Flynote : Sleutelwoorde

Constitutional practice - Parties - *Locus standi* - Although under common law South African Courts have traditionally adopted restrictive approach to matter of legal standing, requiring person who approaches Court to have interest in sense of being personally adversely affected by wrong alleged, provisions of s 38 of Constitution of the Republic of South Africa Act 108 of 1996 has changed common law rules of legal standing - Much broader approach to standing for purpose of enforcement of infringed fundamental rights contemplated by s 38.

Sports and contests - Association football - Rules of National Soccer League relating to transfer of players between clubs - Rules relating to transfer of professional soccer players whose contracts have terminated - Player having no input in respect of transfer fee - Player treated like object - Transfer fee bearing no relation to any amount expended by club in training of player - Any person wanting to play professional soccer subject to rules and regulations of NSL - Rules akin to treating players as goods and chattels, who are at mercy of employer once contract has expired - If entering into contract which incorporates these rules is only option open to person wanting to pursue career of professional football, can hardly be said that he agrees to these terms of his own free will - Rules violating most basic values underlying Constitution - No rational connection between regime and purpose it purports to serve - Compensation regime constituting restraint of trade which is unreasonable and public policy requiring it to be declared unlawful, inconsistent with provisions of Constitution, and therefore invalid.

Constitutional law - Human rights - Right to dignity in terms of s 10 of Constitution of the Republic of South Africa Act 108 of 1996 - Rules of National Soccer League relating to transfer of players between clubs - Rules relating to transfer of professional soccer players whose contracts have terminated - Player having no input in respect of transfer fee - Player treated like object - Transfer fee bearing no relation to any amount expended by club in training of player - Any person wanting to play professional soccer subject to rules and regulations of NSL - Rules akin to treating players as goods and chattels, who are at mercy of employer once contract has expired - Rules violating most basic values underlying Constitution - No rational connection between regime and purpose it
purports to serve - Compensation regime constituting restraint of trade which is unreasonable and public policy requiring it to be declared unlawful, inconsistent with provisions of Constitution, and therefore invalid.

Constitutional law - Human rights - Right to freedom of movement in terms of s 21 of Constitution of the Republic of South Africa Act 108 of 1996 - Rules of National Soccer League relating to transfer of players between clubs - Rules relating to transfer of professional soccer players whose contracts have terminated - Player having no input in respect of transfer fee - Player treated like object - Transfer fee bearing no relation to any amount expended by club in training of player - Any person wanting to play professional soccer subject to rules and regulations of NSL - Rules were akin to treating players as goods and chattels, who are at mercy of employer once contract has expired - Rules violating most basic values underlying Constitution - No rational connection between regime and purpose it purports to serve - Compensation regime constituting restraint of trade which is unreasonable and public policy requiring it to be declared unlawful, inconsistent with provisions of Constitution, and therefore invalid.

Constitutional law - Human rights - Right to choose profession or occupation freely in terms of s 22 of Constitution of the Republic of South Africa Act 108 of 1996 - Rules of National Soccer League relating to transfer of players between clubs - Rules relating to transfer of professional soccer players whose contracts have terminated - Player having no input in respect of transfer fee - Player treated like object - Transfer fee bearing no relation to any amount expended by club in training of player - Any person wanting to play professional soccer subject to rules and regulations of NSL - Rules akin to treating players as goods and chattels, who are at mercy of employer once contract has expired - If entering into contract which incorporates these rules is only option open to person wanting to pursue career of professional football, it can hardly be said that he agrees to these terms of his own free will - Rules violating most basic values underlying Constitution - No rational connection between regime and purpose it purports to serve - Compensation regime constituting restraint of trade which is unreasonable and public policy requiring it to be declared unlawful, inconsistent with provisions of Constitution, and therefore invalid.

Contract - Legality - Restraint of trade - Public policy - Contract entered into in terms of rules of National Soccer League relating to transfer of players between clubs - Rules relating to transfer of professional soccer players whose contracts have terminated - Player having no input in respect of transfer fee - Player treated like object - Transfer fee bearing no relation to any amount expended by club in training player - Any person wanting to play professional soccer subject to rules and regulations of NSL - Rules akin to treating players as goods and chattels, who are at mercy of employer once contract has expired - If entering into contract which incorporates these rules is only option open to person wanting to pursue career of professional football, it can hardly be said that he agrees to these terms of his own free will - Rules violating most basic values underlying Constitution of the Republic of South Africa Act 108 of 1996 - No rational connection between regime and purpose it purports to serve - Compensation regime constituting restraint of trade which is unreasonable and public policy requiring it to be declared unlawful, inconsistent with provisions of Constitution, and therefore invalid.

Practice - Parties - *Locus standi* - Although under common law South African Courts have traditionally adopted restrictive approach to matter of legal standing, requiring person who approaches Court to have interest in sense of being personally adversely affected by wrong alleged, provisions of s 38 of Constitution of the Republic of South Africa Act 108 of 1996 has changed common-law rules of legal standing - Much broader approach to standing for purpose of enforcement of fundamental rights infringed contemplated by s 38.
Headnote: Kopnota

The rules of the third respondent (the NSL) provided that any footballer wishing to play professional football had to register with the NSL. They provided further that a professional footballer was required to obtain a clearance certificate from his club before he could be registered by the NSL as a player of a new club. If such a player concluded a contract with a new club, his former club was entitled to compensation. If a player stopped playing competitive football upon the expiry of his contract he remained registered as a player of the club with which he was last employed for a period of 30 months, after which the club was no longer entitled to compensation. The amount of the compensation payable (in the event that the two clubs could not agree upon the amount of compensation) was calculated by an arbitrator in terms of a pre-set formula, which did not take into account factors personal to the player. Prior to the amount of compensation being set and paid, the player was unable to register with the new club. The applicant, a professional footballer, applied for an order declaring that the NSL’s constitution, rules and regulations relating to the transfer of professional soccer players whose contracts had terminated were contrary to public policy and unlawful and/or inconsistent with the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and therefore invalid. The applicant brought the application both in his personal capacity and as a class action. The NSL opposed the application and, inter alia, contended that the applicant lacked locus standi to bring the application. It was further contended that the applicant had entered into the contract with his previous club freely and voluntarily and thus the contract, which was in terms of the NSL’s rules, did not violate his rights to freedom of movement, the right to choose a profession or occupation freely and the right to dignity in terms of s 21, s 22 and s 10 of the Constitution.

Held, that it was well established that, although under the common law South African Courts had traditionally adopted a restrictive approach to the matter of legal standing, requiring a person who approached the Court to have an interest in the sense of being personally adversely affected by the wrong alleged, the provisions of s 38 of the Constitution had changed the common law rules of legal standing. A much broader approach to standing for the purpose of the enforcement of the fundamental rights infringed in the Bill of Rights was contemplated by s 38. (Paragraph [17.5] at 1261J-1262B/C.)

Held, further, that a player, in terms of the NSL rules, was helpless. He could give no input in respect of the transfer fee and, if all else failed, he was at the mercy of an arbitrator who determined the compensation payable according to a formula for which there was no rational basis. The player would then be treated just like an object. His figures would be fed into a formula and an amount would pop up, which was not very different from the manner in which the book value of a motor vehicle was determined. It was abundantly clear that the transfer fee thus determined bore no relation to any amount expended by the club in training the player. (Paragraph [34] at 2.)

Held, further, that the applicant, or any person who wanted to play professional soccer, was subject to the rules and regulations of the NSL. These rules were akin to treating players as
goods and chattels, who were at the mercy of their employer once their contract had expired. These rules violated the most basic values underlying the Constitution. If entering into a contract which incorporated these rules was the only option open to a person who wanted to pursue a career of professional football, it could hardly be said that he had agreed to these terms out of his own free will. (Paragraph [38] at 3.)

Held, further, that there was no rational connection between the regime and the purpose it purported to serve, no information in that regard having been placed before the Court by the NSL. (Paragraph [40] at 4.)

Held, further, that the compensation regime constituted a restraint of trade which was unreasonable, that public policy required that it be declared unlawful and that it should be declared to be inconsistent with the provisions of the Constitution and therefore invalid. (Paragraph [41] at 5.)

**Cases Considered**

Annotations

**Reported cases**

*Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (C): dictum at 1028J - 1030B applied

*Eastham v Newcastle United Football Club Ltd and Others* [1963] 3 All ER 139 (Ch): considered

*Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others* 1999 (2) SA 471 (C): referred to

*Knox D’Arcy Ltd and Another v Shaw and Another* 1996 (2) SA 651 (W): referred to

*Kotze & Genis (Edms) Bpk en ’n Ander v Potgieter en Andere* 1995 (3) SA 783 (C): referred to

*Magnia Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A): referred to

*Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A): referred to

*S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) (2000 (1) SACR 414; 2000 (5) BCLR 491): applied

*S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665): referred to

*Union Royale Belge Des Societes de Football Association (ASBL) and Others v Jean Marc Bosman* [1996] 1 CMLR 645 (ECJ): applied

Statutes Considered

Statutes


Case Information

Application for a declaratory order. The facts appear from the reasons for judgment.

N M Arendse SC (with Anton Katz) for the applicant.

N A Cassim SC (with B E Leach) for the third and fourth respondents.

Cur adv vult.

Postea (December 6).

Judgment

Traverso J:

Facts

[1.1] The applicant is a young man, presently aged 21, who is a professional footballer by occupation.

[1.2] The first respondent is John Comitis, who is employed by the sixth respondent, Ajax Cape Town, a football club affiliated to the third respondent.

[1.3] The second respondent is Vasco da Gama Football Club (Vasco), which is also affiliated to the third respondent.

[1.4] The third respondent is the National Soccer League (NSL), a body corporate which operates under the name and style of Premier Soccer League. The NSL is the only professional football body affiliated to, and recognised by, the South African Football Association (fifth respondent) and it regulates the various professional leagues in South Africa.

[1.5] The fourth respondent is the chairperson of the management committee of the NSL.

[1.6] The fifth respondent is the South African Football Association (SAFA). SAFA is the highest authority in South African football and is affiliated to the Confederation Africaine de Football (CAF) and to the Federation Internationale de Football Association (FIFA).

TRAVERSO J

[1.7] The sixth respondent is Ajax Cape Town (Ajax), which is also a football club affiliated to
the NSL.

[1.8] The seventh respondent is Hellenic Football Club (Hellenic).

[1.9] The eighth respondent is Cape Town Spurs Football Club CC (Spurs).

[1.10] The ninth and the tenth respondents are the Ministers of Sport and Labour respectively, who are merely being cited in this application because they may have an interest in it.

[2] It is common cause between the parties that professional football in South Africa is regulated and controlled by the NSL. Any club or footballer wishing to play professional football must be registered with the NSL. If a player is not registered he cannot play for any club that is affiliated to the NSL. The NSL is an association which has as its primary purpose the control and management of professional football in South Africa. All professional football clubs in South Africa are affiliated to the NSL, which in turn is affiliated to SAFA. SAFA is in turn affiliated to CAF and FIFA, the world body of professional football. The hierarchy is therefore: NSL; SAFA; CAF; FIFA.

[3] The NSL is controlled by its board of governors. The board of governors is appointed from 18 Premier League clubs, who each appoint a representative to that board of governors. In addition there is one representative appointed by the so-called ‘inland stream’ of the first division clubs. Another person is appointed by the ‘coastal stream’ of the first division clubs. Accordingly two representatives of the board of governors are not part of the Premier Division clubs. It is common cause that any footballer who wishes to pursue professional football as an occupation must play under the FIFA umbrella and that, accordingly, such a player will have to join a club affiliated to the NSL.

[4] This application turns on the interpretation of the regulations of the NSL and more particularly those regulations which provide for compensation to be paid to clubs in respect of professional footballers whose contracts with their respective clubs have terminated.

[5] Before considering these regulations the facts need to be considered.

[6] The applicant started playing football at the age of 12 and by the time he matriculated in 1996 he was approached by Spurs to play professional football. At the time Spurs was an affiliate of the NSL and played in the Premier Division of the NSL.

[7] When the applicant joined Spurs he entered into a 24-month contract which was due to terminate on 31 July 1999.

[8] In mid-1999 the applicant suffered a serious injury and was accordingly unable to play soccer for the rest of his contractual period. The applicant was paid throughout this period.

[9] On 19 July 1999 (approximately 12 days before the expiry of the applicant’s contract) Spurs sold its professional soccer league franchise
to Mother City Sports Club (Pty) Ltd (Mother City). Spurs was sold to Mother City as a going concern. Included in the sales price was a 'list of included players'. The agreement also contained an annexe B which consisted of the list of excluded players (including the applicant) in respect of whom the contract states:

'13.7 The purchaser does not by virtue of this transaction acquire any rights whatsoever, or any obligations of whatever nature, in connection with the players listed on annexe B as excluded players. The excluded players shall at all times remain under the seller's control and the purchaser shall immediately, at any time, when so requested by the seller, sign any document in connection with the excluded players as may, from time to time, be requested by the seller. For the avoidance of doubt, it is recorded that the proceeds of any transfer of any of the excluded player shall vest entirely in the seller."

(Emphasis supplied.)

[10] It is common cause that the agreement that was entered into between Spurs and Mother City was entered into without the players' knowledge or consent.

[11] The applicant recovered from his injuries during December 1999 and at that stage approached Ajax for a contract to play professional football. Ajax has a close relationship with Vasco, which acts as a 'nursery' for the latter in respect of injured players. Vasco is not a member of the NSL. Because Ajax was concerned about the applicant's match fitness, it approached Vasco to 'nurse' the applicant through his recovery from his injury. The applicant played for Vasco from January 2000 until the end of the season in April/May 2000, when he again approached Comitis, the owner of Ajax, to play for that club. Comitis informed him that there was no prospect of him playing for Ajax. The applicant accordingly requested Comitis for a clearance certificate so that he could join a different club.

