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Restrictive Covenants in Employment Contracts: A Comparison between the Legal Positions in India and South Africa

Avinash Govindjee

Sairam Bhat

Restrictive Covenants in Employment Contracts: A Comparison between the Legal Positions in India and South Africa

Dr. Avinash Govindjee* and Dr. Sairam Bhat**

It is now a matter of routine to include restrictive covenants in employment contracts. Such clauses circumscribe the permissible range of actions of the employee to protect the business concerns of the employer. This article compares the judicial approach towards restrictive covenants in India and South Africa. Through such a comparison, the authors attempt to highlight why it is significant to balance the constitutional imperative of freedom of trade and profession with the sanctity of contract, without privileging one over the other. In light of India and South Africa's shared social experiences and current levels of economic growth, the article concludes with suitable changes which should be adopted by the respective judiciaries, combining the existing strengths of each system with lessons learnt from the other.

* Visiting Research Scholar, National Law School of India University, Bangalore; Senior Lecturer, Faculty of Law, Nelson Mandela Metropolitan University, Port Elizabeth, South Africa. The author acknowledges the financial support of the National Research Foundation of South Africa.

** Assistant Professor of Law, National Law School of India University, Bangalore.

I. Introduction

Employers always want to retain efficient employees. This desire is more pronounced in competitive industries where key employees are not only valuable to their employer, but are also a potential threat to the business if they leave their employment and begin working for a rival. In an age of greater employee mobility, the increased ability of employees to take trade secrets and other confidential information with them when they depart, has further fuelled these concerns.

In this atmosphere, employers are taking increased steps to protect themselves against the prospect of opportunistic employees absconding with the customers of the business and proprietary information. This is most often done by way of incorporating restrictive covenants within the contract of employment. Despite the popularity of this device with employers, very little research has been conducted regarding the appropriateness of the current legal approach being followed in India.[1]

Restrictive covenants, insofar as they restrict the future conduct of employees, raise a number of issues regarding the freedom of contract and the right to work. Such a right has constitutional shades, and in so far as it is based on the freedom of contract, it can also be traced to common law. Ultimately the question is one of balance – does the freedom of contract include the freedom to bind oneself to future restrictions, or can certain substantive limitations be imposed to protect this freedom itself?

This note seeks to examine this issue from a comparative perspective and instigate debate by comparing the legal position governing restrictive covenants in employment contracts in India and South Africa.

II. Reasons for Comparing India with South Africa

One may at first glance question the merit in comparing the legal position governing restrictive contractual clauses in India and South Africa. After all, India's common law is exclusively based on English Law while South Africa's common law is Roman-Dutch based.[2] In addition, India has the benefit of the Indian Contract Act,

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[1] For some exceptions to this statement, see Jain, *Would Restraint of Trade Survive Even After Termination of Agreement?*, IV C.L.C. 184 (2005) (hereinafter Jain); Seetharaman & Pai, *Restrictive Covenants in Employment Contracts*, 2 Comp. L.J. 101 (2002) (hereinafter Seetharaman & Pai).

[2] Until a few years ago, however, restraints of trade in South African contract law were greatly influenced by English law. See Magna Alloys and Research (SA) (Pty) Ltd v. Ellis, 1984 (4) SA 874, 876 & 877.

1872, which overrides certain common law principles, whereas South Africa has no legislation specifically devoted to the law of contract.

However, it is submitted that it is these differences and the dissimilarity in approaches favoured by the two countries that make the comparison an interesting one, and which, we hope, may result in renewed questioning as to the merits of each approach.[3]

Further, there are also some well-known similarities that make such a legal comparison apposite. India and South Africa are countries which both still experience great inequality and large-scale poverty. Laws, policies and judgments therefore need to be attuned to the economic and social realities facing the people, while poor implementation continues to be a practical problem that needs to be factored in while framing such policies in the first place.[4] Both countries also share similar historical experiences. Based on all these factors and various other common interests, both countries have formed a strong alliance at the international level and routinely collaborate on a variety of issues.[5] More importantly, just as India's drafters viewed a range of preceding Constitutions in drafting India's historical document, South Africa's drafters learnt lessons from India in drafting the Constitution of the Republic of South Africa, 1996. Judges in South Africa have also been impressed by the judgments of their Indian counterparts. As Sachs notes:

