

## An Evaluation of the Restraint of Trade to Contracts for the Sale of a Business Undertaking in South Africa

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**ABSTRACT** Agreements in restraint of trade prohibit the contracting party to exercise the choice in performing the profession or business activities. As a general rule, agreements in restraint of trade are prima facie valid and enforceable unless they are against public policy. The constitution is the supreme law and grants the right to freedom of trade, occupation and profession to citizens only. Public policy is enshrined in the constitution and requires that contracts must be respected. The restraint of trade must have protectable interests. Parties to the contracts in sale of business goodwill enjoy the equal bargaining power in their transactions. The area and time of restraint of trade should be reasonable to allow the buyer to establish his or her business. Court should carefully scrutinise contracts in restraint of trade in sale of business to ensure that they do not completely eliminate competition.

### INTRODUCTION

An agreement by which someone is restricted in his or her freedom to carry on his or her trade, profession, business or other economic activity is generally called an agreement in restraint of trade (Van der Merwe et al, 2007, 2012; Christie 2006; A Becker and Co (Pty) Ltd v Becker 1981 3 SA 406 (A)). There are two main types of restraint of trade provisions. The first one is a sale of goodwill restraint where the seller undertakes not to carry on or interest himself in a similar business in competition with the purchaser (Sharrock 2007). The second is a “termination of employment restraint where an employee undertakes not to compete against his employer on termination of the contract of employment by setting up business on his own account or entering the service of a competitor” (Sharrock 2007). In *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A), the court opined that the contracts in restraint of trade are *prima facie* valid and enforceable. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy (Woker 2005; C-J Pretorius 2009; Calitz 2011; Du Plessis and Davis 1984). It is against public policy to impose an unreasonable restriction on someone’s freedom to trade or work.

The Constitution (1996) has an impact on all laws in regard to constitutional matters. It is the supreme law and any law or conduct that is inconsistent with it is invalid and unenforceable to the extent of its inconsistency. This also includes the law of contract in respect of restraint of trade provisions. The Constitution enshrines the right to freedom of trade, occupation and profession (Constitution section 22). Contracts in restraint of trade affect this constitutional right to the extent that they restrict the freedom of individuals to choose and participate in a trade or work of their choice. However they must be consistent with the Constitution otherwise they will be declared invalid and unenforceable. This paper will focus on the meaning of the right to freedom of trade, the requirements of restraint of trade in sale of a business undertaking, protectable interests, rationale for the restraint in sale of business, equality of bargaining power, area and time of restraint of trade.

### THE MEANING OF THE RIGHT TO FREEDOM OF TRADE, OCCUPATION AND PROFESSION

The interim Constitution (1993) has introduced a right to freely engage in economic activity. This right was maintained by the final Constitution as a right to freedom of trade, oc-

cupation and profession. It is included in the Bill of Rights of the Constitution.

### **The Interim Constitution**

The right to freely engage in economic activity created by the interim Constitution was broad, as it applied to every person. However it had an internal limitation in section 26 (2), as such right might be restricted in certain circumstances that it enumerated. Furthermore, the right to freely engage in economic activity could also be limited by a law or conduct that satisfied the requirements of section 35 of the interim Constitution.

With regard to contracts in restraint of trade, a person “may raise the defence that common law rules which permit restraints are unconstitutional in that they prevent him from earning a living” (Waker 1994) This issue has been decided by courts under the interim Constitution. In *Waltons Stationary Co (Edms) Bpk v Fourie* 1994 4 SA 507 (O), the court opined, on indirect application of the interim Constitution, that section 26 primarily intended to ensure that the common law principle of commercial freedom was not undermined by legislation, regulations or other statutory measures (Currie and De Waal 2005). According to the common law, all persons having contractual capacity have the right to freely engage in commercial activity and to earn a living anywhere in the national territory. In a restraint of trade case, the court had to balance the common law principles of freedom of trade and sanctity of contracts having regard to public policy. According to the court, “s. 26 had no effect on the common law governing restraints of trade as it accorded with the spirit, purport and objects of the interim Constitution” (Currie and De Waal 2005; *Knox D’Arcy Ltd v Shaw* 1996 2 SA 651 (A)). So, restraint of trade did not constitute an infringement of the right to freely engage in economic activity. However, such right has been replaced by a right to freedom of trade, occupation and profession in the final Constitution.

