin (Pty) Ltd v Beukes* (1989 1 SA 1 (AD) 71) public policy has been described as an "expression of 'vague import'". This mistrust of the concept has resulted in there being no substantial engaging with the concept in order to develop guidelines for the courts in an effort to infuse public policy with a concrete, usable meaning (Hawthorne 1995 "The Principle of Equality in the Law of Contract" *THRHR* 58 173). The two highest courts of the land may now well have changed this situation. In *Carmichele v Minister of Safety and Security* (2001 10 BCLR 995 (CC) 1014D) the Constitutional Court stated:

"Under section 39(2) of the Constitution concepts such as 'policy decisions and value judgements' reflecting 'the wishes ... and the perceptions ... of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution."

The Supreme Court of Appeal followed this lead of the Constitutional Court and Cameron JA in *Brisley v Drotsky* (2002 4 SA 1 (SCA) 1 34G-35A) stated that:

"In its modern guise 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism."

The full bench of the Supreme Court of Appeal approved this dictum in *Afrox Healthcare Bpk v Strydom* (*supra* 37D-E).

For all intents and purposes the matrix of values that underlies the Constitution now constitutes the public policy of South Africa. The touchstone to test for the validity of a restraint of trade provision is therefore understood to be public policy as expressed by the fundamental constitutional values and in particular those that underlie the right to trade.

Section 39(1) of the Constitution provides, *inter alia*, that when interpreting a fundamental right, the court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(2) of the Constitution obliges all courts when developing the common law to promote the spirit, purport and objects of the Bill of Rights. From this it follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the court is under an obligation to remove that deviation (see *Carmichele v Minister of Safety and Security supra* 1006B).

The Constitution, however, does not provide a definitive set of values (Roederer “Post-Matrix Legal Reasoning: Horizontality and the Role of Values in South African Law” 2003 *SAJHR* 57 80). What is important is that every rule is contingent upon the values that support it (Roederer 2003 *SAJHR* 80). In order therefore to understand the right to trade it is necessary to understand the values underlying it and their interrelationship. Only then can one determine whether a restraint of trade constitutes a limitation of the right or not.

5.2 *The right to trade and its underlying values*

The right to trade provided for in section 22 of the Constitution is also contingent upon a number of values. As already indicated, *Magna Alloys and Research (Pty) Ltd v Ellis (supra)* made it clear that the two values – or principles of public policy – of freedom of contract and freedom of trade are at the heart of the inquiry into the validity or otherwise of a restraint of trade provision. In *Afrox Healthcare (Pty) Ltd v Strydom (supra* 38C) the Supreme Court of Appeal gave clear recognition to freedom of contract as a constitutional value:

“Die grondwetlike waarde van kontraktersvryheid omvat, op sy beurt, weer die beginsel wat in die stelreël *pacta sunt servanda* uitdrukking vind.”

Other values also play a role. The value of dignity plays an informative role in giving meaning to section 22 (De Waal, Currie and Erasmus *The Bill of Rights Handbook* 1ed (2001) 383). Dignity is an attribute of life itself and is an acknowledgement of the intrinsic worth of human beings and that human beings are entitled to be treated as worthy of respect and concern. The concept of dignity encompasses aspects such as self-identification, self-fulfilment and self-realisation. Dignity also recognizes that human beings are capable of acting rationally and making choices. This understanding of dignity has clear implications for freedom of contract, as freedom of contract

(and its concomitant principle of *pacta sunt servanda*) gives recognition to and informs the constitutional value of dignity. Therefore, a significant relationship exists between freedom of contract and dignity.

In *Brisley v Drotzky* (*supra* 35E-F) Cameron JA stated that:

“[T]he Constitution’s values of dignity and equality and freedom require that the courts approach their task of striking down contracts or deciding to enforce them with perceptive restraint. One of the reasons ... is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.”

In interpreting the fundamental right contained in section 22 then, the values of *inter alia*, freedom of trade, freedom of contract, dignity and equality (as will be indicated below) are to be promoted.