> We look to the Indian Supreme Court which had a brilliant period of judicial activism when a certain section of the Indian intelligentsia felt let down by Parliament. They were demoralised by the failure of Parliament to fulfil the promise of the Constitution, by the corruption of government, by the authoritarian rule that was practiced so often at that time. Some of the judges felt the Courts must do something to rescue the promise of the Constitution, and through a very active and ingenious interpretation bringing different clauses together they gave millions of people the chance to feel 'we are people in our country, we have constitutional rights, we can approach the Courts...[6]

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[3] For an example of criticism of the current Indian legal position, *see*: SEETHARAMAN & PAI, *supra* note 1.

[4] In Pathumma v. State of Kerala, A.I.R. 1978 S.C. 771, 779, the Court held that it was not necessary for the Supreme Court to rely on the American Constitution for the purpose of examining the seven freedoms contained (at that stage) in Article 19 of the Indian Constitution precisely because the social conditions and habits of Indian people were different. *See also*: Jagmohan Singh v. State of Uttar Pradesh, A.I.R. 1973 S.C. 947, 952.

[5] Mbeki, *India and South Africa: The Ties that Bind*, THIS DAY, Oct. 17, 2003, at 15.

[6] Sachs, *Making Rights Work – The South African Experience* in SMITH, MAKING RIGHTS WORK 1, 10 (1999). *See*: Nageswara Rao, *Human Rights Initiatives* in NIRMAL, HUMAN RIGHTS IN INDIA: HISTORICAL, SOCIAL AND POLITICAL PERSPECTIVES 53, 68 (2000).

The Preambles to the Indian and South African Constitutions are similar in their championing of the ideals of "social justice" and the improvement of the quality of life of all citizens.[7] Directly relevant to the issue at hand is the similarity between the constitutional protections for freedom of trade, occupation and profession in the respective Constitutions. § 22 of the South African Constitution states that every citizen has the right to choose his trade, occupation or profession freely and that the practice of a trade, occupation or profession may be regulated by law. Similarly, Article 19(1)(g) of the Indian Constitution grants all citizens the right to practise any profession, or to carry on any occupation, trade or business while Article 19(6) deals with permissible exceptions on the exercise of the right.[8]

It is these constitutional freedoms that are directly implicated by upholding a clause in a contract that restrains an employee in a certain tangible way and circumscribes his freedom to work.

III. The Traditional Approach in India

Traditional restrictive covenants in employment agreements contain one or more of the following provisions:

1. Confidentiality agreements, in which the employee promises not to reveal confidential or proprietary information acquired in the course of employment after termination of that employment;[9]

2. Non-competition agreements, in which the employee promises not to start a competing business or work for a competitor for a given period after departing;[10] and

3. Non-solicitation agreements, in which the employee promises not to solicit the employer's clients or employees for a given period after termination of the employment.

The legality of such clauses is governed by § 27 of the Indian Contract Act, which itself was wholly imported from Field's Draft Code for New York and was

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[7] Govindjee, The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India (2005) (unpublished Ph.D. dissertation, Nelson Mandela Metropolitan University).

[8] Datar, Constitution of India 174-5 (2001).

[9] Bob Hepple, *The Duty of Loyalty: Employee Loyalty in English Law*, 20 Comp. Lab. L. & Pol'y J. 205, 215 (1999).

[10] *Id.*

based upon the old English doctrine of restraint of trade.[11] § 27 states that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. As a result of this statutory rule, Courts have historically expressed hostility to contractual provisions that limit employee conduct after the employment relationship has terminated, and have therefore regarded restrictive covenants with suspicion, often refusing to enforce them. In general, judicial objections to enforcing restrictive covenants have traditionally fallen into two categories: opposition to restraint of trade, and concern over the need to protect employees.[12] More specifically, Courts have displayed hostility to restrictive covenants because they regard them as (1) deprivations of employees' ability to earn a living, (2) anti-competitive, (3) the result of unequal bargaining power between employers and employees, and (4) contrary to general principles of promoting free labour.