### **Section 22 of the 1996 Constitution**

Section 22 of the final Constitution has a less restrictive application than its predecessor section 26 of the interim Constitution since it only applies to citizens instead of everyone. This was a deliberate decision made by the legislature. During the second *certification* case (*Ex Parte*

*Chairperson of the Constitutional Assembly* 1997 2 SA 97 (CC) paras 17-21), the confinement of this right to citizens was challenged on the ground that it failed to comply with the requirement that the Constitution should accord this universally accepted fundamental right to everyone. The right to occupational choice was not recognised in international and regional instruments. The Constitutional Court found that there were other acknowledged and exemplary constitutional democracies where the right to occupational choice was extended to citizens only, or not granted at all. The Bill of Rights required including only those rights that have gained a wide measure of international acceptance as fundamental human rights. Therefore, the challenge to section 22 was rejected.

The question arises whether juristic persons can claim the freedom granted by section 22. Section 8 (4) of the Constitution provides that juristic persons are “entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person.” Hence, the nature of occupational freedom can be exercised by juristic persons and they should, in principle, enjoy the protection of section 22. Currie and De Waal argue that if this right “is extended to juristic persons a court may regard juristic persons incorporated in South Africa as citizens.” It is therefore submitted that section 22 right also applies to juristic persons.

### **Choice of a Trade, Occupation or Profession**

The Constitution guarantees that “every citizen has the right to choose their trade, occupation or profession freely.” The public has an interest in allowing individuals to work for their own living rather than being supported by public funds (Currie and De Waal 2005). At the same time, the public also benefits from the skill or business of a particular individual. However, some trade, occupation and profession are regulated by law and individuals who choose to join them must comply with the relevant legislation (*De Freitas v Society of Advocate of Natal* 2001 3 SA 750 (SCA); *Rosemann v General Council of Bar of South Africa* 2004 1 SA 568 (SCA)). Failure to do so prevents a person from joining and doing his or her preferred activities.

The most obvious restriction on the right to choose a trade, occupation or profession is a denial of access to particular trade to particular

groups of people (Currie and De Waal 2005). Any conduct or law that denies occupational choice to individuals must be justified by the limitation clause in section 36 of the Constitution, otherwise it may be declared unconstitutional and unenforceable.

### ***Practice of Trade, Occupation or Profession***

The second sentence of section 22 provides that “practice of a trade, occupation or profession may be regulated by law.” In *JR 1013 Investments CC and Others v Minister of Safety and Security and others* 1997 7 BCLR 925 (E), the court opined that “the fact that a free choice was granted to all citizens was not equivalent to a guarantee that any citizen may practice any trade, occupation or profession.” So, the right of individuals to engage in any activity is always subject to a variety of restrictions depending on the nature of the profession.

The practice of certain professions is routinely regulated to protect the interest of the general public. If a person wants to practice in a profession, he or she must have the necessary skills and qualifications to do so. In *S v Lawrence* 1997 4 SA 1176 (CC), para 33, the Constitutional Court opined that: “Certain occupations call for particular qualifications prescribed by law and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in any such occupations. For instance, nobody is entitled to practice as a doctor or as a lawyer unless he or she holds the prescribed qualifications, and the right to engage freely in economic activity should not be construed as conferring such a right on unqualified persons; nor should be construed as entitling persons to ignore legislation regulating the manner in which particular activities have to be conducted, provided always that such regulations are not arbitrary.” A person must comply with ethical codes that apply to his or her profession. The restraint of trade provisions relate to the practice of a trade, occupation or profession.

### **REQUIREMENTS OF RESTRAINT OF TRADE IN SALE OF A BUSINESS UNDERTAKING**

A restraint of trade in contracts limits an individual’s freedom to work or to trade (Currie and De Waal 2005). Sometimes, the purchaser of a business may “protect the business and its

goodwill against competition by having the seller agree not to operate on similar business within a given geographical area over a given period of time” (Van der Merwe et al. 2007). In *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A), the court opined that contracts in restraint of trade are valid and enforceable unless they are contrary to public policy, in which case they would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. It follows that an unreasonable restriction of a person’s freedom of trade would probably also be against public policy and unenforceable. In *Brisley v Drotsky* 2002 4 SA 1 (SCA), the court opined 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” (Kanamugire 2013; *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 29-30). Restraint of trade provisions must comply with public policy otherwise they will be unreasonable and unenforceable.