[12] As will appear later, it is common cause that a professional footballer is required to obtain a clearance certificate from his club before he can be registered by the NSL as a player of a new club. The applicant could accordingly not move to a new club until he had received a clearance certificate from Ajax, which, it would appear, would only be issued once Ajax received compensation in respect of the applicant's services.

[13] The present situation is that the applicant was in the mean time approached by Hellenic to join their club. After a trial period Hellenic offered to sign the applicant on as a professional player, provided he was furnished with a clearance certificate. He again contacted Comitis, who initially informed him that Ajax required R50 000 compensation before they would issue a clearance certificate. Hellenic was not prepared to pay this amount. The applicant then personally approached Comitis, who reduced the figure to R17 500, but this amount was also unacceptable to Hellenic. Ajax was still not prepared to issue a clearance certificate and the applicant then approached Vasco, but they could not provide him with a clearance certificate as they contended he was not a member of Vasco. Various approaches were made to the various clubs in an attempt

---

TRAVERSO J

---

Copyright Juta & Company
applicant has managed to obtain a clearance certificate from Vasco, but strictly speaking this clearance certificate is of no force and effect as Vasco is not a club under the auspices of the NSL. A clearance certificate from a club affiliated to the NSL is required before a player can play for a new club. The applicant is presently playing for Hellenic but remains subject to the rules and regulations of the NSL. The contract which the applicant entered into with Hellenic provides that the club and the players agree to adhere to, and be bound by, the constitution, rules and regulations of the NSL.

[14] In view of the aforegoing, the applicant contends, *inter alia*, that the NSL’s constitution, rules and regulations relating to the transfer of professional soccer players whose contracts have terminated as being contrary to public policy and unlawful and/or inconsistent with the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and therefore invalid. It is argued that because a player has to await a clearance certificate, which invariably will only be issued once the compensation has been fixed, before he can sign up with a new club, his fundamental rights enshrined in the Bill of Rights are being violated.

[15] The third and fourth respondents raised five points *in limine*. Before dealing with these points *in limine* and the merits of the application, I will set out those regulations which I regard as pivotal to the decision to which this Court will come.

‘13.1 Every player designated as professional shall have a written contract with the club employing him.

. . .

14.1 Only a player who is currently registered by the League shall be permitted to participate in official matches of the League.

. . .

14.4 Eligibility to play shall only be granted to a player who fulfils one of the following conditions:

. . .

14.4.2 if the player in question is transferred from one club to another within SAFA in accordance with these regulations and holds a club transfer certificate;

. . .

15.3 The transfer fee for a professional contracted with a club shall be determined by that club.

. . .

15.5 Should a player be granted a free transfer by a club, and the said transfer is accepted in writing by the player, it shall be necessary for the club to furnish a clearance and for his new club to register him.

15.6 On or before 15 May each year, each club shall send by registered post to the League a list of players they intend placing on the transfer list as well as a list of players to whom they are granting free transfers. The club shall stipulate against the name of each player it wishes to transfer the fee involved. The League shall circulate to all clubs full lists of the players on transfer and the players on free transfer.
15.6.1 Once a club has officially listed a fee for a player placed on transfer, the fee may be increased only with the permission of the management committee of the League.

15.6.2 In the case of each player the full names, age and playing position of the player shall be specified by the club.

15.7 Amateur players, or players not having been placed on the open transfer list after 30 May, will with the League's written consent be able to sign for any club in the League, after first having been declared a free agent by the management committee of the League as defined in clause 12.7 above, or its duly authorised subcommittee.

Players whom clubs fail to re-engage on terms offered by clubs may be placed on the open transfer lists by the club for the remaining period of the contract.

15.7.1 Clubs shall not include amateur players on their notification list to the League in terms of 15.6 above.

15.9 A player who is placed on the transfer list for a fee and not transferred by the start of the new season shall be paid in the normal way by the club, provided that he fulfils or tenders fulfilment of his obligations to the club that has placed him on the transfer list.

15.9.1 Should a player be granted a free transfer and his contract terminated, or his services are not taken up by another club before the start of the new season, the said professional need not be paid in the new season by the club wishing to transfer him.

17.11 In a case of a player whose contract has expired, neither he nor any prospective new club is required to notify his former club of any negotiations he is personally conducting. However, once the player has signed the contract with a new club, the new club is obliged to contact the club to which compensation is possibly due under the rules herein below.

17.13 If a professional player concludes a contract with a new club, his former club shall be entitled to compensation.

17.15 If the two clubs disagree on the amount of compensation to be paid to the players' previous club, such dispute shall be submitted to the management committee of the League first, who shall thereafter submit same to an arbitrator of the Arbitration Foundation of South Africa (should the parties not accept the management committee's decision), and whose decision shall be final and binding on all parties.

18. Termination of activity

A professional player who stops playing competitive football upon the expiry of his contract shall remain registered as a player with the club with which he was last employed for a period of 30-months as from the end of the season in which the player stopped playing. After this period has elapsed without the player resuming playing, the club shall not be entitled to compensation. During the 30 month period referred to above, a club shall be entitled to a transfer fee for the player should the player in question again become actively involved as a contract or non-contract player.'

[16] I will now proceed to deal with each one of the points in limine under a separate heading:
TRAVERSO J

[17] The contents of the replying affidavit - lack of *locus standi*.

[17.1] Mr Cassim who, with Mr Leach, appeared for the third and fourth respondents, contended that the applicant lacks *locus standi* to bring this application, both in his personal capacity, and, on behalf of the class of persons that he purports to represent.

[17.2] The argument about the applicant's *locus standi* in his personal capacity was twofold. Firstly, it was argued that when the application was launched the applicant was not a member of the NSL, and that, in view thereof, there was no dispute between the applicant and the NSL. This argument and the argument in respect of the next point *in limine*, namely that there is no justiciable dispute between the parties, is to a large extent conflated. I will deal with these arguments in more detail under the next heading and will set out a short synopsis of my findings now.

At the time when the application was launched, and prior to the applicant joining Hellenic, he was awaiting a clearance certificate as he had regarded himself as bound by the NSL's constitution, rules and regulations. In any event, even if the applicant was no longer a member of the NSL, the NSL's regulations clearly still applied to him because he could not sign up with Hellenic until he obtained a clearance certificate.

Secondly, it was argued that because he has now joined Hellenic as a professional player, his constitutional rights which he contends are violated by reason of the compensation regime cannot be said to be violated at present.

But it is common cause that the applicant, as a registered professional player with Hellenic, is obliged to adhere to, and be bound by the constitution, rules and regulations of the NSL. Accordingly, the applicant remains subject to the compensation regime once his contract with Hellenic runs out.

[17.3] In respect of the class action Mr Cassim argued that the applicant purports to supplement and/or make good certain deficiencies in his founding affidavit by introducing new matter into his replying affidavit. He accordingly asked for certain portions of the applicant's replying affidavit to be struck out.

[17.4] Accordingly, it was submitted that the applicant has failed to lay a basis in his founding affidavit to bring this application on behalf of a class of persons. It was argued by Mr Cassim that the applicant has not demonstrated any basis in law in terms whereof he is entitled to represent the class of persons which he purports to represent in this application other than his bare *ipse dixit* and certain hearsay allegations.

[17.5] It is well established that, although under the common law South African Courts have traditionally adopted a restrictive
approach to the matter of legal standing, requiring a person who approaches the Court to have an interest in the sense of being personally adversely affected by the wrong alleged, the provisions of s 38 of the Constitution (Act 108 of 1996) have changed the common-law rules of legal standing. A much broader approach to standing for the purpose of the enforcement of the fundamental rights infringed in the Bill of Rights is contemplated by s 38.

[17.6] Section 38 of the Constitution provides:

'Anyone listed in this section has the right to approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights. The persons who may approach a Court are:

(1) anyone acting in their own interest;

(2) . . .

(3) anyone acting as a member of, or in the interest of, a group or class of persons;

(4) anyone acting in the public interest. . . .'

[17.7] The effect and application of the aforesaid section has often been considered. For a complete yet concise summary of the relevant authorities, see Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (1) SA 997 (C) and more particularly the dictum of Van Heerden J at 1028J - 1030B:

'However, as pointed out by all the above-mentioned writers, the provisions of s 38 of the Constitution (and those of the predecessor to s 38, namely s 7(4) of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution)) radically change the common-law rules of legal standing - such provisions mandate a much broader approach to standing for the purpose of the enforcement of the fundamental rights entrenched in the Bill of Rights (chap 3 of the interim Constitution and chap 2 of the final Constitution, respectively). In Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) at para [165], Chaskalson P, dealing with the interim Constitution, adopted a broad approach to legal standing, stating that:

"Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of s 7(4) of the Constitution . . .”

(see also paras [166] - [168] of the reported judgment).

TRAVERSO J

In the same case, O'Reagan J expressed her agreement with this statement of Chaskalson P, stating that

"there can be little doubt that s 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far
broader than our common law has ever permitted. . . . This expanded approach to standing is quite appropriate for constitutional litigation. . . . (Section) 7(4) casts a wider net for standing than has traditionally been cast by the common law."

(At para [229].) And further that

"the particular role played by the Courts in a constitutional democracy . . . requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact."

(At para [230].)

In *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W) Cameron J aligned himself with the approach to standing in constitutional cases adopted by Chaskalson P in the *Ferreira* case (see above). Dealing with the provisions of s 7(4)(b) of the interim Constitution, the learned Judge stated that

"(t)his approach seems to me to be appropriate not only to the Constitutional Court, but to all Courts that are called upon to adjudicate constitutional claims. It seems to me further that a broad approach should be taken not only to who qualifies as having standing under s 7(4)(b), but to how that standing may be evidenced. . . . It would run counter to the spirit and purport of the interim Constitution to require that persons who identify themselves as members of a group or class as a member of whom and in whose interest a litigant acts, should reiterate with formalistic precision the complaint with which they associate themselves. Even more contrary to that spirit and purport would be to require that they attest to their status or that they put in affidavits joining in the litigation."

[17.8] Section 38 of the Constitution should be read with ss 172 and 173. Section 172 provides, *inter alia*, as follows:

1. When deciding a constitutional matter within its power, a Court -

   (1) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

   (2) may make any order that is just and equitable. . . ."

Accordingly s 172 obliges and requires a Court, when deciding Constitutional matters within its power, to declare a law or conduct which is inconsistent with the Constitution to be invalid, and is given a discretion to make any further order which is just and equitable if it finds that a law or conduct is inconsistent with the Constitution. See *S v Manamela and Another (Director-General of Justice Intervening)*

---

**TRAVERSO J**

2001 (1) SA p1264

2000 (3) SA 1 (CC) (2000 (1) SACR 414; 2000 (5) BCLR 491) at 25F - 27C (SA) and 435g - 437c (SACR).

Section 173 vests a Court with the inherent power to develop the common law in accordance with the interests of justice. The NSL is a body which performs a public function. Soccer is a sport which enjoys large support. The fate of soccer players is of public interest. If, as contended by the applicant, the regulations of the NSL violate the
fundamental rights of the professional players, such as fair administrative action, fair labour practices, freedom of association, human dignity etc, this is patently a matter of such vast public interest, that a narrow approach would be inappropriate.

[17.9] The applicant, in support of his contention that he brings this application in the interest of professional footballers and potential professional footballers, makes the following allegations:

(1) He states that the application enjoys wide support amongst professional footballers.

(2) In support of this allegation the applicant filed confirmatory affidavits by Paul Booth, who is the father of Matthew Booth, who captained the under 23 team that represented South Africa at the Olympic Games this year. Mr Booth has himself been involved with amateur football for more than 20 years and has a sound knowledge of the implications of a player changing from amateur status to that of a professional.

(3) In addition a supporting affidavit by Mr Gomes was filed. Mr Gomes is known to assist professional footballers in several respects. He has been involved with professional football for most of his life, and is well acquainted with the effects of the regulations of the NSL on professional footballers and in particular the compensation regime.

[17.10] In my view, the applicant has laid a sufficient foundation to bring this application in the interest of professional soccer players and potential professional soccer players. In any event, the affidavits which were incorporated into the applicant's replying papers are, in essence, a response to the denial by the third respondent of the applicant's standing to bring a class action. It does not introduce new matter not adverted to in the founding papers.

[17.11] This point accordingly has no substance.

[18] The absence of a justiciable dispute

[18.1] Mr Cassim contended that presently there is no justiciable dispute between the applicant and the respondents. He argued that because the applicant has now been granted a certificate declaring him to be a free agent, and because he is now playing for Hellenic, there is presently no violation of, nor an apprehension of a violation of any of the applicant's constitutional rights.

[18.2] This argument loses sight of the nature of the relief which the applicant is seeking, namely a declaratory order. Even though the applicant is presently playing for Hellenic it is common cause that before he could do so he had to sign a contract with Hellenic...
in terms whereof he has subjected himself to the regulations of the NSL. The declarator which the applicant seeks involves the validity of these regulations and more particularly those dealing with the existing compensation regime.

[18.3] The right to approach a competent Court to declare that a fundamental right in the Bill of Rights has been infringed or threatened is not confined to parties who have a live dispute. (See Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others 1999 (2) SA 471 (C).) The applicant has experienced the hardship of the compensation regime in respect of players whose contracts have expired. Even though the applicant's contract with Ajax had expired, Comitis had the power to control the manner in which he would or should pursue his career. Either Ajax had to be paid compensation or the applicant would have had to give up professional soccer as a career. In the end the applicant obtained a clearance certificate which, it would appear, is invalid because it was obtained from a club which is not a member of the NSL. Be that as it may, it would be contrary to the very essence of the kind of relief which the applicant is seeking to expect him to await the expiry of his contract before he again approaches the Court. He will simply find himself in a position where it is once again contended that because his contract has expired he is no longer a member of the NSL and therefore does not have the legal standing to challenge its regulations.