A priori general or partial restraints contained in a service or business contract have normally been held to be void by the Courts. For instance, in Brahmaputra Tea Co. v. Scarth,[13] a stipulation in a contract prohibiting the defendants from engaging in the cultivation of tea for a period of five years from the date of the termination of the agreement was held to be void. This was despite the fact that the restriction was limited only to a distance of forty miles from the plaintiff's tea gardens. In line with the above, the Courts have also shown reluctance in enforcing non-disclosure clauses. In Shree Gopal Paper Mills v. SKG Malhotra[14] for example, the Supreme Court held against enforcing such a clause. In this case, the defendants had signed an employment contract, Cl. 2(c) of which read as follows: *"Employee or managing agents...shall not divulge nor communicate to any person or persons whatsoever any information which he may receive or obtain in relation to the affairs of the Company"*. The defendant had worked as an apprentice for one year and left the company. The Company sought an injunction against the defendant, which was denied by the Court. The Court concluded that no *"special training"* was imparted to the defendants and there was no opportunity to acquire any information that may be qualified as a trade secret or as information that required any protection. Therefore, the clauses in the contract were held to be non-enforceable.[15]

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[11] SEETHARAMAN & PAL, *supra* note 1.

[12] Oregon Steam Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64, 68.

[13] [1885] I.L.R. 11 Cal 545 [Calcutta High Court].

[14] A.I.R. 1960 S.C. 61.

[15] *See also* V.N. Deshpande v. Arvind Mills, A.I.R. 1964 Bom 423 [Bombay High Court]. In the said case, the High Court of Bombay was considering a clause relating to confidentiality of information and stated as follows:

> Clause 9 of the agreement prevents the appellant from divulging any secret information of the nature mentioned in that clause after the termination of his service. As pointed out in Herbert Morris Ltd. V. Saxelby, [1916] 1 AC 688 [HL]

This case was followed by the landmark decision in Niranjan Shanker Golikari v. The Century Spinning Company.[16] Century Spinning Company entered into a technology transfer agreement with a German company. The company also entered into an agreement with its foreign collaborators for maintaining such information as confidential. Pursuant to this agreement, they entered into non-disclose agreements with their employees. This present dispute arose when an employee with whom a contract of employment was signed for a period of five years, received training for 9 months and then left the company to join a rival concern. Clause 9 of the employment contract read as follows: "*Employer shall have the right to restrain an employee from divulging any and all information, instruments, documents, reports etc. which may have come to his knowledge while in service of the company.*" In this case, the Court drew a clear distinction between special information and general knowledge and found that since general knowledge was the asset of the employee, no injunction could be granted. In the same breath, however, it also recognised that restraints that operate during the period of employment will "*generally*" not be regarded as in restraint of trade. This balancing act in this case makes it one of the most important decisions on the doctrine of restraint of trade as applicable to employment contracts in India.

In so far as the onus of proof in such cases is concerned, in a controversial judgment, the Gujarat High Court in Sandhya Organic Chemicals v. United Phosphorus Ltd.[17] held that the onus of proof shall lie on the party who claims the violation of an agreement. In this case, Sandhya Chemicals had invented a new process of manufacturing aluminium and zinc phosphides and claimed that one of its employees who had known trade secrets had leaked certain information to United Phosphorus and helped them start selling a similar product using the same process. Sandhya Chemicals brought a suit of injunction against United Phosphorus in an attempt to interdict them from making use of the trade secrets that had been disclosed. The Court held that unless Sandhya Chemicals could prove patentability of its product, United Phosphorus was permitted to bring out similar products and would incur no liability whatsoever towards Sandhya Chemicals for making use of trade secrets received from an ex-employee of Sandhya Chemicals. This case shows how difficult it would be for any company to actually prove the violation of non-disclosure agreements post-employment.

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the defendant is not prevented from acquiring knowledge which makes him a better employee for the public for future employment. It only prevents him from divulging information which he has received as respondents' employee to another party. It is, therefore, clear that the clause as worded is proper and an injunction granted in terms thereof is not unreasonable or wider latitude than justified in law.