As a general rule, “restraints of trade are generally accepted in South Africa and elsewhere as part of normal business practice” (Woker 1994) and they are not contrary to section 22 of the Constitution. In *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA), Malan AJA, observed that “contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in section 22” (Neethling 2008). Contracts in restraint of trade are frequently made in business transactions and they exist to promote economic growth. “The seller would not be able to sell his goodwill if he (the seller) could open a competing business in the vicinity and the selling price would thus be reduced substantially” (Woker 1994; Trebilcock 1986). As a result, a restraint of trade in sale of a business undertaking benefits both parties to the contract and has an interest worthy of protection.

### **Protectable Interests**

In a sale of business undertaking, goodwill constitutes a proprietary interest that needs pro-

tection (Neethling 2007, 2010). “The term goodwill can hardly be said to have any precise significance. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that reputation and improve it” (Receiver of Revenue v Cavanagh 1912 AD 459, 464). Goodwill generally consists of two elements, namely personality and locality. “The goodwill of a professional business depends largely upon personal connection, and much less upon locality; whereas the very converse may be the case in regard to the goodwill of a trading business” (Receiver of Revenue (Cape) v Cavanagh 1912 AD 459, 464). Personality goodwill includes customer and customer connections of a person. If a business is sold together with the goodwill, the seller is under an obligation not to solicit ever against the former customers. So, the retention or alienation of the goodwill as a separate asset in a business makes a great difference.

In *IRC v Muller and Co' Margarine, Ltd* [1900-3] All ER 413 (HL) Lord Macnaghten argued that “goodwill is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force that brings in custom. It is one thing which distinguishes an old established business from a new business at its start” (Domanski 1993; Louw 2007; Neethling 2008). Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In *KBI v Snyman and Webster* (1994) 56 SATC 149 (O), the court opined that goodwill was the drawing power of a business, a form of immaterial property and could be alienated (Willian 2001). “Know-how” can be sold outright and bring in a capital asset. When this happens, “a trader or a manufacturer sells his goodwill or know-how outright to a purchaser, withdraws from the business himself, and agrees not to use the ‘know-how’ or goodwill to the prejudice of the purchaser” (*KBI v Snyman and Webster* (1994) 56 SATC 149 (O)). Therefore, a person, as a trader, has “right to attract custom” which is protected from unlawful interference by a competitor. The drawing power of a business emphasises on the totality of the characteristics which draw customers to an undertaking.

The problems of goodwill can be understood by the aid of an analogy from animal life (Heydon 1971). In *Whiteman Smith Motors Co. v*

*Chaplin* 1943 2 KB 35, 42 Scrutton, LJ, opined: “The cat prefers the old home to the person who keeps it, and stays in the old home though the person who has kept the house leaves. The cat represents that part of the customers who continue to go to the old shop, though the old shopkeeper has gone; the probability of their custom may be regarded as an additional value given to the premises by the tenant’s trading. The dog represents that part of the customers who follow the person rather than the place; these the tenant may take away with him if he does not go too far. There remains a class of customers who may neither follow the place nor the person, but drift away elsewhere. They are neither a benefit to the landlord nor the tenant, and have been called the rat for no particular reason except to keep the epigram in the animal kingdom”.

Maugham, LJ, argued that “really there should be a fourth animal, the rabbit, to indicate the customers who come simply from propinquity to the premises; and, if this is borne in mind, it will be apparent that the rabbit may be much bigger than the cat, who (if indeed it does not wholly vanish) may well shrink to the dimensions of a mouse.”

The analogy from animal life demonstrates the complexity of motives that stimulate customers to be attached to a business and shows different sources from which goodwill derives its value. It is submitted that the restraint of trade in sale of a business undertaking has the aim of maintaining customers represented by the dog as they can easily follow the old owner. In summary, the protectable interests in sale of goodwill are: the locality, customer connections, good name, reputation, connection of a business and the attracting force that brings in custom. This is not an exhaustive list and other protectable interests may be recognised by the courts. The next section evaluates the rationale of restraint of trade in sale of business undertaking.