[18.4] I accordingly hold that there is in fact a justiciable dispute between the parties.

[19] Non-joinder of interested parties

[19.1] The respondents contend that all clubs with whom contracts have been concluded by professional players have a direct and substantial interest in the outcome of these proceedings. This submission is correct.

[19.2] I do not agree, however, that this necessarily means that there has been a non-joinder. The individual clubs are all compelled to be members of the NSL. The NSL, in terms of clause 2 of its constitution, is a body corporate, capable of suing and being sued in its own name. The NSL is the only professional soccer body recognised by SAFA. All members of the NSL are subject and bound to the NSL constitution and its rules and regulations, as well as the rules and regulations relating to various league and club competitions. The NSL is the body which represents all the affiliated clubs and all the affiliated clubs are represented on the board of governors of the NSL. Each club therefore has direct representation on the board of governors, and the NSL is therefore the representative body of all the clubs. It would make a mockery of the process of litigation if a litigant, who wishes to have a section of the constitution of any professional body declared invalid, has to join each and every individual member of that body as a party to the proceedings. Would a member of the Bar who wishes to challenge the validity of a section of the Bar's constitution have to cite each and every
member of the Bar?

[19.3] I am therefore satisfied that there has not been a non-joinder as contended by Mr Cassim.

[20] The arbitration provision

[20.1] Clause 11.1 of the constitution of the NSL provides:

‘All members of the NSL which, for purposes of this clause, and without limiting the generality thereof, shall include clubs, officials and players, shall be obliged to submit any dispute other than that of a disciplinary nature as referred to in clause 7.12.1.1; 7.12.1.2; 7.12.1.3 to arbitration.’

[20.2] Clause 11.4.2 implies that the interpretation of the constitution and/or rules and regulations of the NSL is a matter which can be determined by an arbitrator. This case, however, involves more than the mere interpretation of the constitution of the NSL. It involves a possible declaration of invalidity of certain clauses thereof.

[20.3] Mr Cassim argued that the applicant has failed to advance compelling reasons why the arbitration clause should not apply between the parties. Accordingly he submitted that the applicant is not entitled to proceed with this application pending the outcome of a referral of the dispute to arbitration.

[20.4] An arbitration clause does not oust the jurisdiction of the Court. If a party to an agreement seeks to rely on an arbitration clause, the Court retains its discretion as to whether it should itself determine the dispute or whether to stay the proceedings. (See Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 584A - C.)

[20.5] This is, in my view, the kind of case where I should exercise my discretion in favour of this Court deciding the issue. The dispute in this case involves difficult and complex constitutional issues as well as matters of public policy.

[20.6] The arbitrator will not have the power to declare any law or conduct which is inconsistent with the Constitution, invalid. (See Butler and Finsen Arbitration in South Africa: Law and Practice (Juta, 1993) at 176 - 7.) In any event, in terms of the Constitution, only the Courts are vested with the power to declare a law or conduct unconstitutional. (Section 172.) This is not the kind of dispute which should or could be determined by an arbitrator.

[21] This brings me to the merits. I have already quoted the relevant regulations. To summarise, the effect of these regulations are:

[21.1] All professional players must belong to a club which is affiliated to the NSL.
[21.2] All members of the NSL are bound by its constitution, rules and regulations.

[21.3] Every player who receives remuneration in excess of travel and hotel expenses shall be regarded as a professional player. The result is that every player who earns an income (however meagre) from soccer will be regarded as a professional player, and is obliged to enter into a written agreement with the club that employs him.

[21.4] Players are transferred from one club to another 'by agreement between clubs'.

[21.5] The transfer fee for a player 'shall be determined by that club'. A player may however in the sole discretion of the club be granted a 'free transfer' and if the player accepts it, he may be furnished with a clearance certificate for his new club to register him.

[21.6] Regulation 17(5) empowers a professional player to conclude a contract with another club:

1. if his contract with his present club has expired or will expire within six months; or
2. his contract with his present club has been rescinded by one party or the other for valid reasons; or
3. his contract with his present club has been rescinded in writing by both parties after mutual agreement.

However, this regulation also provides that his former club will under those circumstances be entitled to compensation from his new club.

[21.7] The amount of compensation payable by the new club to the old club shall be agreed upon between the two clubs involved. Where the two clubs disagree on the amount of compensation, the dispute is first submitted to the management committee and thereafter to the arbitrator.

[21.8] The arbitrator will be responsible for fixing the amount of compensation to be paid to the player’s previous club by the new club with whom the professional player has concluded a contract. The arbitrator's award will be final and binding. In terms of the regulations the arbitrator has no discretion whatsoever. He merely has to apply a formula with which I will deal more fully later.

[21.9] If a professional player stops playing competitive football, he shall upon the expiry of his contract remain registered as a player with the club with which he was last employed for a period of 30 months as from the end of the season in which the player stopped playing. After the 30 months have elapsed his club will not be entitled to compensation. If, however, he should, during the 30-month period, again become actively involved either as a contract or non-contract player, his club shall be entitled to a transfer fee. (For the sake of convenience this system will hereinafter be

TRAVERSO J

Copyright Juta & Company
The present application involves the situation where a player's contract has expired, and who has been placed on a transfer list and against whose name a transfer fee has been stipulated by the transferring club. It also involves the situation where a player has entered into a new contract with a club, as averted to in para 21.6 above.

It is of note that the player has no input whatsoever in respect of the transfer fee which is fixed and stipulated by the transferring club. It is also of note that the transfer fee is not something which is determined according to any guidelines or stipulated criteria. Should the player be offered a new contract by another club, his former club will be entitled to compensation. The two clubs will agree on the amount of compensation. The player is not entitled to any input in these negotiations.

If the two clubs are unable to agree on the transfer fee the matter must be referred to the management committee who shall submit same to an arbitrator whose decision shall be final and binding.

The arbitrator's role is limited. In terms of the regulations the arbitrator is obliged to 'proceed in accordance with the following principles in fixing the amount'.

The so-called principles are arbitrary and are applied across the board to all players without taking into account any factor peculiar to a particular player which may affect the amount of compensation which a club will be prepared to pay for a player. As will appear hereunder there is no rational basis for the so-called principles.

For purposes of illustration I will set out the result if the formula were to be applied to the applicant:

Compensation shall be based on the gross income of the player multiplied with a stipulated factor having regard to the player's age (reg 17.16.1).

Applicant's gross income is:
R1 700 \times 12 = R20 400

The stipulated factor for the applicant's age group is 12.
R20 400 \times 12 = R244 800

This amount will be final and binding. The arbitrator cannot, for example, take into account the fact that the applicant had not played Premier League soccer for some months and had just recovered from an injury. The result of applying the formula is easy to establish. It is a simple arithmetical calculation. It is inconceivable that any club who wants to sign on a player will do so unless the compensation issue has been resolved between the two clubs and run the risk of this formula being applied. On the present facts Hellenic was not even prepared to pay R17 500 compensation for the applicant. It is therefore apparent that, while two clubs are bickering about the amount of compensation payable, the player is prevented from taking up his employment with his
new employer. The player is totally at the mercy of the two clubs. The battle between the clubs can continue indefinitely. There is no time limit stipulated in the regulations within which negotiations should be finalised or the matter referred to arbitration. A club which would like to retain the services of a player can therefore dig in its heels, thereby effectively preventing the player from taking up alternative employment.

Compensation will always be payable by the new club unless the player is given a free transfer. Whether the player is given a free transfer is again something which is in the sole discretion of the club. The player has no say. It is also of note that on the question of when a player will be given a free transfer, there are no objective criteria or stipulated guidelines. This is something that takes place at the whim of the transferring club.

[25] Mr Cassim argued that the regulations have a protective mechanism in favour of the player in that a player can refer a dispute to the management committee if the negotiations are frustrating his ability to play.

[26] For this contention he relied on regs 12.7 and 15.7, which provide:

12.7 Any dispute regarding the status of a player involved in a transfer within the country shall be settled by the management committee of the League in terms of these rules and regulations.

15.7 Amateur players, or players not having been placed on the open transfer list after 30 May, will with the League's written consent be able to sign for any club in the League, after first having been declared a free agent by the management committee of the League as defined in clause 12.7 above, or its duly authorised subcommittee.

Players whom clubs fail to re-engage on terms offered by clubs may be placed on the open transfer lists by the club for the remaining period of the contract.

Regulation 12.7 deals only with a dispute involving the status of a player, whereas 15.7 deals with amateur players who have been declared free agents by the management committee. I do not agree that these regulations have any bearing on the issue which this Court has to decide.

[27] It is no answer to say, as the third and fourth respondents do, that 'there is no obligation on any footballer to play professional football'. This contention is frivolous and shows a scurrilous disregard for a person's (and in particular the applicant's) right to choose his profession freely. Of course, I accept that any profession must be regulated to a certain extent - these regulations can be internal or imposed by statute. Whatever the case may be, a profession can only be regulated in a manner which is reasonable and in a manner which does not violate the constitutional rights of individuals.

[28] If we should find that the regulations violate one or more of the applicant's or other football players' fundamental rights, then it follows as a matter of logic that the only choice with which a professional football

Copyright Juta & Company
player is faced is to enter into a contract which violates these rights, thereby offending public policy, or not to play professional football at all. This is no choice.

[29] The situation which arises when a player’s contract comes to an end and he is by virtue of a compensation dispute prevented from joining a new club is akin to a restraint of trade provision in a normal commercial employment contract. That this is so becomes even more apparent once one has regard to reg 18, which provides:

18. Termination of activity

A professional player who stops playing competitive football upon the expiry of his contract shall remain registered as a player with the club with which he was last employed for a period of 30 months as from the end of the season in which the player stopped playing. After this period has elapsed without the player resuming playing, the club shall not be entitled to compensation. During the 30-month period referred to above, a club shall be entitled to a transfer fee for the player should the player in question again become actively involved as a contract or non-contract player.’

[30] In Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) the Court acknowledged the sanctity of contract, provided that the effect of an order enforcing an agreement in restraint of trade would not offend against public policy. The Courts have considered the impact of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) on the restraint of trade law, and have been uniformly dismissive of the suggestion that the interim Constitution necessitated the revision of restraint of trade law. (Waltons Stationery Co (Edms) Bpk v Fourie en ’n Ander 1994 (4) SA 507 (O); Kotze & Genis (Edms) Bpk en ’n Ander v Potgieter en Andere 1995 (3) SA 783 (C); Knox D’Arcy Ltd and Another v Shaw and Another 1996 (2) SA 651 (W).)

[31] I have no reason to differ from the views expressed in those decisions. I am, however, firmly of the view that considerations of public policy cannot be constant. Our society is an ever-changing one. We have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights. One can think of many situations which would, prior to 1994, have been found not to offend public policy which would today be regarded as inhuman. Examples are so plentiful that I do not believe that it is necessary for me to mention them.

[32] If we should therefore find that the regulations of the NSL are contrary to public policy, it is self-evident that the contract which the applicant has with Hellenic, which incorporates the NSL regulations, is contrary to public policy and that, accordingly, the ‘restraint of trade’ should not be enforced.

[33] Mr Arendse, who appeared with Mr Katz for the applicant, referred us to Eastham v Newcastle United Football Club Ltd and Others [1963] 3 All ER 139 (Ch). This case involved a professional football player who had entered into a contract with Newcastle United FC. The contract was
TRAVERSO J

renewable annually. During the subsistence of the 1959 - 1960 period the plaintiff applied for a transfer but the club refused and enforced the retention provisions which applied. The Court (per Wilberforce J) held that the retention and transfer provisions operated in restraint of trade. At 145H Wilberforce J remarked:

'The transfer system has been stigmatised by the plaintiff's counsel as a relic from the Middle Ages, involving the buying and selling of human beings as chattels; and, indeed, to anyone not hardened to acceptance of the practice it would seem inhuman, and incongruous to the spirit of a national sport.'

On the basis that a player could apply to have a transfer fee reduced or eliminated, Wilberforce J upheld the transfer system.

[34] As pointed out above a player, in terms of the NSL rules, is helpless. He can give no input in respect of the transfer fee, and, if all else fails, he is at the mercy of an arbitrator who determines the compensation payable according to a formula for which there is no rational basis. The player would then be treated just like an object. His figures will be fed into the formula and an amount will pop up! Not very different from the manner in which the book value of a motor vehicle is determined! It is abundantly clear that the transfer fee thus determined bears no relation to any amount expended by the club in training the player.

In my view, this procedure strips the player of his human dignity as enshrined in the Constitution. Section 7(1) of the Constitution states:

'7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

Section 10 in turn provides:

'10. Everyone has inherent dignity and the right to have their dignity respected and protected.'

[35] In Union Royale Belge Des Societes de Football Association (ASBL) and Others v Jean Marc Bosman [1996] 1 CMLR 645 (ECJ), the European Court of Justice held that art 48(39) of the Treaty of Rome precludes the application of rules whereby a professional footballer who is a national of one member State may not, on the expiry of his contract with a club, be employed by a club of another member State unless a transfer, training and development fee is paid. The following dicta in this case are of assistance in arriving at a conclusion on the present factual situation:

'[11] The UEFA and FIFA regulations are not directly applicable to players but are included in the rules of the national associations, which alone have the power to enforce them and to regulate relations between clubs and players.

...'