[16] A.I.R. 1967 S.C. 1098.

[17] AIR 1997 Guj 177 [Gujarat High Court].

As a result of such cases, Indian lawyers have traditionally frowned upon the very idea of signing non-compete clauses with employees on the ground that this is judicially indefensible. The position in India appears to be that employers are not entitled to protect themselves against competition *per se* on the part of an employee after the employment has ceased.[18] In other words, a bare covenant not to compete cannot be upheld.[19] However, there have been decisions that reveal a backtracking from this strict approach.

IV. Rethinking the Strict Approach?

The traditionally strict attitude of the judiciary has slowly started to shift. It must be remembered that § 27 of the Indian Contract Act was enacted at a time when trade was still undeveloped and the object underlying the section was to protect trade from any restraints. Today, however, trade in India has developed to a larger extent, and some have argued that there is no reason why a more liberal attitude should not be adopted by allowing such restraints as are deemed reasonable on the facts and circumstances of each case.[20] For example, Seetharaman and Pai submit that in certain cases non-compete and non-disclose agreements should in fact be upheld as being in the public interest.[21] Similarly, Jain argues that there should be some exceptions to the rule that every agreement in restraint of trade after its termination is void.[22] He contends that the Courts ought to provide flexibility to the rule depending upon the facts and circumstances of a particular case.[23] Even the Allahabad High Court in Bholanath Shankar Dar v. Lachmi Narain[24] has observed, *"it is unfortunate that sec. 27... seriously trenches upon the liberty of the individual in contractual matters affecting trade."*

In an employment contract, it has been submitted that the employer may protect two interests: trade secrets and business connections.[25] In Niranjan Shanker Golikari v. The Century Spinning Company,[26] the Court held by *obiter* that *"any restraint of trade for the protection of trade secrets is reasonable, if restricted to time, nature of employment*

[18] Hay, Halsbury's Laws of India Vol. 47, ¶ 27 (2002).

[19] Vancouver Malt and Sake Brewing Co Ltd. v. Vancouver Breweries Ltd., A.I.R. 1934 P.C. 101 [Privy Council].

[20] Pollock & Mulla; Indian Contract and Specific Relief Acts Vol. 1 813 (Bhadbahde ed., 2006).

[21] Seetharaman & Pai, *supra* note 1, at 104.

[22] Jain, *supra* note 1.

[23] *Id.*

[24] A.I.R. 1931 All. 83 [Allahabad High Court].

[25] Eastham v. Newcastle United Football Club Ltd., [1963] 3 All E.R. 139 [Chancery Division].

[26] *Supra* note 16.

and area." A restraint is also valid if it protects a *"legitimate"* interest of the employer and the nature of such interests recognised as legitimate by law will vary according to the subject matter of the contract. However, as discussed above, these comments should not be construed to mean that the law will allow a covenant merely to avoid competition.[27] Even in cases where the employer has trained the employee or enabled the employee to become a skilled craftsman or professional worker, the employer cannot demand that these skills should not be used against him.[28]

Nevertheless, perceptions about clauses in restraint of trade have changed further with the decision of the Supreme Court in Gujarat Bottling v. Coca Cola Co.[29] In this case Coca Cola had licensed Gujarat Bottling to bottle and sell aerated beverages subject to the latter not manufacturing, selling, dealing or otherwise associating with competing products. When Gujarat Bottling breached the covenant, the matter went up to the Supreme Court. The Supreme Court held that:

> A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties, is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided...

The Court then went on to hold that *"any non-disclosure clause shall be applicable only during the period of service and any restraint beyond the service is in violation of section 27 Indian Contract Act 1872."*[30] Thus, the Court recognised that a standard of reasonableness should be applied when judging any clause as being in restraint of trade (although the Court chose not to decide on this issue). Also, a distinction was recognised between restrictions operating during the period of employment and those operating post-employment.