### **The Rationale of Restraint of Trade in Sale of Business**

In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his or her trade, profession or calling, unless he or she has bound himself or herself to the contrary (Neethling 2008). In *Becker and Co (Pty) Ltd v Becker and others* 1981 3 SA 406 (A),

414 Muller JA, opined that “when a business is sold with its goodwill, but without any express premise not to compete, the seller is privileged to open up a new business in competition with the buyer, but he is under obligation not to solicit his former customers or to conduct his business under such a name and in such a manner as to deprive the buyer of the goodwill that he paid for.” If a seller disposes of the goodwill of a business, he or she is not allowed thereafter to act contrary to the sale. It is an economic fact that as a result of the sale of an undertaking, the purchaser as a rule steps into the shoes of the former entrepreneur; he or she therefore acquires all the advantages of the existing goodwill (Van Heerden 1995).

To allow a purchaser to establish his or her own business, a seller of a business should not canvass the old customers. He or she may not sell the custom and steal away the customers in that fashion (*Trego v Hunt* 1896 AC 7 (HL), 25). The restraint of trade in a sale of business undertaking “does not add the value to the goodwill, because it does not bring fresh customers, but it prevents them from being taken away” (*Townsend v Farman* [1900] 2 Ch 698 (ChD), 703). In *Becker’s case*, the applicant sold both the business and its goodwill separately. The parties entered into a restraint of trade for a period of five years. The court opined that the restraint of trade applied only to the business and the respondent seller could not solicit business from old customers even after the period of restraint has expired. It is submitted that this case was wrongly decided as the seller should be allowed to canvass old customers after the expiration of the restraint of trade. The new owner (buyer) needs to create a reputation or strong relationship with his or her customers and maintain the business, especially during the restraint of trade period. This can encourage competition among the business people and allow the seller to become again economically active in the business environment.

A person who buys a business and acquires a restraint of trade in sale of business undertakings can cede it to the cessionary. In *Botha and Another v Carapax Shadeports (Pty) Ltd* 1992 1 SA 202 (A), 212 Botha JA, opined that: “the benefit of an agreement in restraint of trade, which exists for the advantage of a business, passes to the purchaser of that business and its goodwill, as part of the goodwill.” Goodwill is attached

to a business especially its drawing power or attracting force (Domanski 1993). “Since a covenant protecting goodwill is normally for the benefit of the business rather than its current owner, it can be freely assigned, and will pass to assignees *inter vivos* and personal representatives whether they are mentioned or not, and whether the assignment is of the whole business or only part of it” (Heydon 1971; *Crobbe-laar v Shoprite Checkers* (710/2008) [2011] ZASCA 11 (11 March 2011), para 18). However, the parties to a contract are free to structure their agreement as they please. A covenantor cannot refuse to comply with his or her obligations under the restraint of trade on the basis that the cedent (covenantee) has ceded the business to the cessionary. The covenantor has to respect the covenant of restraint regardless of who is the owner of the business.

In *Sellers v Eliovson and Others* 1985 1 SA 263 (W), the applicants sold their shares and entered into a restraint of trade. A clause in an agreement of sale of shares in two companies provided that the applicant shall not, for a period of three years, solicit or canvass for a business from any of the customers of the two companies. Within such period, the applicant was approached by one of the customers mentioned in the agreement and requested to submit a tender for certain business with such customer. The applicant sought a declaration order declaring that it may respond to the invitation to submit a tender and that such a tender would not fall foul of the aforementioned clause. The court opined that “the applicant was barred from submitting a tender in response to a request from and of the customers of the companies as such would be soliciting for business.” In fact, the submission of a tender by anybody is clearly canvassing or solicitation of business. It is submitted that the covenantor is prohibited to submit a tender even if an old customer freely, voluntarily and honestly asked him or her to do so. The covenantor must fully comply, in all circumstances, with his or her obligations under the restraint of trade.

In *Chubb Fire Security (Pty) Ltd v Greaves* 1993 4 SA 358 (W), the respondent had sold his business to the applicant and thereafter he was employed by the applicant. The contract of sale contained a restraint of trade. The contract of employment was made the same day of the sale and aimed to avoid competition. After some months, the respondent was unlawfully dismissed by the applicant.