[16] At the material time, the FIFA regulations provided in particular that a professional player could not leave the national association to which he was affiliated so long as he was bound by his contract and by the rules of his club and his national association, no matter how harsh their terms might be. An international transfer could not take place unless the former national association issued a transfer certificate acknowledging that all financial...
commitments, including any transfer fee, had been settled.

... [20] Where a non-amateur player, or a player who assumes non-amateur status within three years of his transfer, is transferred, his former club is entitled to a compensation fee for development or training, the amount of which is to be agreed upon between the two clubs. In the event of disagreement, the dispute is to be submitted to FIFA or the relevant confederation.

... [100] Since they provide that a professional footballer may not pursue his activity with a new club established in another member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.

... [104] Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by art 48 of the Treaty. It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, inter alia, the judgment in Kraus, and case C-55/99, Gebhard).

... [109] However, because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally. The prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.

... [113] Finally, the argument that the rules in question are necessary to compensate clubs for the expenses which they have had to incur in paying fees on recruiting their players cannot be accepted, since it seeks to justify the maintenance of obstacles to freedom of movement for workers simply on the ground that such obstacles were able to exist in the past.'

[36] The Court struck down the rules laid down by the sporting associations to the extent that they provide that a professional footballer who is a national of one member State may not, on the expiry of his contract with a club, be employed by a club of another member State unless the latter club has paid the former club a transfer, training or development fee. Mr Cassim sought to distinguish the Bosman case from the present factual situation in that the NSL rules do not contain a provision preventing a player from moving to a different region. He further argued that inasmuch as our Bill of Rights does not have a provision which is similar to art 48 we cannot properly rely on the Bosman decision. Article 48 provides, inter alia:

'1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member States as regards employment, remuneration and other conditions of work and employment.

[37] I do not agree with this approach. Although the rules of the NSL do not expressly forbid a player from moving from one region to another, that may well be the effect thereof. Assume for example the applicant, at the expiry of his contract with Hellenic in Cape Town, wants to move to

TRAVERSO J

a club in Johannesburg, he will be prevented from doing so unless and until the clubs have agreed on a transfer fee, or the arbitration proceedings have been finalised.

[38] Mr Cassim was eventually constrained to concede that the regulations of the NSL impact on the following three fundamental rights of a player:

1. Freedom of movement.
2. The right to choose a profession or occupation freely.
3. The right to dignity.

He, however, argued that because the applicant entered into the contract with Hellenic freely and voluntarily, it does not violate these rights. I have difficulty in understanding this argument. As I have set out above, the applicant, or any person who wants to play professional soccer, is subject to the rules and regulations which I have set out above. In my view, these rules are akin to treating players as goods and chattels who are at the mercy of their employer once their contract has expired. In my view these rules violate the most basic values underlying our Constitution. If entering into a contract which incorporates these rules is the only option open to a person who wants to pursue a career of professional football, it can hardly be said that he agreed to these terms out of his own free will.

[39] Although Mr Cassim touched on a justifiable limitation of the aforesaid rights he did not, rightly in my view, pursue this argument.

[40] The onus lies with the NSL to satisfy this Court that the compensation regime is a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. (See Freedom of Expression Institute v President, Ordinary Court Martial (supra in para [28] at 484E - 485A); S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665) in para 102. In my view, there is no rational connection between the regime and the purpose it purports to serve. No information was placed before this Court by the NSL. In fact, the merits were addressed by Mr Cassim in his heads of argument in five short paragraphs. In third respondent's opposing affidavit it was dealt with in a most superficial manner. Most of the time
and energy of the third and fourth respondents were spent on arguing the points *in limine*.

[41] Accordingly, I come to the conclusion that the compensation regime constitutes a restraint of trade which is unreasonable and that public policy requires that it be declared unlawful, and that it should be declared to be inconsistent with the provisions of the Constitution, and therefore invalid. As set out above, the Constitution imposes an obligation on this Court to declare unconstitutional conduct invalid.

[42] Because of the practical implications which will self-evidently follow from a declaration of invalidity, there should be a period of grace to enable the NSL to effect the necessary changes in an orderly manner.

[43] In the circumstances I come to the conclusion that the following order will be made:

---

[43.1] It is declared that the constitution and regulations of the National Soccer League are inconsistent with the Constitution and invalid to the extent that players whose contracts with clubs have terminated are not entitled to claim a free transfer and/or to be declared a free agent.

[43.2] The declaration of invalidity is suspended for a period of six months from the date of this order to enable the third respondent to correct the constitutional inconsistency which has resulted in the declaration of invalidity.

[43.3] Third and fourth respondents are ordered to pay the costs, which costs are to include the costs of two counsel.

Ngwenya J concurred.

Applicant’s Attorneys: *Murphy, Wallace, Slabbert Inc.*. Third and Fourth Respondents’ Attorneys: *Brian Bleazard Attorneys, Johannesburg; Fairbridge, Arderne & Lawton Inc, Cape Town.*

---

**MAGNA ALLOYS AND RESEARCH (SA) (PTY) LTD V ELLIS 1984 (4) SA 874 (A)**

<table>
<thead>
<tr>
<th>Citation</th>
<th>1984 (4) SA 874 (A)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>Appèlafdeling</td>
</tr>
<tr>
<td>Judge</td>
<td>Rabie HR, Kotzé AR, Joubert AR, Trengove AR en Van Heerden AR</td>
</tr>
<tr>
<td>Heard</td>
<td>May 14, 1984</td>
</tr>
<tr>
<td>Judgment</td>
<td>September 27, 1984</td>
</tr>
<tr>
<td>Annotations</td>
<td>Link to Case Annotations</td>
</tr>
</tbody>
</table>
Flynote: Sleutelwoorde

Kontrak - Wettigheid van - Ooreenkoms ter inperking van handelsvryheid - Afdwingbaar en geldig solank openbare belang nie daardeur geskaad word nie - Hof moet let op omstandighede van geval wat geld op tydstip waarop afdwinging van beperking geëis word - Onredelike inperking van handelsvryheid waarskynlik ook 'n aantasting van openbare belang indien dit afgedwing word - Party wat beweer hy is nie gebonde aan beperkende bepaling nie dra las om aantasting van openbare belang te bewys - Hof nie beperk tot bevinding ten opsigte van ooreenkoms in geheel nie - Maar is by magte om te beslis dat gedeelte van ooreenkoms afdwingbaar of onafdwingbaar is.

Headnote: Kopnota

Die benadering wat in talle Suid-Afrikaanse Hofbeslissings gevolg is, dat 'n bepaling in 'n ooreenkoms wat 'n beperking op die handelsvryheid van 'n party plaas, prima facie ongeldig of onafdwingbaar is, is 'n benadering wat uit die Engelse reg afkomstig is. In ons gemene reg is daar niks te vind wat verklaar dat 'n bepaling in 'n ooreenkoms wat 'n party se handelsvryheid inkort, ongeldig of onafdwingbaar is nie. Die regsposisie by ons is dat elke ooreenkoms in die lig van die omstandighede van die betrokke geval beoordeel moet word om vas te stel of die afdwing van die ooreenkoms die openbare belang sou skaad, in welke geval dit onafdwingbaar sou wees. Alhoewel dit in die openbare belang is dat ooreenkomste wat vryelik aangegaan is, nagekom moet word, is dit egter ook, in die algemeen, in die openbare belang datiedereen hom vir sovü moontlik vryelik in die handels - en beroepswêreld moet kan laat geld. 'n Beperking van 'n persoon se handelsvryheid wat onredelik is, sal waarskynlik ook die openbare belang skaad indien dit afgedwing word.

Aanvaarding van die openbare belang as die toetssteen bring mee dat wanneer iemand beweer dat hy nie gebonde is aan 'n beperkende bepaling waartoe hy in 'n ooreenkoms toegestem het nie, hy die las dra om te bewys dat die afdwing van die bepaling teen die openbare belang sal wees. Die Hof sal moet let op die omstandighede wat geld op die tydstip waarop hy gevra word om die beperking af te dwing, en is nie beperk daartoe om te bevind dat 'n beperkende bepaling in sy geheel afdwingbaar of onafdwingbaar is nie - 'n gedeelte van so 'n bepaling kan ook as sodanig bevind word.

Die beslissing in die Witwatersrandse Plaaslike Afdeling in Ellis v Magna Alloys and Research (SA) (Pty) Ltd omvergewer.

Flynote: Sleutelwoorde

Contract - Legality - Covenant in restraint of trade - Valid and enforceable as long as it is not contrary to public policy - Court to have regard to circumstances obtaining at time when enforcement of restriction is sought - Unreasonable restraint of trade probably also contrary to public policy if it is enforced - Party seeking to avoid being bound by restrictive condition bears onus of proving it contrary to public policy - Court not limited to a finding in regard to agreement as a whole - Entitled to declare agreement partially enforceable or unenforceable.
The approach, followed in many South African judgments, that a covenant in restraint of trade is *prima facie* invalid or unenforceable stems from English law and not our common law, which contains no rule to that effect. The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it 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. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.

Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the *onus* of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable.

**Case Information**

Appèl teen 'n beslissing in die Witwatersrandse Plaaslike Afdeling (HUMAN R). Die feite blyk uit die uitspraak van RABIE HR.