This line of argument has led the Courts to conclude that an agreement of service by which an employee binds himself not to compete with his employer, directly or indirectly, during the term of his agreement is not considered to be in restraint of trade. In Makhanlal Natta v. Tridib Ghosh,[31] a stage artist had agreed with a drama company not to join another drama company. The clause was found to be reasonable considering that the remuneration given to the defendant by the plaintiff was much more than that offered by the other company, and that injury to

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[27] Premji Damodar v. Firm LV Govindji and Co., A.I.R. 1943 Sind 197 [Sind High Court].

[28] *Supra* note 20, at 825.

[29] A.I.R. 1995 S.C. 2372.

[30] *Id.*

[31] A.I.R. 1993 Cal 289 [Calcutta High Court].

the plaintiff was irreparable. The artist was accordingly restrained from joining another company till the period of the contract. Similarly, a negative covenant in a contract of service signed by an assistant engineer who agreed not to leave the service of his employer during the term of the contract, and not to serve or engage for any other firm in India or elsewhere during that period, was not considered to be in restraint of trade.[32]

Finally, in this regard, a wrongful dismissal of an employee, being an entire repudiation of the contract, puts an end to an ancillary agreement like the covenant in restraint of trade. This was reiterated by the Court in Superintendence Company v. Krishna Murgai,[33] where the employment contract clause read as follows: "*Employee hereby agrees not to take employment in a competitor firm or set up a similar business himself after he leaves the service of the employer.*" The defendant's services were terminated and he subsequently established a competing business which resulted in the company seeking an injunction against his actions. The Court interpreted the term '*leave*' to mean voluntary departure and not termination. Importantly, the Court held that a wide interpretation of the term '*leave*', to include termination of contract, would violate § 27 of the Indian Contract Act.

Another way in which the strict approach is being departed from is through recognising implied terms into the contract of employment. For instance, in every employment contract, a term that the employee will give faithful service to the employer is regarded as an implied term, and certain activities of employees are regarded as breaches of that duty to faithful service.[34] In Industrial Development Consultants v. Cooley,[35] a major common law case and hence relevant to India the defendant was a reputed architect employed with IDC. The Eastern Gas Board Company was offering a lucrative contract for building 4 depots and IDC was keen to bid for the same. As Cooley was keen to get the contract on his own, he resigned from IDC claiming a nervous breakdown and bid for the Eastern Gas Board contract. After the contract was given to Cooley, IDC filed a suit against him for breach of duty. The Court held that there was a breach of the implied duty of fidelity and that Cooley should account for the profit he had made from the deal. This judgment was based upon the realisation that Cooley could not have bid for the contract without

[32] Lalbhavi Dalpatbhai and Co v. Chittarangan Chandulal Pandiya, A.I.R. 1966 Guj 189 [Gujarat High Court].

[33] A.I.R. 1980 S.C. 1717.

[34] In Robb v. Green, [1895] 2 Q.B. 315 [Queen's Bench Division], it was held that an employee who copies out names and addresses of his employer's customers for personal use after leaving employment has breached the duty of fidelity and can be prevented from using the lists.

[35] [1972] 2 All E.R. 162.

all the material information he had acquired during the nature and course of his employment with IDC.

V. Onus and Remedies

The Supreme Court in the Niranjan Shanker Golikari's case[36] was of the opinion that where an agreement is challenged on the ground of it being in restraint of trade, the onus is upon the party supporting the contract to show that the restraint is reasonably necessary to protect his interests. Thus, it can be inferred that restrictive covenants are not *per se* in violation of § 27 but that they would be invalid if the employer fails to prove that they are reasonable. However, in the Gujarat Bottling case[37] the Court refused to consider the question whether reasonableness of restraint is within the purview of § 27 of the Contract Act and proceeded on the basis that an enquiry into reasonableness of the restraint is not envisaged by § 27. As a result of this view, they held that instead of being required to consider two questions as in England, the Courts in India have only to consider the question whether the contract is or is not in restraint of trade.