The question was whether the applicant was entitled to enforce the restraint despite having repudiated the contract of employment? The learned judge Du Plessis opined that “the restraint shall apply even if the contract is terminated as a result of the breach of the party seeking to rely on the restraint.” Furthermore, the respondent was a man with a considerable reputation in the fire protection industry, and was in a position, by competing with the applicant, in effect to take back the goodwill sold if not restrained. The restraint was imposed in order to protect the goodwill of the applicant. In the circumstances where the contract of employment was part of transaction in terms of which respondent sold his business to applicant, and the restraint accordingly imposed primarily to protect goodwill purchased by applicant, the applicant was entitled to enforce the restraint. The contract provided that the restraint would be imposed if the employment contract was terminated for whatever reason. The rule that a party to a contract should not be allowed to profit from his or her own wrong is a rule of construction only. There is no rule of substantive law prohibiting an agreement to the effect that some advantages will accrue to the party as a result of his or her own breach of contract. The court enforced the restraint of trade despite the repudiation of contract by the applicant.

A person who is not a party to a restraint of trade cannot be prohibited from opening a competing business with the purchaser. In *Manousakis and Another v Renpal Entertainment CC* 1997 4 SA 552 (C), a close corporation sold its business to another close corporation with a restraint of trade to the extent that the seller was prevented to engage in a similar business for a period of three years and within four kilometres from the business sold. Mr George negotiated the agreement on behalf of the seller close corporation.

After one year, he formed a close corporation and opened a competing business within one kilometre from the old business. Friedman JP opined that it was clear that George had not sold any goodwill which had been attached to him. He was not a party to any restraint clause and the purchaser did not make any payment for him for such goodwill as he might have had. The learned judge went on to say that “the purchaser of goodwill may not, even by means of a contractual restraint agreed to by the seller, elimi-

nate competition as such.” The court refused to grant an order preventing Mr George to carry on his business. The purchaser needs to pay for the goodwill and secure the agreement to restrain the seller from opening a competing business for a specified time and area. The restraint of trade can also be made in other various contracts of business undertaking such as the practice of medical practitioners and franchise agreements (Woker 2005a, b, 2006). In these kinds of contracts, there is equality of bargaining power between the contracting parties (buyer and seller).

### EQUALITY OF BARGAINING POWER

Parties in contracts for the sale of goodwill are in equal bargaining position to negotiate their agreement about restraint of trade (Kerr 2002). In *New United Yeast Distributors (Pty) Ltd v Brooks and Another* 1935 WLD 75 Greenberg J opined that it was “in the public interest that parties who, being in an equal position of bargaining power, make contracts, should be compelled to perform them, and not to escape from their liabilities by saying that they had agreed to something which was unreasonable.” Two equal contracting parties frequently make a restraint for the purpose of avoiding undue competition. They have an opportunity to protect their respective interests and achieve a good bargain.

Where a contract is made between equal contracting parties, the fact that it has been freely so made is very strong evidence pointing to the conclusion that the restraint imposed was no more than necessary to protect the interests of the parties concerned, and as such was reasonable *inter partes*. This circumstance gives rise to an assumption that the terms are reasonable in fact, but a court is not bound by the parties’ assessment of the situation and may find the terms to be unreasonable (Kerr 2002). The parties’ assertion that their contract is reasonable does not constitute a conclusive evidence. In *English Hop Grovers Ltd v Dering* 1928 2 KB 174, Scrutton LJ, argued that “courts will view restraints of trade imposed between equal contracting parties with more favour than those between master and servant.” The fact that parties are in equal bargaining position does not guarantee that parties will make a contract that complies with public policy. If they agree to the terms of contracts contrary to public policy, courts will refuse to enforce them (Kanamugire 2013).

In *Malan En Andere v Van Jaarsveld En'n Ander* 1972 2 SA 243 (C), medical practitioners formed a partnership for their profession. One partner was sick and his state of health adversely affected the practice. The sick partner was called upon to withdraw from the partnership and comply with the restraint of trade. A clause in a partnership agreement restrained the outgoing partner for five years from practicing within a radius of 50 miles from Riversdale, in competition with the remaining partners. The court opined that, as there had been a valid partnership agreement making provision for the withdrawal of partners, he had been in a position to contract on an equal footing with his partners and that the restraint was not unreasonable between the partners. "If it is clear that parties contracted on an equal footing, a court will more easily conclude that the restraint is reasonable and thus enforceable" (Pretorius 1997). It is submitted that the outgoing partner was not in an equal bargaining position when he was requested to leave the partnership. Therefore the court should have considered this factor and refused to enforce the restraint on the basis that it was contrary to public policy.