*J Unterhalter SC* (bygestaan deur *S W Sapire*) namens die appellant: It was said in *Katz v Efthimiou* 1948 (4) SA 603 *per* DE BEER AJP at 610 that the doctrine that contracts in restraint of trade are generally to be considered as being in conflict with public policy is entirely foreign to the Roman and Roman-Dutch systems of law and has been engrafted into our system of law. See also Wessels' *Law of Contract in South Africa* 2nd ed vol 1 at 177 para 539. DE VILLIERS CJ in *Edgcombe v Hodgson* (1902) 19 SC at 226 refers to *Voet* 2.14.2 (this should be 2.14.16) who states "all honourable and possible matters may be made the subject of an agreement, but not those contrary to public law nor those which might redound to the public injury" (*Gane’s* translation vol 1 at 428). *Voet*, says the learned CHIEF JUSTICE, does not mention the encouragement of trade as a matter of public policy. In the two cases in the Hooge Raad concerning restraints of trade the validity of the contracts and the reasonableness of the restraints were not questioned. Van Bijnkershoek *Observationes Tumultuariae* II 1359; Pauw *Observationes Tumultuariae Novae* II 876. Both the Roman and the Roman-Dutch law provided that an agreement will not be enforced which is contrary to public policy. *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD at 204. Certain contracts, the enforcement of which would be against public policy, are especially named - wagering contracts and contracts in restraint of marriage. Grotius *Introduction to the Jurisprudence of Holland* 3.3.48 (*Lee’s* trans at 327); *Voet* 2.14.21 (*Gane’s* translation vol 1 at 435); *Dodd v Hadley* 1905 TS at 442; *Edgcombe v Hodgson* (*supra* at 226). In the absence of a statement in the sources of our law that contracts in restraint of trade are by reason of public
policy similarly in a designated category of unenforceable contracts, there is no basis for deriving from such sources a proposition that contracts in restraint of trade are per se invalid. Cf Van de Pol v Silbermann and Another 1952 (2) SA at 569C - E and 570A; McCullough and Whitehead v Whiteaway and Co 1914 AD at 625. The English law has a history over several centuries of the development of rules in regard to contracts in restraint of trade. Heydon The Restraint of Trade Doctrine at 1 - 36; Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd 1894 AC (per Lord HERSCHELL LC) at 541 - 548. Lord MACNAGHTEN stated "the fair result of all the authorities" at 565 of the Nordenfelt case as "... all restraints of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case". In Mason v Provident Clothing and Supply Company Limited 1913 AC 724 Lord HALDANE said at 733 that the covenantees must show that the restriction sought to be imposed goes no further than was reasonable for the protection of their business. The English law, therefore, explicitly designated a contract in restraint of trade as one contrary to public policy, but qualified this. English cases on restraint of trade have been followed in South Africa. Holmes v Goodall and Williams Ltd 1936 CPD at 45; Gordon v Van Blerk 1927 TPD at 772 - 775; Durban Rickshas Ltd v Ball 1933 NPD at 489 - 496; Federal Insurance Corporation of South Africa Ltd v Van Almelo (1908) 25 SC at 943 - 944; Thompson v Nortier 1931 OPD at 152 - 153; Tilney v Rock and Way 1928 EDL at 112; New United Yeast Distributors (Pty) Ltd v Brooks and Another 1935 WLD at 82 - 84 and 86; Brooks and Wynberg v New United Yeast Distributors (Pty) Ltd 1936 TPD at 304. The effect of these cases as to the validity of contracts in restraint of trade is stated in Super Safes (Pty) Ltd and Others v Voulgarides and Others 1975 (2) SA at 785D - F. The Appellate Division has not stated an explicit adoption of the English law but has assumed, relative to the undernoted case, that there is no difference between the South African and English systems of law. Van de Pol v Silbermann and Another (supra ) at 570A. The passing reference to contracts in restraint of trade in McCullough and Whitehead v Whiteaway and Co (supra ) at 625 makes no statement of principle. Although unreasonable restraint of trade is coupled with public interest in Kock & Schmidt v Alma Modehuis (Edms) Bpk 1959 (3) SA at 317B - C, again there is no statement of principle. In Steyn v Malherbe and Grobler, a judgment delivered in the Appellate Division on 26 May 1967 and reported in 1967 (2) PH A43, the Court examined the reasonableness of a restraint clause in an agreement but there was no pronouncement on the fundamentals of the doctrine. There is a suggestion in Capnorizas v Webber Road Mansions (Pty) Ltd 1967 (2) SA at 431H that a restraint clause in a lease may be necessary to protect a lessee from competition in the building occupied, but again there is no statement of principle. It was stated in Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA at 439D that in Van de Pol v Silbermann and Another (supra ) at 569 - 570 this Court left open the question whether our law was in all respects similar to the English law in regard to whether the enforceability of an agreement in restraint of trade depends upon the reasonableness of the restraint. There was a reference to recent developments in the law but these were not discussed. The Appellate Division, therefore, in the present matter, should, with respect, declare the law in regard to contracts in restraint of trade. There have been recent decisions in our Courts that have departed from the line of authority adopted in earlier cases, and that may assist the Appellate
Division in declaring the law in regard to contracts in restraint of trade. In *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* 1977 (4) SA at 505H, DIDCOTT J, with whom FRIEDMAN AJ concurred, decided that public policy in South Africa does not generally condemn covenants in restraint of trade and that "according to our law, they are not *prima facie* void. If any at all are contrary to public policy and unenforceable on that account, they are confined, in my opinion, to those which have been proved unreasonable." The Court reasoned that South African law preferred the idea of sanctity of contract to that of freedom of trade, and based this on mercantile justification and the moral requirement that people should keep their promises. The Court, at 506F, overruled *Durban Rickshas Ltd v Ball* (*supra*); *Roffey’s case* was approved in *Madoo (Pty) Ltd v Wallace* 1979 (2) SA at 957G - H, and reference was made to the great respect paid to the sanctity of contracts in our law. See also *Wohlman v Buron* 1970 (2) SA at 764D. In *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA, the Court at 199G - H stated that it was unable to follow *Roffey’s case*. See also *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (3) SA at 256G - 257H; *Industrial Law Journal* 1981 at 182. In *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA at 1099H, a Full Bench Decision, BOTHA J, while expressing his opinion that he shared the view of DIDCOTT J in *Roffey’s case* that the idea of the sanctity of contract should take precedence over the idea of freedom of trade, considered that a mere difference of opinion did not justify a departure from precedent established over 50 years by many eminent Judges throughout the country (1100D - F; 1101D - E). In *Allied Electric (Pty) Ltd v Meyer and Another* 1979 (4) SA 325, the Court offered certain comments on aspects of the judgment in the *Chemsearch* case, and these are dealt with hereunder. In *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305, a Full Bench decision, VAN DEN HEEVER J (at 311E - F) doubted whether it should today be accepted as axiomatic, whether regarded as a fact or a legal "doctrine", that an agreement in restraint of trade is *prima facie* adverse to the interests of the community. The learned Judge adopted the definition of Aquilius in 1941 *SALJ* at 346, that a contract against public policy is one which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interests of the community, and stated that this is determined by a factual enquiry. TEBBUTT J (at 317A - D), while not deciding the issue, expressed the view that freedom of trade did not require the same emphatic preservation as does the maintenance of the sanctity of contract. WATERMEYER JP considered that there was great merit in the views of VAN DEN HEEVER J but that a decision was unnecessary. Although the Courts in the Provincial and Local Divisions have, subject to what is stated in para 6 hereof, adopted English principles in regard to contracts in restraint of trade it is, in submissions to the Appellate Division, necessary to consider the sources of our law. *Regal v African Superslate (Pty) Ltd* 1963 (1) SA at 106C - G and 120C - D; *S v Bernardus* 1965 (3) SA at 297H - 298A; *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA at 410F - 411A. As appears from annexure "A" hereto, a treatise on the historical development of the maxim *pacta sunt servanda*, the principle of the sanctity of contract is basic to our common law. The history of the restraint of trade doctrine in England shows a development of case law to state a principle that contracts in restraint of trade are void but a "proper and useful contract", depending on reasonableness, is good. *Heydon (op cit)* at 14; *Mitchell v Reynolds* 1 P Wms 181 24 English Reports 347. Our sources do not have the rigidity of the English law in that a contract in restraint of trade is not expressly regarded as
void. The yardstick is public policy and this makes for a flexibility related to situations in a particular era. The three cases referred to in para 6 above show the tensions at present existing in our law because of the uncritical early acceptance of the English law. See also the discussion in the following journals and books: Suzman in 1968 SALJ at 91; Kahn in 1968 SALJ at 398; Aronstam in 1978 SALJ at 21; Otto in 1978 THRHR at 208; Nathan in 1979 SALJ at 43; Kerr in 1979 SALJ at 545; The Principles of the Law of Contract 3rd ed at 115 - 118; Christie The Law of Contract in South Africa at 352 - 368 and The Law of South Africa vol 5 at 75 - 76. As a contract in restraint of trade arises from the cons ensus of the parties made deliberately and seriously and is neither immoral nor illegal, it should, subject to the rules in regard to fraud, mistake, duress and similar aspects that destroy consensus, be regarded as primarily valid because of that consensus and should then be examined in regard to any aspects of public policy that may require the Courts not to enforce it. This will place the emphasis where the sources of our law have placed it and not where the English law has placed it. Rook v Wallach 1904 TS 201, 211 and 226; Conradie v Rossouw 1919 AD 279 and Froman v Robertson 1971 (1) SA at 121D. The onus of proving that a contract in restraint of trade is invalid is upon the person resisting the enforcement of such contract. If the contract is prima facie valid, then it is for the person challenging this to set up a special defence in regard to it and to prove it. Pillay v Krishna and Another 1946 AD at 952; De Jager v Grunder 1964 (1) SA at 463B - C. If such defence is that the contract cannot be enforced on the grounds of public policy because it is in unreasonable restraint of trade, then applying the ordinary principles of onus relating to pleadings, the onus would lie on the party alleging it. SA Wire Co (Pty) Ltd v Durban Wire and Plastics Ltd 1968 (2) SA at 787F - H and 788C; African Theatres Ltd v D'Oliviera and Others 1927 WLD at 129; Roffey's case supra at 504B - C; Stewart Wrightson (Pty) Ltd and Another v Minnitt 1979 (3) SA at 405E - H; Drewton's case supra at 313B - D; Poolquip Industries (Pty) Ltd v Griffin and Another 1978 (4) SA at 359H. In Allied Electrical (Pty) Ltd v Meyer and Another (supra at 329H), it is said that the onus is on the person endeavouring to enforce the restraint because reasonableness must be alleged and proved. But if the contract is prima facie valid, it is submitted that unreasonableness as part of the defence in regard to public policy must be alleged and proved by the person setting up the defence. In National Chemsearch (SA) (Pty) Ltd v Borrowman and Another (supra ), the learned Judge at 1101F declined to depart from precedent in regard to onus and said that other considerations applied in the Appellate Division. In the Highlands Park Football Club case supra the learned Judge at 199E referred to Kerr's Principles of Law of Contract 2nd ed at 105, where it is stated that the covenantor should not be required to prove a series of negatives. But the choice between two conflicting principles should not depend on evidential considerations: Industrial Law Journal 1981 at 180 - 181. The Court, in considering whether as a matter of public policy a contract in restraint of trade should not be enforced will weigh the relevant circumstances prevailing at the time that judgment on the contract is sought. Aling and Streak v Olivier 1947 TPD 215 decided that the validity of the restraint clause had to be tested by reference to the facts as they existed on the date when the agreement was entered into and held that it did not become valid or invalid from time to time as various incidents occur (at 225). In the National Chemsearch case supra at 1106D, BOTHA J decided that the Aling and Streak case supra should not be followed. In Allied Electric (Pty) Ltd
v Meyer and Another (supra), KING J suggested at 330H, that the reasonableness should be tested at the time of the conclusion of the contract, but in the light, as a matter of probability, of the best estimate of the parties in regard to the future. Cf Stewart Wrightson (Pty) Ltd and Another v Minnitt (supra) at 403G - H. In Roffey's case supra at 507F - H, it is suggested that the Court must concern itself with the reasonableness or otherwise of the restraint in the circumstances existing when the enforcement is sought and not in those which prevailed when the covenant was imposed. In Drewton's case supra at 312D - E the learned Judge stated that the

enquiry whether the Court will enforce a contract not per se illegal should relate to the time when the Court is asked to do so. This followed from the premise that the contract is always valid, and the enquiry being whether the Court should compel compliance with a particular agreement or not at a given time. The Court referred to the statement by VAN DEN HEEVER JA writing as "Aquilius" in the 1941 SALJ at 346. The Courts should guard the interest of the community in the light of the general sense of justice of the community, when the Court is best able to judge it and when the Court is best able to guard it, and that is when the Court is asked to enforce a provision in an agreement. There is no proper guardianship if the Court, concerned only to give effect to the state of affairs as it may have applied many years ago when an agreement was concluded, ignores what may be vital considerations at the time of judgment. Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA at 188H. On the basis of the Court deciding whether or not it will enforce, as a matter of public policy, a particular provision in an agreement in restraint of trade, severability tests are not necessary. Drewton's case supra at 313D; Roffey's case supra at 507A - H; National Chemsearch case supra at 1111 - 1116. As the fundamental principle of pacta servanda sunt has not been recognized in many of the early decisions of our Courts through an acceptance of English law and an adoption of a view of public policy in regard to restraint agreements that lacks the flexibility of the Roman-Dutch law, the Appellate Division may now restate our fundamental principles notwithstanding the many years during which the English doctrine prevailed.

J van Aswegen namens die respondent*(1): Whatever the law may be in regard to restraint of trade clauses which occur in other types of contract, such clauses which occur in contracts between master and servant have always been frowned on by our Courts - where parties do not contract on an equal footing. New United Yeast Distributors v Brooks 1935 WLD 75; Commercial Holdings v Leigh Smith 1982 (4) SA at 235A - D and Roffey v Catterall, Edwards and Goudré (Pty) Ltd 1977 (4) SA at 499D - H. Any clause which prevents work or services, after the termination of the contract, will be struck down, if it is directed towards the sterilisation of services, rather than towards the absorption of services. See the cogent reasoning along these lines by Lord PEARCE in Esso Petroleum v Harper's Garage (Stourport) [1967] 1 All ER 727. (A tie agreement case.) The conflict between the two principles, both based on public policy, of freedom of contract and freedom of trade, should, in every case where it is shown clearly that the restraint in fact causes the sterilisation of services without any justification for the protection of the covenantee's business interests, be resolved in favour of the servant as covenantor. In such cases pacta servanda sunt must yield to considerations of public policy, for
it is against the public interest that the public should be deprived of the opportunity to do business with the respondent. And it is equally unfair that the right of any person should, in the circumstances of the present case, be taken away to freely earn his livelihood. The contract unduly restraints the "werkkrag" and the "werkkrag" of Ellis, without any need for the protection of appellant's legitimate business interests. These fundamental rights are not to be lightly infringed. See A Becker and Co v Becker 1981 (3) SA at 421D - H (werkkrag); Atlas Organic Fertilisers v Pikkewyn Ghwano 1981 (2) SA 173 and especially G A Fichardt v The Friend Newspapers 1916 AD 6 (werkkrag) and Mattheus v Young 1922 AD 507 (werkkrag); Allied Electric v Meyer 1979 (4) SA at 335A - B (werkkrag); Freight Bureau v Kruger 1979 (4) SA at 341D - H (werkkrag). In Van de Pol v Silbermann 1952 (2) SA 572 GREENBERG JA accepted that the onus in restraint cases rests on the covenantee to show its reasonableness. Steyn v Malherbe 1967 (2) PH A43. On the facts of the present case it is not necessary to resolve the conflict as to onus between the Full Bench judgment in National Chemsearch v Borrowman (onus on covenantee) 1979 (3) SA at 1102B - D and Roffey v Catterall, Edwards and Goudre 1977 (4) SA at 505E - H (onus on covenantor) and Drewton v Carlie 1981 (4) SA 305 (onus on covenantor). The Appellate Division has pointed out again that our Courts have always accepted that the validity of the restraint depends on the reasonableness of the restraint. Tamarillo v Aitken 1982 (1) SA at 439C - D. The Appellate Division referred to Van de Pol v Silbermann 1952 (2) SA at 569 - 570 for this proposition. It may also be argued that the claim of the appellant, who seeks to enforce his restraint clause strictly according to its tenor, is defeated by his own flagrant breach of contract and his failure to supply goods and execute orders, so as to enable its agents to earn their livelihood. The requirements of the exceptio non adimpleti contractus are satisfied, although the contract has been lawfully terminated by Ellis for such breach of contract. See BK Tooling v Scope Precision Engineering 1979 (1) SA at 430D - H and Dalinga Beleggings v Antina 1979 (2) SA at 60A - C. As to the time when the validity of the restraint clause must be decided, there is conflict of judicial opinion: Normally the validity of a contract must be decided in the light of the circumstances prevailing at the time of its conclusion. Grobler v Naudé 1980 (3) SA 321; Strauss v De Villiers 1983 (1) SA at 9F - G. Circumstances may radically change from the time of conclusion to the time of enforcement of the restraint. For this reason BOTHA J in National Chemsearch v Borrowman 1979 (3) SA at 1106D - H and especially at 1107G - H and 1108A, held that the Court must at the time of the trial decide whether the restraint is reasonable, because the Court must then decide whether it will enforce the restraint in the light of the dictates of public policy. See too: Drewtons v Carlie 1981 (4) SA at 312C - G. (The contract is always valid, but the Court must decide whether it will enforce it in the given circumstances prevailing at the trial stage.) For the older cases holding a contrary view see National Chemsearch v Borrowman 1979 (3) SA at 1106D - H. Public policy is by no means a constant factor, for it may change with the passage of time. See: Roffey v Catterall 1977 (4) SA at 504C - H. It has been pointed out that "This public policy is a high horse to mount and is difficult to ride when you have mounted it." See Driefontein Consolidated Mines v Jansen 1901 17 TLR 605, quoted in Mabaso v Nel's Melkery 1979 (4)
SA at 362A. However much public policy may change, there can be no doubt that today, as a matter of public policy, our Courts will not enforce a restraint agreement, which has clearly been proved to be unreasonable - more especially so where the covenantee has been proved to be in breach of a fundamental obligation.