In Sunilchand C. Mazumdar v. Aryodaya Spinning and Weaving Mills Co. Ltd.,[38] the defendant, a qualified technician and diploma holder in textile technology, agreed to serve the plaintiff's spinning mills for five years. After serving for about a year as a senior assistant he resigned and accepted an employment in another spinning company on a salary higher than before. He was employed by the plaintiff because of his specialised training and admittedly there was a considerable dearth of such trained technicians. This agreement was held to be valid and an injunction to prevent breach of negative covenant was granted. It was held that the onus of justifying the covenant in restraint of trade or of proving reasonableness lies upon the covenantee.[39] But once this onus is discharged, the onus of proving that the restraint tends to injure the public lies upon the party attacking the covenant.[40] However, as mentioned earlier, the case of Sandhya Organic Chemicals v. United Phosphorus Ltd[41] stands as a reminder that this position of law is not as clear cut as it appears on the face of it.

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[36] *Supra* note 16.

[37] *Supra* note 29.

[38] A.I.R. 1964 Guj 115 [Gujarat High Court].

[39] A.I.R. 1980 Raj 155 [Rajasthan High Court].

[40] *Supra* note 16.

[41] *Supra* note 17.

From the aforesaid analysis it emerges that the Indian position on restrictive covenants is shrouded in ambiguity. While initially a strict approach was favoured, today much water has flown under the bridge to conclude that the self-same strictness persists as the position of law. The interests of business and increased mobility of employees has led the courts to rethink their original formulations. It can only be hoped that the result of this rethink soon crystallise into a clear and unambiguous position of law.

VI. The South African Law Position

A. Background and Onus: Magna Alloys and Research (SA) (Pty) Ltd v. Ellis[42]

In Magna Alloys, the Appellate Division found that previous South African judgments, which had held that a covenant in restraint of trade was *prima facie* invalid or unenforceable, stemmed from English law and not South African common law. According to the Court, the common law in South Africa contained no rule to that effect, and, the proper position was that each agreement should be examined with regard to its own circumstances in order to ascertain whether the enforcement of the agreement would be contrary to public policy, in which event it would be unenforceable. The Court held that while public policy required that agreements freely entered into should be honoured, it also generally required that everyone should be free to seek fulfillment in the business and professional world. An unreasonable restriction of a person's freedom of trade would, therefore, probably also be contrary to public policy if enforced. Importantly, the Court decided that when a party alleged that he or she was not bound by a restrictive condition to which he or she had agreed, the onus would be on that person to prove that the enforcement of the condition would be contrary to public policy.[43]

The Magna Alloys case was heard prior to the operation of the Constitution of the Republic of South Africa, 1996 and some judges have begun to argue that the manner in which onus was dealt with in that case is now unconstitutional. In the recent decision of Canon KwaZulu-Natal (Pty) Ltd. v. Booth,[44] a provincial division of the High Court held that because a restraint of trade constituted a limitation on a person's constitutional right to earn a living, the restraining party should establish that the restraint was reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom. Similarly, in Lifeguards

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[42] *Supra* note 2.

[43] For a review of the literature prior and post the *Magna Alloys* case, see Kerr, *Restraint of Trade after Magna Alloys* in Visser, Essays in Honour of Ellison Kahn 186 (1989).

[44] 2005 (3) S.A. 205 (N).

Africa (Pty) Ltd. v. Raubenheimer,[45] the Court raised the question as to whether it was contrary to the spirit, object and purport of the Constitution to burden the covenantor (employee) in a covenant in restraint of trade with the onus of proving that a limitation to his or her constitutional right to freedom of trade, occupation and profession was not reasonable and justifiable.[46]

B. Unreasonable Restraints Contrary to Public Policy

Although it may be argued that Courts view restraints between employers and employees more strictly because it is assumed that parties are not in an equal bargaining position, in Louw and Co (Pty) Ltd. v. Richter and others,[47] the Court confirmed that covenants in restraint of trade are valid in South Africa. Like all other contractual stipulations, however, they are unenforceable to the extent that their enforcement would contravene public policy.[48] The Court stated the following in this regard:

> It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought.[49]

A restraint that is found to be reasonably required for the protection of the party who seeks to enforce it, in accordance with the test that has been laid down in the cases, is constitutionally permitted.[50] To determine the reasonableness of a restraint, a Court in South Africa must make a value judgment with two principal policy considerations in mind.[51] The first is that the public interest requires that parties should comply with their contractual obligations, as expressed by the maxim favouring the sanctity of contract (*pacta sunt servanda*).[52] The second is that all persons

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[45] 2006 (5) S.A. 364 (D).

