



fn inc

Attorneys Notaries Conveyancers

1st Floor, 2 Albury Park, Albury Road, Dunkeld West, 2196. DoceX 11 Hyde Park. t +27 11 560 7100 f +27 11 759 7960. Stellenbosch Office: t +27 82 287 3173

---

## RESTRAINTS OF TRADE

Restraints of trade enforcement requires the balancing of two conflicting principles.

- the sanctity of contract and
- the freedom to trade

In an effort to strike a balance between these two opposing principles SA Courts have pronounced that the onus is on the party resisting enforcement of a restraint to prove that it offends against public policy ( *Magna Alloys and Research (SA) Pty Ltd v Ellis 1984 (4) SA 874 (A)* )

There are opinions that state that the principle in SA law that the person restrained bears the onus of proving that a restraint is against public policy and should not be enforced must be reviewed in light of ss 22 and 36(1) of the Constitution.

The opinion states that the onus must therefore be on the party seeking to enforce a restraint to prove that it is reasonable and justifiable in public interest.

Only once the restrainer (covenantor) has discharged the overall onus of proving that the restraint complies with s 36(1) of the Constitution ( is reasonable and justifiable) must the onus fall on the restrained (covenantee) to prove that the restraint opposes public policy (unreasonable)

Sec 22 of the Constitution provides 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."

In terms of Sec 36(1) of the Constitution this right can be

".limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom..."

Based on the common law principle of the sanctity of contract, our Courts will attempt by all means to enforce contracts, but will not enforce contracts that are against public policy. The Courts have pointed out that an unreasonable restriction of a person's freedom of trade would be contrary to public policy and would not be enforced. Public policy in the present day is rooted in the Constitution and the fundamental values it enshrines.

On the one hand our society's constitutional norms are based on freedom of competition and trade and therefore the interpretation of these Restraint of trade agreements must be viewed in this light.

On the other hand, in the process of exercising the freedom of trade, individuals are at liberty to enter into any form of agreement even if such agreement restricts this fundamental right.

In deciding whether a restraint is reasonable and justifiable in a democratic society based on principles of equality and dignity and that it is justified by considerations of commercial competitiveness that is embraced by our constitution, the Court may look at :

- does the restraint not simply seek to exclude competition per se but that it seeks to protect a propriety interest worthy of protection such as trade secrets and goodwill on the sale of a business and that it does not go further than is necessary to protect the interest in terms of it's duration and it's area of operation.
- Must be reasonable as between the parties and therefore no consideration of public policy militating very strongly against it.

*Although care has been taken to ensure the accuracy of the above information, FN Inc and its members, employees, agents and representatives cannot be held liable for any loss suffered, as a result of the use of this information.*

*Updated May 2017*