Judgment

RABIE HR: Die geding waaruit hierdie appèl voortvloei, het op 7 November 1977 begin toe die respondent, Adolf Christiaan Ellis, in die Witwatersrandse Plaaslike Afdeling 'n aksie teen die appellant ingestel het waarin hy beweer het gedurende die tydperk September 1975 tot 15 Januarie 1977 ingevolge 'n mondelinge ooreenkoms goedere (hoofsaaklik sweisapparaat) van die appellant verkoop het en dat die appellant hom nog nie al die kommissie betaal het wat hy met die verkoop van dié goedere verdien het nie. Hy het gevolglik 'n staat van die kommissie wat hy verdien het, die debattering van daardie staat en betaling van die bedrag wat aan hom verskuldig mag blyk te wees, geëis. Die appellant het in sy verweerskrif beweer dat hy R35,15 aan die respondent verskuldig was maar dat hy, vanweë sy teeneis (besonderhede waarvan hieronder weergegee word) nie verplig was om hierdie bedrag aan die respondent te betaal nie. Die respondent aanvaar dat hy op slegs R35,17, tesaam met koste op die toepaslike landdroshofskaal, geregtig was, en daar is toestemming om betaling van hierdie bedrag en die koste onderworpe aan die Verhoorhof se beslissing oor die appellant se teeneis sou wees, en dat die Verhoorhof net oor die teeneis sou beslis.

Die Verhoorhof (HUMAN R) het die appellant se teeneis afgeweë en die appellant gelas om die respondent se koste, insluitende die koste van twee advokate en koste tussen prokureur en kliënt, te betaal. Die appellant appelleer nou teen die geheel van die Verhoorhof se bevel.

Die besonderhede van appellant se teeneis lui soos volg:

"3 (a) On 17 November 1975, the parties entered into a written agreement to which were annexed two annexures, marked annexure 'A' and annexure 'B'.

(b) On 24 January 1976, the aforementioned annexures to the said agreement were substituted and replaced by revised annexures, also marked annexure 'A' and annexure 'B'.

(c) A copy of the said written agreement and the annexures thereto are annexed to the defendant's plea herein marked annexures 'PA', 'PB', 'PC', 'PD' and 'PE'.

(d) In terms of clauses 6 (b) and 6 (c) of the agreement, annexure 'PA', the plaintiff undertook that for a period of two years following the termination of the agreement for any cause, and within a radius of 10 kilometres of the perimeter of the geographical area defined in annexure 'PE', he would not:

(i) directly or indirectly either as a partner, employee, agent, salesman, or representative enter into or engage in any business in competition with the
defendant;

(ii) sell any other thing, substance, or material, the function, use or purpose of which is similar to or the same as the

function, use or purpose of the products defined in annexure 'PD';

(iii) seek or solicit customers or business for the sale of such said thing, substance or material within the area mentioned above;

(iv) promote or assist financially or otherwise any person, firm, association or corporation engaged in a business which competes with the defendant's business.

(e) In terms of clause 6 (d) of the agreement, annexure 'PA', it was agreed and acknowledged that:

(i) in the event of breach of the terms of the provisions of the agreement by the plaintiff, the defendant would suffer damages at the rate of R250 per week for the period during which the plaintiff was in violation of the provisions of clauses 6 (b) and 6 (c)

(ii) such sum would constitute a genuine pre-estimate of the damages which would be suffered by the defendant as a result of plaintiff's breach of the foregoing provisions.

4. On or about 1 February 1977, within a period of two years following the termination of his services with the defendant and within a radius of 10 kilometres of the perimeter of the geographical area defined in annexure 'PE', the plaintiff entered into and has continued being employed by a firm or company, viz Welding Advisory Services, whose business is in competition with that of the defendant and has in the course of such employment contravened the provisions of clause 6 (b) and the provisions of one or more of the subclauses of clause 6 (c).

5. In the premises, the plaintiff has become indebted to the defendant in a sum of R18 000, being R250 per week from 1 February 1977 to date, viz 17 June 1978.

6. Furthermore, in the premises, the defendant is entitled:

(a) to an interdict restraining the plaintiff from continuing in breach of the agreement between the parties;

(b) to payment of such further amount of damages as will be due for the period 18 June 1978 to date of judgment. Wherefore the defendant prays for judgment against the plaintiff for:

(a) payment of the sum of R18 000;

(b) payment of such additional sum of damages calculated at the rate
of R250 per week from 18 June 1978 to date of judgment;

(c) an order restraining the plaintiff from continuing in breach of the agreement between the parties;

(d) alternative relief;

(e) costs of suit."

Die goedere van die appellant waarna daar in klousule 6 van die ooreenkoms verwys word, word soos volg in aanhangsel "PD" by die ooreenkoms omskrywe:

"All of the products listed in the sales catalogue of the company, subject to any future additions or deletions of products by the company, which sales catalogues are made a part hereof..."

Die gebied waarop die ooreenkoms tussen die partye betrekking

RABIE HR"Magna Area 225" genoem en dit word soos volg omskryf:

"Starting where the road from Sasolburg to Vanderbijlpark crosses the Vaal River, travel north to the right hand turn-off to Vereeniging via Kleigord. Proceed along Houtkop Road to Senator Road to Ring Road. Continue straight across the Klipriver to Ring Road to the Suikerbosrand River. West along this river to the Vaal River. Along the Vaal to the Lewis Road Bridge. Then south past Viljoensdriif Siding to Coalbrook Siding, then west and north to Sasolburg and the starting point.

This area to include all accounts within the municipal area of Meyerton and Sasolburg - together with its associated coal mines. It also includes the accounts of Vereeniging Refractories, Klip Power Station, Kragbron and Vereeniging Hospital.

Travelling in the direction of this description you are authorised to call on all accounts to the right of the Road River, the centre of the road being the dividing line at all times."

Uit die getuienis blyk dit dat "Magna Area 225" 'n geïndustrialiseerde gebied is en dat dit binne die sogenaamde "Vaal Driehoek" val.

In antwoord op 'n versoek om nadere besonderhede oor die bewering in para 4 van die teeneis dat Welding Advisory Services 'n mededinger van die appellant is, het die appellant gesê:

"Welding Advisory Services competes with the defendant in the business of supplying and distributing of specialized electrodes, brazing alloys, silver solders and powders."

Dit was gemene saak tussen die partye dat die appellant en Welding Advisory Services albei artikels van die bogemelde aard verkoop het.

In sy pleit op para 3 van die teeneis het die respondent die bestaan van die ooreenkoms waarop die appellant hom beroep, erken. Hy het egter ontken dat klousule 6 van die ooreenkoms geldig of afdwingbaar ("valid or enforceable") was -

"in that it seeks to impose an unreasonable restraint on the plaintiff in carrying on his trade or business."

Wat para 4 van die teeneis betref, het die respondent al die bewerings daarin tot aan die einde van die woorde "... that of the defendant" erken. Hy het ook erken dat hy die bepalings van
klousule 6 (b) van die ooreenkoms verbreek het op die wyse deur die appellant beweer. Hy het paras 5 en 6 van die teeneis ontken, en sy bede was dat die Hof klousule 6 van die ooreenkoms ongeldig moet verklaar en die appellant se eis met koste moet afwys.

Die appellant het die respondent in 'n versoek om nadere besonderhede gevra om te sê op welke gronde, en in welke opsigte, hy beweer dat klousule 6 van die ooreenkoms onredelik en onafdwingbaar is. Die respondent het soos volg geantwoord:

"The clause is a covenant in restraint of trade in that it purports to restrict the common law right of the plaintiff to trade or work and the defendant seeks, pursuant to this clause, an order which has the effect of interdicting the plaintiff from continuing with his present work. The agreement being, by virtue of the above facts, a covenant in restraint of trade, is prima facie void and unenforceable. The onus is upon the defendant to satisfy the Court that the restraint is reasonable. The plaintiff contends that the entire clause is unreasonable and unenforceable. The onus being on the defendant to prove that the prima facie void clause is reasonable and therefore enforceable, the defendant is not entitled to any further particularity."

In die appellant se teeneis word daar na sekere klousules van die

1984 (4) SA p885

RABIE HR

oorenkoms tussen die partye verwys. Paragraaf 3 (d) van die teeneis bevat 'n samevatting van die inhoud van klousules 6 (b) en 6 (c) van die ooreenkoms, en para 3 (e) 'n samevatting van klousule 6 (d), en dit is nie nodig om die klousules self aan te haal nie. Ek wil egter op enkele verdere bepalings van die ooreenkoms wys:

(i) Klousule 1: Hierin word bepaal dat die appellant aan die respondent die alleenreg ("exclusive right") verleen -

"to act as agent for it in respect of the sale of those products listed in annexure 'A' hereto, to purchasers, hereinafter referred to as 'customers', who carry on business within the geographical area being and contained within the boundaries set out in annexure 'B' hereto".

(ii) Klousule 2 (a): Hierin word gesê dat die appellant onderske om artikels wat bestel word, te voorsien, maar met die voorbehoud "that all orders are subject to acceptance by the company".

(iii) Klousule 2 (f): In hierdie klousule onderneem die appellant:

"To train and educate the agent in the knowledge of the company's products and selling methods and to provide him with such information and literature regarding customers as it considers will best enable the agent to sell the maximum volume of the said product."

(iv) Klousule 6 (a): Hierdie klousule het betrekking op die beperking wat deur klousule 6 (b) op die respondent gelê word. Dit lui soos volg:

"The agent acknowledges that the training materials, advice and assistance of the company's supervisors, customer lists, route sheets and other
confidential information, all given to him by the company or acquired or formulated by him during the effectiveness of this agreement as a result of his having access to the aforementioned aids and information and dealing in the company's products are of such a value and nature as to make it reasonable and necessary for the protection of the company that the agent will not compete with the company within or in the vicinity of the geographical area mentioned in para 1 and shown on annexure 'B' hereto for custom amongst the customers or potential customers of the company for the period hereinafter mentioned."

(v) Klousule 7 (b): Hierin word bepaal dat die respondent "an independent contractor and free agent" is en, verder, dat hy nie die bevoegdheid het om 'n handeling te verrig waardeur hy die appellant bind nie.

(vi) Klousule 7 (e): Dit bepaal dat enige van die partye die ooreenkoms tussen hulle kan beëindig deur aan die ander party 15 dae skriftelike kennis van beëindiging te gee. Dit bepaal verder dat by beëindiging van die ooreenkoms die respondent nie bevry word "from complying with the covenants and terms of this agreement which survive termination, including but not limited to paras 4 (c) and 6 hereof", nie. Die bepalings van klousule 6 blyk uit wat hierbo gesê is. Klousule 4 (c) bevat onder meer 'n onderneming van die respondent om, ná die beëindiging van die ooreenkoms, "not to defame or disparage the company's business, or products... nor engage in any unfair trade practices towards the company".

Toe die verhoor in die Hof a quo op 3 Maart 1981 begin het, het reeds meer as twee jaar verloop sedert die verstryking van die tydperk 1984 (4) SA p886 RABIE HR

RABIE HR

van twee jaar wat in klousules 6 (b) en (c) van die ooreenkoms genoem word. Die appellant se eis om 'n interdik het gevolglik nutteloos geword, en die vrae waaroor die Verhoorhof moes beslis, was dus of die beperking wat in klousules 6 (b) en (c) op die respondent geplaas is, afdwingbaar was en, indien wel, of die appellant op die betaling van vergoeding, soos in klousule 6 (d) van die ooreenkoms bepaal, geregtig was.

Die Verhoorhof het op grond van sekere beslissings van die Transvaalse Provinsiale Afdeling en die Witwatersrandse Plaaslike Afdeling die saak benader op die grondslag dat 'n bepaling in 'n ooreenkoms wat 'n beperking op 'n persoon se handelsvryheid plaas, onafdwingbaar is, tensy daar spesiale omstandighede is wat die beperking regverdig, en, verder, dat die party wat so 'n beperking wil afdwing, die las dra om te bewys dat dit geregverdig is. So 'n party, het die Hof in navolging van die gemelde sake beslis, kan hom van die bewys las kwyt deur te bewys dat die beperking redelik ("reasonable") is. Die Verhooorregter het, ná oorweging van die
getuienis wat deur die partye voorgelê is, bevind dat die appellant hom nie van hierdie bewyslas gekwyt het nie en het gevolglik sy teeneis afgewys. Ek sal na die betrokke getuienis verwys nadat ek eers op die regsposisie met betrekking tot ooreenkomste wat 'n beperking op 'n persoon se handelsvryheid plaas, ingegaan het.

Die reg wat tot nog toe in ons Howe toegepas is met betrekking tot die afdwingbaarheid van 'n ooreenkomst wat 'n beperking op die handelsvryheid van 'n party by 'n ooreenkomst plaas, is in hoofsaak 'n navolging van die Engelse reg op hierdie gebied - hoewel dadelik gesê moet word dat daar in sekere onlangse beslissings (waarna ek later in die uitspraak sal verwys) stemme opgegaan het teen die navolging van ten minste sommige van die Engelsregtelike reëls oor die aangeleentheid.