[46] § 36 of the Constitution states that rights in the Bill of Rights may be limited by a law of general application if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[47] 1987 (2) S.A. 237 (N).

[48] *Id.*

[49] *Id.*

[50] Reddy v. Siemens Telecommunications (Pty) Ltd., [2006] SCA 164 [RSA].

[51] *Ibid.*, at ¶15.

[52] Visser, *The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade*, 101 S.A.L.J. 641 (1984).

should be productive and be permitted to engage in trade and commerce or the professions in the interests of society.[53] It is important that both of these considerations have been held to reflect constitutional values as well as the common law.[54]

In other words, because of the concept of "public interest" a restraint would be unenforceable if it prevents a party, after termination of his or her employment, from partaking in trade or commerce without a corresponding interest of the other party deserving of protection.[55] In Basson v. Chilwan and others,[56] four factors were identified as being relevant in considering the reasonableness of a restraint:

a) Does one party have an interest that deserves protection after termination of the agreement?

b) If so, is that interest threatened by the other party?

c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

Other factors that will be taken into account and which form parts of the inquiry include the nature, extent and duration of the restraint. In other words, where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and unenforceable.[57] For example, in Basson v. Chilwan[58] an employer's application to assert a protectable interest in respect of customer connections against an ex-employee who had no such connections was dismissed.[59] By contrast, in Reddy v. Siemens Telecommunications (Pty) Ltd.[60] the applicant was in possession of confidential information in respect of which the

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[53] *Supra* note 50, at ¶15.

[54] *Supra* note 50. Contractual autonomy was held to be part of the freedom informing the constitutional value of dignity whereas freedom of contract was considered integral to the constitutional right in § 22, described above.

[55] Townsend Productions (Pty) Ltd v. Leech and others, 2001 (4) SA 33 (C), 50J-51B.

[56] 1993 (3) SA 742 (A), 767G-H.

[57] *Supra* note 50, at ¶16.

[58] *Supra* note 56.

[59] For an example of technological innovation which was held not to constitute a "protectable interest", *see*: Valunet Solutions Inc t/a Dinkum USA v. eTel Communications Solutions (Pty) Ltd., 2005 (3) SA 494 (W).

[60] *Supra* note 15, at ¶20.

risk of disclosure by his employment with a competitor was found to be significant. The respondent in this case merely sought to restrain the applicant from being employed by a competitor for a period of twelve months and had no intention of preventing the applicant from using any other personal skills and abilities.

Where the employee has had access to protectable information confidential to his or her previous employer and the reasonable possibility exists, objectively speaking, that the employee might disclose trade secrets to a new employer, the Court's decision will not turn on whether the employee admits remembering any relevant information.[61] In each case, the Court will look to the facts and will also not be influenced by any undertakings made by an ex-employee to the effect that he or she will not disclose the trade secrets.[62] After employment has ceased, an employer is not entitled to protection against a former employee's competition *per se* by a covenant taken from the employee during or prior to employment.[63]

C. Protection in the Absence of a Restraint of Trade Clause and Partial Enforcement

It appears to be clear that a contract of employment will be breached by an employee who misuses trade secrets, knowledge of secret processes or business connections – irrespective of the existence of a restrictive covenant.[64] In this case the employer would appear to be entitled to use the remedies of an interdict (injunction) to prevent an ex-employee from using his or her inside knowledge to unlawfully compete.[65] A claim for damages should also be possible in such a case.

A proposed restraint should not be wider than necessary to protect the protectable interest.[66] In Sunshine Records (Pty) Ltd. v. Frohling and others,[67] the Court held that an agreement in restraint of trade may be only partially enforced when this was required by the public interest. In deciding this question, regard could be had to whether the restraint clause was designed to be unduly oppressive and whether partial enforcement would not operate harshly or unfairly towards the person(s) bound by the restraint.[68]

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[61] International Executive Communications Ltd t/a Institute for International Research v. Turnley, 1996 (3) SA 1043 (W).