#### THE AREA AND TIME OF RESTRAINT

The restraint of trade must apply to a reasonable specific area and time (Christie 2006; Kerr 2002). "Size of area and length of time must be related to the circumstances" (Chirstie 2006), but there are no rigid applicable rules except that each case depends on its own facts and merits. For instance, in a medical profession, it does not seem unreasonable for the purchaser to want to secure himself or herself for an indefinite period against the competition of the vendor. This kind of restraint is not unreasonable *inter partes* nor inimical to the interest of the public. The area and time of the restraint must be reasonable to sufficiently protect the business concerned (Kerr 2002). In some cases, the restraint may cover the entire country and/ or even an indefinite time.

With respect to the area covered by the restraint, "a court bears in mind firstly, the nature of the practice or business protected; secondly, the area from which the patients or clients or customers are drawn; and thirdly, the area into which the protected practice or business is intended, and/or may reasonably be expected, to expand in the not too distant future" (Kerr 2002).

In *Wohlman v Buron* 1970 2 SA 760 (C), the respondent sold a unique business for the manufacturer of pipe cleaners and Christmas decorations in Cape Town, and the restraint covered the entire South Africa. In addition, a transport company sold its total issued shares and the restraint covered the Republic of South Africa, Rhodesia, Zambia and Portuguese East Africa. Furthermore, the restraint may cover the whole world if the only potential customers are governments of independent states (*Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd* 1894 AC 535 (HL)). Usually a restraint of trade operates within a reasonable area from where the business is located.

The restraint of trade providing an unreasonable duration of time will not be enforced, unless a court decides to order a partial enforcement. However, "there may be instances where a restraint for a lifetime of a party or an indefinite period will be reasonable" (Pretorius 1997). In *CTP Ltd and Others v Argus Holdings (Pty) Ltd and Another* 1995 4 SA 774 (A), Nienaber JA approved that a restraint for an indefinite period did not clash with public policy and granted interdict for an indefinite period. As a general rule, the restraint of trade exists for a reasonable time that allows a person to establish his or her own business.

The area and duration of restraint play an important role in maintaining business transactions. It is submitted that the enforcement of the restraint of trade is not to punish the seller but to allow a new business owner to arrange, promote and protect his or her activities. This objective must be fulfilled without any interference from the seller.

#### CONCLUSION

Since the decision in *Magna Alloys* case, a restraint of trade is *prima facie* valid and enforceable unless it is against public policy, in which it would be unenforceable. Public policy requires that contracts freely and voluntarily made must be respected. The final Constitution narrows the right to freedom of trade, occupation and profession to citizens only. Section 22 of the Constitution does not invalidate agreements in restraint of trade. To be effective, the restraint of trade must not be contrary to public policy and has to preserve a protectable interest. Public policy is now rooted in the Constitu-

tion and the fundamental values it enshrines. They include human dignity, the achievement of equality, and the advancement of human rights and freedoms, non-racialism and non-sexism. Protectable interests in a sale of business undertaking include customer connections, good name, reputation, locality, business connections and the attractive force that brings in custom (drawing power).

Equality of bargaining power characterises the contracts in sale of business goodwill. Parties negotiate on equal footing and ensure that their interests are protected according to the terms of the contracts containing restraint of trade. It is in the public interest that the parties who make such contracts should be compelled to comply with them and not to escape their liabilities by asserting that they had agreed to something which was unreasonable. However, this is not a conclusive evidence. The courts are entitled to refuse to enforce the contracts if they are against public policy or unreasonable. The area and time mentioned in the restraint of trade must be sufficient to protect the new owners in promoting the business without interference of the seller. Contracts in restraint of trade play a significant role in the law of contract by allowing the new owners to establish a business and should be encouraged.

### RECOMMENDATIONS

It is submitted that the courts should scrutinise the contracts in restraint of trade in sale of a business undertaking and refuse to enforce them if they are against public policy. The fact that parties are in equal bargaining power is not a guarantee that they will negotiate terms that comply with public policy. The purchaser should be able to compete, maintain and promote his or her business in commercial world. The author also submits that, on the sale of goodwill for a valuable consideration, there is an implied contract that the vendor will not solicit former customers, who are really the people who form the goodwill. The seller should abstain from any act intended to deprive the purchaser of that which has been sold and restore it to the vendor. However, the purchaser should protect himself or herself by entering into a covenant in restraint of trade to refrain the seller to open a similar business in the same area and canvass or solicit the old customers. In this

way, the purchaser can establish and promote his or her own business.

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