'n Mens sou 'n lang reeks sake kon opnoem wat toon dat ons Howe in die verlede Engelse reg toegepas het wanneer hulle moes besluit oor die afdwingbaarheid van 'n ooreenkomst wat 'n beperking op 'n party se handelsvryheid plaas. Dit is egter nie nodig om dit te doen nie. Die appellant se advokaat noem 'n klompie van hierdie sake in sy skriftelike betoogpunte. Ek meen dat dit voldoende is om te wys op wat GREENBERG AR in hierdie verband in Van de Pol v Silbermann and Another 1952 (2) SA 561 (A) op 569E - F gesê het:

"In the Provincial Divisions there have been a large number of cases which have unquestioningly applied the English law on the point and in Holmes v Goodall and Williams 1936 CPD 35 at 42 it was said, as a trite observation, that 'English cases on restraint of trade have been followed in South Africa' and the Court then proceeded to apply the English law."

Die Engelse reg hou in, kan kortliks en in die algemeen gesê word, dat elke inkorting van 'n party se handelsvryheid prima facie onafdwingbaar (of "void", soos soms in uitsprake gesê word) as synde teen die openbare belang, tensy daar bewys gelewer word van omstandighede wat toon dat die inkorting redelik is, dit wil sê, redelik ten opsigte van die partye by die ooreenkomst en redelik ten opsigte van die openbare belang. Daar word blykbaar algemeen aanvaar dat die volgende passasie in die uitspraak van Lord MACNAGHTEN in die bekende saak Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [ 1894] AC 535 op 565 'n juiste opsomming van die geldende Engelse reg oor die aangeleentheid is:

"The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restrictions of trade of themselves, if there is nothing more, are contrary to public policy, and, therefore, void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

Kyk ook die uitspraak van Viscount HALDANE in Mason v Provident Clothing and Supply Co Ltd 1913 AC 724 en die uitspraak van Lord ATKINSON in Herbert Morris Ltd v Saxelby [ 1916]

Copyright Juta & Company
1 AC 688, waar die bogemelde passasie aangehaal word en gesê word dat dit 'n duidelike opsomming van die Engelse reg bevat.

Laasgenoemde twee sake is van groot belang wat die Engelse reg betref vanweë die reëls wat dit met betrekking tot die kwessie van die bewyslas neergelê het. Daarin is beslis dat die persoon wat hom op 'n beperkende bepaling beroep, die las dra om te bewys dat die beperking inter partes redelik is, maar dat die las om te bewys dat 'n beperkende bepaling teen die openbare beleid - en dus ongeldig ("invalid") - is, al sou dit ook redelik inter partes wees, op dié party rus wat beweer dat dit teen die openbare beleid is. Hierdie reëls geld tans nog in die Engelse reg. In Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd 1968 AC 269 het Lord MORRIS OF BORTH-Y-GEST in sy uitspraak (op 319D - E), met verwysing na Herberg Morris Ltd v Saxelby (supra), die volgende gesê:

"It has been authoritatively said that the onus of establishing that an agreement is reasonable as between the parties is upon the person who puts forward the agreement, while the onus of establishing that it is contrary to the public interest, being reasonable between the parties, is on the person so alleging."

En ook:

"The reason for the distinction may be obscure, but it will seldom arise since once the agreement is before the Court it is open to the scrutiny of the Court in all its surrounding circumstances as a question of law."

Kyk ook J D Heydon The Restraint of Trade Doctrine (Butterworths 1971) wat op 37 sê:

"Ever since Mason v Provident Clothing and Supply Co Ltd and Herbert Morris Ltd v Saxelby it has been standard doctrine that the onus of proving that a contract in restraint of trade is reasonable in the interests of the covenantee is on the party seeking to enforce the contract, while the onus of proving that it is against the public interest is on the party resisting enforcement."

Die reëls van die Engelse reg met betrekking tot ooreenkomste wat 'n beperking op 'n party se handelsvryheid plaas, vind hulle oorsprong, volgens onlangse uitsprake, in oorwegings van die openbare belang, van openbare beleid. In die Esso Petroleum- saak supra, sê Lord

RABIE HR

HODSON in sy uitspraak (op 317C - D) dat daar al gesê is dat die leerstuk teruggevoer moet word na Magna Carta, waarvolgens 'n vry mens nie sy vryheid, wat "freedom of trade" insluit, ontreem mag word nie. In Lord MORRIS OF BORTH-Y-GEST se uitspraak (op 318B - C) word gesê dat -

"the basis of the doctrine of restraint of trade is the protection of the public interest",

en dat, wanneer 'n mens dit in gedagte hou, dit maklik is om te begryp -

"how the law developed in its conception of reasonableness as the test which must be passed in order to save a contract in restraint of trade from unenforceability".

Lord PEARCE sê die volgende in sy uitspraak (op 324B):

"Public policy, like other unruly horses, is apt to change its stance; and public policy is the ultimate basis of the
Courts’ reluctance to enforce restraints.“

En dan voeg hy by:

“Although the decided cases are almost invariably based on unreasonableness between the parties, it is ultimately on the ground of public policy that the Court will decline to enforce a restraint as being unreasonable between the parties. And a doctrine based on the general commercial good must always bear in mind the changing face of commerce. There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable between the parties. There is one broad question: is it in the interests of the community that the restraint should, as between the parties, be held to be reasonable and enforceable?”

Lord WILBERFORCE praat in sy uitspraak (op 332 in fine) van ’n “public policy test of reasonableness”.

Soos ek hierbo gesê het, is daar talle beslissings van ons Provinsiale en Plaaslike Afdelings waarin die reëls van die Engelse reg met betrekking tot ooreenkomste wat ’n party se handelsvryheid inkort, gevolg en toegepas is. Hierdie Hof het hom nog nooit uitgespreek oor die vraag wat ons reg met betrekking tot die aangeleentheid is nie. Ek verwys hieronder kortliks na die paar sake in hierdie Hof waarin ooreenkomste van die gemelde aard ter sprake gekom het.

In Van de Pol se saak supra het GREENBERG AR, met verwysing na ’n betoog dat “an agreement in restraint of trade is prima facie unenforceable”, gesê (op 569D - E) dat daar ’n passasie in McCullough and Whitehead v Whiteaway & Co 1914 AD 599 op 625 - 626 voorkom wat "seems to suggest that such a doctrine is part of our law”. In laasgenoemde saak is onder meer betoog dat ’n ooreenkoms “oppressive and in restraint of trade” was, en INNES HR het in verband daarmee gesê:

“Now, that the document was one-sided and harsh admits of no doubt; but I am not aware of any principle of our law by which, on that ground alone, an undertaking deliberately and knowingly entered into could be repudiated. Certainly we were referred to no such authority. Nor do any of the decisions with regard to contracts in restraint of trade seem to me to be in point. This agreement did not prevent the appellant from trading; it bound him down to trade in certain matters only through a certain channel, and one-sided though its provisions appear he was enabled in a very few years to build up under them a large and profitable business.”

Ek vind hierin geen beslissing oor wat ons reg met betrekking tot ’n ooreenkoms wat ’n beperking op ’n party se handelsvryheid plaas, is nie. INNES HR het bevind dat die ooreenkoms waarom dit in daardie saak gegaan het nie ’n ooreenkoms was wat die appellant se handels-

RABIE HR

vryheid aan bande gelê het nie, en daar was gevolglik geen rede om te beslis oor die reg wat geld wanneer ’n ooreenkoms so ’n beperking bevat nie. Daar is dan ook geen sprake daarvan dat INNES HR enigsins bevind het dat die Engelse reg oor die aangeleentheid ook in Suid-Afrika geld nie.

In die Van de Pel- saak het hierdie Hof ook nie beslis wat ons reg oor die aangeleentheid is nie. GREENBERG AR het vir die doeleindes van die appèl aanvaar, sonder om oor die vraag te
beslis, dat in ons reg, net soos in die Engelse reg, 'n bepaling in 'n ooreenkoms wat 'n beperking op 'n party se handelsvryheid plaas, afgedwing sal word indien die beperking redelik is en nie teen die openbare belang is nie. Hy het ook vir dieselfde doel aanvaar dat die persoon wat hom op die beperking beroep, die las dra om te bewys dat dit redelik is.

In Kock en Schmidt v Alma Modehuis (Edms) Bpk 1959 (3) SA 308 (A) is ook nie beslis wat ons reg met betrekking tot ooreenkomste wat 'n beperking op iemand se handelsvryheid plaas, is nie. Daar is onder meer betoog dat die ooreenkoms wat in daardie saak ter sprake was, onafdwingbaar was omdat dit 'n onredelijke inkorting van die handelsvryheid van 'n party by die ooreenkoms bewerkstellig het. STEYN HR het, sonder om die regsposisie enigsins te bespreek, bevind dat die feite van die saak geen onredelijke inkorting van handelsvryheid getoon het nie. Hy het ook gesê dat daar nie betoog is dat die beweerde inkorting die openbare belang nadelig getreën het nie. (Kyk op 317A - C van die verslag.)

In Steyn v Malherbe 1967 (2) PH A43 (A) het die respondent (die eiser in die Hof a quo) hom beroep op 'n ooreenkoms wat 'n beperking op die apppellant - 'n vennoot wat uit 'n vennootskap getree het - geplaas het volgens die uitspraak van BEYERS AR was dit gemene saak tussen die partye dat die las op die respondent, wat die beperking wou afdwing, gerus het om te bewys dat die beperking inter partes redelik was. Hierdie Hof het bevind dat die beperking redelik was. Die Hof het die saak beslis op die basis waarop dit deur die partye voorgedra is, en het hom nie oor die reg uitgespreek nie.

In A Becker and Co (Pty) Ltd v Becker and Others 1981 (3) SA 406 (A) , waar dit oor die verkoop van die verkoper se "goodwill" gegaan het, het VAN HEERDEN WN AR in sy aparte uitspraak, met verwysing na Van de Pol se saak supra, onder meer gesê dat

"vanweë oorwegings van openbare belang so 'n hoë prys op vrye mededinging gestel word dat selfs 'n beding ter beperking van die verkoper se handelsvryheid nietig is indien dit 'n draagwydte het wat verder strek as wat beskerming van die koper se belange verg."

Vir sover hiermee te kenne gegee mag word dat Van de Pol se saak beslis het wat in die aangehaalde woorde gesê word, sou dit nie juist wees nie. Die aangehaalde stelling is in ooreenstemming met die Engelse reg, en in Van de Pol se saak is daar, soos hierbo gesê is, vir die doeleindes van die appèl aanvaar, sonder dat daaroor beslis is, dat ons reg met die Engelse reg ooreenstem.

In Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) het MILLER AR daarop gewys dat daar, in navolging van die Engelse reg, in talle Suid-Afrikaanse sake blykbaar aanvaar is

"that an agreement in restraint of trade depends for enforceability upon the reasonableness of the restraint"

RABIE HR

(op 439D), en dat Van de Pol se saak die vraag of ons reg in hierdie verband in alle opsigte dieselfde as die Engelse reg is, onbeantwoord gelaat het. MILLER AR het self ook nie op hierdie vraag ingegaan nie aangestem hy bevind het dat die bepaling waarom dit in die saak voor die Hof gegaan het, nie 'n inkorting van handelsvryheid geskep nie.
Met betrekking tot die reg soos dit in ons Howe toegepas word, moet daarop gewys word dat daar weinig twyfel bestaan dat daar in ons gemene reg niks te vind is wat verklaar dat bepalings in 'n ooreenkoms wat iemand se handelsvryheid inkort, ongeldig of onafdwingbaar is nie. In Wessels *The Law of Contract in South Africa* 2de uitg para 539, word gesê:

"The South African Courts, in a series of decisions, have declared that a condition in restraint of trade is void. There is very little doubt that this rule of law has been taken directly from the English law of contract and that considerable difficulty will be experienced in pointing out the Roman-Dutch source of this principle..."

In *Katz v Efthimiou* 1948 (4) SA 603 (O) op 610 het DE BEER WN RP verklaar:

"The doctrine that contracts in restraint of trade are generally to be considered as being in conflict with public policy is entirely foreign to the Roman and Roman-Dutch systems of law."

In die *Van de Pol-saak* supra het GREENBERG AR gesê dat die advokate in die saak niks in die Romeins-Hollandse reg kon vind "which prohibited or viewed with disfavour such agreements". Die appellant se advokaat het ons verwys na geskrifte waarin melding gemaak word van twee beslissings van die Hooge Raad, die een in 1717 en die ander in 1763, waar sulke ooreenkomste ter sprake was, maar waar geensins te kenne gegee is dat dit nie afdwingbaar was nie. In die eerste geval, vermeld in *Van Bynkershoek Observationes Tumultuariae II* 1359, het Titius en Maevius hulle vennootskap in die houthandel ontbind. By die ontbinding het Titius, op straffe van betaling van 5 000 gulden, onderneem om nie 'n ander vennootskapsooreenkoms in die houthandel aan te gaan nie en ook om nie vir 'n ander hout te verkop of te koop nie. Toe Maevius op grond van die ooreenkoms geëis het, het twee lede van die Hof 'n bevel geweier omdat dit op die afdwing van 'n strafbepaling sou neerkom, maar die meerderheid van die lede van die Hof het beslis dat die strafbepaling in die plek van die interesse gekom het (*succedere in locum rou interesse*), en dat Maevius vir sy *damnum et interesse* kon eis, wat, omdat dit gewoonlik 'n onsekere bedrag (*incertum*) is, hier op 'n vaste bedrag (*in certam summam*) bepaal is. (N S van Oosten *Systematisch Compendium der Observationes Tumultuariae van Comelis van Bijnkershoek* (1962) sê op 75 die volgende met verwysing na die gemelde para 1359:

"Overeenkomst, waarbij Titius zich verplicht aan Maevius f15 000 te betalen als hij met een ander een vennootschap van houthandel zou aangaan of voor een ander hout zou kopen of verkopen, geldig geacht, omdat het bedrag van f15 000 te beschouwen is als bij voorbaat gefixeerde schadevergoeding, 1359.")