[62] *Id.*

[63] Highlands Park Football Club Ltd v. Viljoen and another, 1978 (3) SA 191 (W).

[64] This is also possible as a result of a breach of a fiduciary duty, *see*: Phillips v. Fieldstone Africa (Pty) Ltd. and another, 2004 (3) SA 465 (SCA).

[65] *See*: Sibex Construction (SA) (Pty) Ltd and another v. Injectaseal CC and others, 1988 (2) SA 54 (T).

[66] Nampesca (SA) Products (Pty) Ltd. v. Zaderer, 1999 (1) SA 886 (C), 894-895.

[67] 1990 (4) SA 782 (A).

[68] *Id.*

VII. Conclusion: A Question of Reasonableness?

The case law analysis conducted above illustrates a number of similarities and some interesting differences in the Indian and South African approaches to restrictive covenants in the employment context.

Irrespective of the legislative and common law differences in the treatment of the subject, both countries appear to generally permit employees to compete with their previous employers, whether or not a restrictive covenant was entered into, after such employment has terminated. On the other hand, both countries generally protect employers from an employee's disclosure of a legitimate trade secret and against an abuse of business connections – possibly even in circumstances where no such protection clauses were included in the employment contract. The remedies the Courts will offer to employers in such cases of abuse also appear to be generally the same.

The major differences in approach between the countries are equally clear. South African Courts have consistently favored the view that public policy generally requires the sanctity of contracts to be upheld and enforced over the constitutional right to choose one's trade, occupation or profession freely.[69] Even subsequent to the introduction of the Constitution, which included a section expressly protecting a citizen's right to choose their trade, occupation or profession freely, this principle has been considered to be consistent with the constitutional values of dignity and autonomy and is generally acceptable.[70] By contrast (in particular because of the provisions of the Indian Contract Act) courts in India have been more hesitant in allowing companies to restrict the freedom of their employees once such employment comes to an end.

It is submitted that both countries may be able to take a lesson or two from each other. South Africa should depart from the *Magna Alloys* case and follow the Indian approach of placing the onus on a company to show that a restrictive covenant is necessary and reasonable. This is because of the primacy of the Constitutions of both countries and because both Constitutions contain provisions which directly protect a person's freedom to engage in a trade, occupation or profession of choice – with no corresponding constitutional right protecting employers. A restriction of such a constitutional right should be justified by the person responsible for seeking such a restriction. In the Indian context, it may be arguable that the approach of using § 27 of the Contract Act to prevent a restrictive covenant from operating is too simplistic in the current economic environment and that a judicial enquiry similar

[69] *Supra* note 50, at ¶21.

[70] *Id.*

to that conducted in recent South African decisions is more appropriate.[71] In other words, it is arguable that there should be cases where an employer is entitled to protection against an employee, even once the employment relationship has terminated, in the interest of economic development and greater flexibility of approach. This would necessitate a Court's enquiry into the reasonableness of such clauses and not simply holding them to be invalid *per se* – despite the wording of § 27 of the Contract Act.[72]

Whether or not non-compete clauses and non-disclosure agreements in India are reasonable or not may be answered by the following test:

1. the restraint should be no greater than is necessary to protect a legitimate business interests, such as a trade secret;

2. the restraint should not be unduly harsh or oppressive in restricting the employee's ability to earn a living;

3. the restraint should not otherwise be against public policy; and

4. the restraint should be limited in accordance with the Time–Space–Locality Rule.

It is submitted that a case-by-case analysis incorporating and balancing such factors from a constitutional perspective will best serve both employers and employees in India and South Africa. Whereas South African Courts should adjust their approach in order to place greater emphasis on the constitutional rights of employees (who are seldom able to enter into employment contracts on an equal footing to companies), Indian Courts may continue to give greater prominence to the validity of a restrictive covenant, freely entered into by an employee with some economic muscle, in order to further protect the interests of business.

[71] JAIN, *supra* note 1, at 187.

[72] SEETHARAMAN & PAI, *supra* note 1, at 106.