The question now arises whether, in interpreting section 22 in the context of a restraint of trade dispute, the values of freedom of contract and freedom of trade are in conflict and, therefore, necessitates a choice between the two values? It is submitted that such a choice is not required and that in fact these two values are to be seen as mutually supportive rather than exclusive. If these values are to be promoted, as is provided for in section 39(1)(a) of the Constitution, then surely the idea must be to try and find a synergetic balance between them rather than just to use the one at the expense of the other.

The right to freedom of trade should therefore be understood as something that is informed by the value of freedom of contract, amongst others. The right to trade essentially means nothing more than the right to conclude contracts and that right *includes* the right to limit your ability to contract freely. The right to trade therefore must promote the constitutional value of freedom of contract, amongst others. Not to do so will nullify the right to trade itself. If contracts are not upheld trade itself will be impossible and the right to trade therefore rendered meaningless.

An exercise of the right does not constitute a limitation of the right, provided the constitutional values underlying the right are promoted. If the right (to trade) is exercised and in that exercise the values underlying the right are promoted then the exercise is *prima facie* valid.

Kerr (*The Principles of the Law of Contract* 6ed (2002) 208) states that a restraint of trade provision does restrain trade but is not by virtue of that fact alone inconsistent with section 22. This statement is understood to mean that as long as the exercise of the right to trade (which includes the right to restrain trading) is exercised in a manner that promotes the underlying constitutional values then such an exercise, even if it restrains trading, is a *prima facie* valid exercise of the right. It is only when the exercise of the right (including the right to enter into restraints of trade) has the effect of

undermining one or more underlying constitutional values, that the exercise of the right is inconsistent with section 22.

5.3 *Onus of proof*

By holding restraint of trade provisions *prima facie* constitutional, effect is given to the values of the Constitution, including freedom, dignity and equality, or stated differently, such an approach gives effect to the requirements of public policy. A party seeking to escape the operation of a restraint of trade provision must then bear the onus to prove that the particular provision undermines a constitutional value to such an extent that it outweighs the importance of the constitutional values served by giving effect to the restraint provision. In such a case the value that is undermined does not constitute a limitation of the right exercised, but the attempted exercise of the right is unconstitutional and therefore invalid.

A restraint of trade provision (or any term of contract for that matter) may be held to be unenforceable for offending a constitutional value. The value of freedom of contract will be undermined if the agreement freely entered into between the parties is not adhered to and not enforced by law. Not upholding the contract may also constitute an undermining of the value of dignity. The value of freedom of trade may be undermined if a person's right to trade is restricted without the other party having an interest that is worthy of protection ("beskermingswaardige belang"). The inequality of the bargaining positions between the respective parties may be a factor, seen in the context of the particular matter, that may indicate that the value of equality has been offended and therefore the particular provision will be unenforceable; or the terms of the restraint provision can be of such a nature as to undermine the value of dignity in that the restrained party's entitlement to self-realisation, self-fulfilment and self-identification is denied. As soon therefore as there is an attempt to exercise a right in a manner that undermines one or more of the constitutional values such exercise is invalid and does not constitute a limitation of the right to trade.

The right to trade will most often be limited via legislation, of which there are numerous examples. In such a case the person wanting to enforce the limitation will bear the onus to prove that the limitation is reasonable and justifiable in an open and democratic society. It is the mechanism imposed that will constitute the limitation (eg, legislation setting requirements for trading in certain commodities). The exercise of a right within the parameters of the constitutional values cannot constitute a limitation of that right.

6 Conclusion

The court in *Canon* found that the effect of section 22 of the Constitution was to shift the onus to the party wishing to uphold the restraint because a

restraint of trade constitutes a limitation of the right to trade. This approach, it is submitted, is incorrect. To enter into a restraint of trade agreement and thereby to decide to restrict one's ability to trade or contract in specified circumstances in return for something is an exercise of the right to trade in itself (and not a limitation thereof) and gives effect to the equality, the dignity and the freedom of the parties. It is the enforcement of contracts that ensures that there is a right to trade that is worth having. Restraint of trade agreements should therefore be regarded as *prima facie* valid and will be valid as long as the values of the Constitution are thereby promoted. The moment this no longer happens, the validity of the exercise of the right ceases. The onus to show that the line of constitutionality has been crossed must rest with the party making such averment.

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