Die tweede geval, vermeld in Pauw *Observationes Tumultuariae Novae II* 876, was soortgelyk aan die eerste. Maevius het sy besigheid aan Titius en Sempronius verkop en het hom onderwerp, op straffe van betaling van 'n som geld, aan 'n beperking op sy handelsvryheid wat ná die verkoping sou geld. Die geldigheid van die beperking is nie deur die Hof bevraagteken nie.

'n Mens kan dus met veiligheid aanvaar dat daar in ons gemene reg niks is wat verklaar dat 'n bepaling in 'n ooreenkoms wat die handelsvryheid van 'n party inkort bloot om daardie rede ongeldig of onafdwingbaar is nie. Dit volg dus dat daar in ons gemene reg nie gesag te vind is.
vir die benadering wat al so lank deur ons Howe gevolg word nie, naamlik dat ’n bepaling in ’n ooreenkoms wat ’n beperking op die handelsvryheid van ’n party plaas, prima facie ongeldig of onafdwingbaar is. Dit is ’n benadering wat in navolging van die Engelse reg gevolg word.

Die feit dat ons gemene reg nie verklaar dat ’n ooreenkoms wat ’n party se handelsvryheid inkort, ongeldig of onafdwingbaar is nie, bring nie nie met die benadering nie wat in alle omstandighede afdwingbaar is nie. Beslisings oor die onderwerp toon dat ons Howe al vir baie dekades van die standpunt uitgaan dat dit in die belang van die gemeenskap is dat iedereen vir sover moontlik vry moet wees om hom in die handels- en beroepswêreld te laat geld, en dat ’n onredelike inkorting van hierdie vryheid, of ’n inkorting daarvan wat die openbare belang skaad, nie toegelaat behoort te word nie. Ook in hierdie Hof, wat hom weliswaar nog nie uitgespreek het oor wat ons reg oor die aangeleentheid is nie, is appèlle aangeteken met die vraag van die redelikheid van sulke ooreenkomste gegaan het, sonder dat daar ooit te kenne gegee is dat geskille van hierdie aard geskille is waarby ons Howe nie gemoeid is nie. Dit sou derhalwe, in al die omstandighede, na my mening onrealisties en verkeerd wees om die vraag van ooreenkomste wat ’n beperking op partye se handelsvryheid plaas, ’n onderwerp is wat nie deur ons reg gereël en altyd dieselfde is nie en van tyd tot tyd kan verander, kan daar ook geen numerus clausus wees van soorte ooreenkomste wat as strydig met die openbare belang beskou kan word nie. Dit sou dus volgens die beginsels van ons reg moontlik wees om te sê dat ’n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang is indien die omstandighede van die betrokkie geval sodanig is dat die Hof daarvan oortuig is dat die afdwing van die betrokke ooreenkomms die openbare belang sou skaad. Die "indien" is belangrik, want nie elke bepaling wat iemand se handelsvryheid inkort sou noodwendig teen die openbare belang wees nie. Dit word ook in die Engelse reg so ingesien, want hoewel daar gesê word dat

*Deduci possunt in pactionem negotia quaevis honesta et possibilia, non juri publico contraria, quaeve ad publicam spectarent laesionem.*

Kyk ook Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 op 204. Omdat opvatting oor wat in die openbare belang is, of wat die openbare belang vereis, nie altyd dieselfde is nie en van tyd tot tyd kan verander, kan daar ook geen numerus clausus wees van soorte ooreenkomste wat as strydig met die openbare belang beskou kan word nie. Dit sou dus volgens die beginsels van ons reg moontlik wees om te sê dat ’n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang is indien die omstandighede van die betrokkie geval sodanig is dat die Hof daarvan oortuig is dat die afdwing van die betrokke ooreenkomms die openbare belang sou skaad. Die "indien" is belangrik, want nie elke bepaling wat iemand se handelsvryheid inkort sou noodwendig teen die openbare belang wees nie. Dit word ook in die Engelse reg so ingesien, want hoewel daar gesê word dat

RABIE HR

elke beperkende bepaling prima facie ongeldig is, is bewys toelaatbaar dat dit nie inderdaad so is nie. Dit sou dus korrek wees om te sê dat dit van die feite van elke saak afhang of gesê kan word dat ’n beperkende bepaling teen die openbare belang is.

Dit is interessant om daarop te let dat in Edgcombe v Hodgson 19 SC 224 DE VILLIERS HR met verwysing na Voet 2.14.2 (dit is foutief en moet 2.14.16 wees), die vraag van die geldigheid al dan nie van ’n beperking van iemand se handelsvryheid getoets het aan die vraag of gesê
kon word dat die beperking teen die openbare beleid was. Hierdie benadering is deur MAASDORP R in Federal Insurance Corporation of South Africa Ltd v Van Almelo 25 SC 940 gevolg. In Koöperatieve Wynbouwers Vereniging van ZA Bpkt v Botha 1923 CPD 429 het GARDINER R gesê dat die

“doctrine of restraint of trade has been taken by our Court from the law of England”,

maar dat, soos deur DE VILLIERS HR in Edgcombe v Hodgson (supra) gesê is,

“It is really a development of the Roman-Dutch rule that what is contrary to public law and what would cause the public loss, may not be the subject of a binding pact - - Voet (2.14.16)”. 

Daar is dus al vroeg in ons regspraak gesê dat die vraag van die afdwingbaarheid van ooreenkomst met iemand se handelsvryheid inkort, ooreenkomstig die reëls wat op ooreenkomste wat in stryd met die openbare belang is, beoordeel moet word, en ek is van mening, soos reeds aangedui, dat dit die korrekte benadering is. Ek het reeds hierbo daarop gewys dat ook in die Engelse reg gesê word dat die beskerming van die openbare belang die grondslag van die “doctrine of restraint of trade” is. (Kyk die passasies in die Esso Petroleum-saak supra wat ek hierbo aangehaal het.) In enkele onlangs uitsprake van ons Howe is ook, na my mening tereg, die sienswyse gehuldig dat die vraag van die afdwingbaarheid al dan nie van ’n ooreenkomst wat iemand se handelsvryheid inkort, in die lig van die vereistes van die openbare belang beoordeel moet word. In National Chemsearch (SA) (Pty) Ltd v Borrowman and Another 1979 (3) SA 1092 (T) op 1107G, het BOTHA R dit soos volg gestel:

“With regard to agreements in restraint of trade, it seems to me that the Court's concern is to assess the effect of an order enforcing the agreement in the light of the dictates of public policy...”

En in Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (K) op 313D, spreek VAN DEN HEEVER R die mening uit dat wanneer die Hof weier om sekere ooreenkomst te dwing, hy dit doen -

“not because they are void ab initio, but on the grounds of expediency because performance will detrimentally affect the interests of the community...”

Kyk ook die uitspraak van DIDCOTT R in Roffey v Catterall, Edwards and Goudré (Pty) Ltd 1977 (4) SA 494 (N) en die bespreking van dié saak deur J M Otto in 1978 THRHR. Die geleerde skrywer spreek die mening uit op 211 dat slegs beperkings wat “teen die openbare belang” is as onafwendingbaar beskou moet word en dat die openbare belang “die toetssteen” moet wees.

Aanvaarding van die siening dat die afdwingbaarheid van ’n bepaling wat iemand se handelsvryheid inkort, beoordeel moet word in die

1984 (4) SA p893

RABIE HR

lig van die vraag of die inkorting die openbare belang benadeel, bring sekere gevolge mee. Een hiervan is dat wanneer ’n party by ’n ooreenkoms beweer dat hy nie gebonde is aan ’n beperking wat hy op hom laat lê het nie, hy die las sal dra om te bewys dat die afdwing van die beperking die openbare belang sal benadeel - net soos ’n party by ’n ander soort ooreenkoms
wat beweer dat hy nie daaraan gebonde is nie, normaalweg bewys moet lewer van die een of ander grond wat hom van sy verpligtinge onder die ooreenkoms kan bevry.

Aanvaarding van die openbare belang as die toetssteen, soos hierbo vermeld, bring verder mee - en dit hang nú saam met wat hierbo gesê is - dat daar nie 'n las op die persoon wat 'n beperking wil afdwing, rus om te bewys dat die beperking redelik is nie. Die enigste toets is of die beperking van so 'n aard is dat dit die openbare belang sou benadeel indien dit afgedwing sou word, en die las om sodanige benadeling te bewys, rus (soos hierbo gesê) op die persoon wat weier om hom te onderwerp aan 'n beperking waartoe hy toegestem het. Daar is in talle sake in ons Howe in navolging van die Engelse reg beslis dat daar 'n *onus* rus op die persoon wat 'n beperking wil afdwing om te bewys dat die beperking redelik is, maar so 'n benadering is onlogies en onvanpas wanneer daar uitgegaan word van die standpunt dat ooreenkomsste nagekom moet word tensy daar bewys word dat die afdwing daarvan die openbare belang sal benadeel. In verskeie onlangse sake, asook in artikels in regstydskrifte, is met betrekking tot die kwessie van *onus* tereg gesê dat die vereiste wat in talle sake in ons Howe in die verlede gestel is dat 'n persoon wat 'n beperking wil afdwing, moet bewys dat dit redelik is, nie in ooreenstemming met ons reg is nie. Kyk die uitspraak van DIDCOTT R in *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* (supra); die uitspraak van VAN DEN HEEVER R in *Drewtons (Pty) Ltd v Carlie* (supra); die mening van mnr Arthur Suzman, uitgespreek in 'n boekbespreking in 1968 *SALJ* op 91; Ellison Kahn "The Rules Relating to Contracts in Restraint of Trade - Whence and Whither?" in 1968 *SALJ* 391 ev; J M Otto (*loc cit*) op 210.

Die opvatting dat 'n persoon wat 'n beperking wil afdwing nie die las dra om te bewys dat dit redelik *inter partes* is nie, bring nie met nie dat oorwegings van die redelikheid of onredelikheid van 'n beperking nie van belang is of kan wees nie.

By die beoordeling van die vraag of 'n beperking op 'n persoon se handelsvryheid afgedwing moet word of nie, sal daar normaalweg, meen ek, twee hoofoorwegings wees waaraan die Hof sy aandag sal moet gee. Die eerste hiervan is dat die feit dat 'n ooreenkoms vir een van die partye onredelik of onbillik werk, in ons reg normaalweg nie 'n grond is waarop die ooreenkoms aangeve kan word nie (kyk byvoorbeeld *Wells v South African Alumenite Co* 1927 AD 69 op 73 en *Marlin v Durban Turf Club and Others* 1942 AD 112 op 131), en daar is ook al meermale gesê - ook in hierdie Hof - dat dit in die openbare belang is dat persone hulle moet hou aan ooreenkomsste wat hulle aangegaan het. In laasgenoemde verband het STEYN HR in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shiiren en Andere* 1964 (4)

**RABIE HR**

SA 760 (A) op 767A, gewag gemaak van -

"die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word".

Die tweede hoofoorweging is dat daar al oor 'n baie lang tyd in beslissings van ons Howe aanvaar is dat dit in die belang van die gemeenskap is dat iedereen vir sover moontlik toegelaat moet word om hom vryelik in die handelswêreld of in sy beroep te laat geld - of, om dieselfde
punt op 'n ander wyse te stel: daar is al vir baie jare aanvaar dat dit die gemeenskap skaad as daar 'n onredelike beperking op iemand se handels - of beroepsvryheid geplaas word. By die beoordeling van die vraag of 'n beperking afgedwing moet word of nie, sal die Hof aan albei gemelde aspekte van die openbare belang aandag gee, en elke geval sal danselfsprekend in die lig van sy eie omstandighede beslis word. In die algemeen kan egter aanvaar word, meen ek, dat 'n beperking van 'n persoon se handelsvryheid wat onredelik is, waarskynlik ook die openbare sou skaad indien die betrokke persoon daaraan gebonde gehou sou word. Gestel byvoorbeeld dat A hom beroep op 'n bepaling wat B belet om, nadat hy A se diens verlaat het, vir 'n aantal jare in 'n sekere gebied 'n sekere soort handel te bedryf, en dit dan blyk dat (wat die posisie met die aangaan van die ooreenkoms ook al mag gewees het) A geen praktiese belang daarby het om die beperking in die geheel van die gebied - of vir die geheel van die tydperk - af te dwing nie. In so 'n geval sou die voortsetting van die beperking gedeeltelik onredelik teenoor B wees, en terselfdertyd sou dit ook die belange van die gemeenskap nadelig tref.

Aanvaarding van die sienswyse dat die Hof in die geval van 'n ooreenkoms wat 'n beperking op 'n party se handelsvryheid plaas, moet oordeel of die afdwing van die beperking teen die openbare belang is, bring myns insiens logies en noodwendig 'n verdere gevolg mee, te wete dat die Hof moet let op die omstandighede wat geld op die oomblik wanneer hy gevra word om die beperking af te dwing. In die Engelse reg word die standpunt gehuldig dat die oomblik waarop die ooreenkoms aangegaan word die relevante oomblik is vir die beslissing van die vraag of die ooreenkoms afdwingbaar is, en dat wat daarna gebeur het irrelevant is, en hierdie benadering is ook in 'n aantal Suid-Afrikaanse beslissings gevolg. Die volgende passasie in die uitspraak van DIPLOCK LJ in Gledhow Autoparts Ltd v Delaney [1965] 3 All ER 288, op 295D - E, gee die siening van die Engelse reg oor die aangeleentheid weer:

"... the question of the validity of a covenant in restraint of trade has to be determined at the date at which the agreement was entered into and has to be determined in the light of what may happen under the agreement, although what may happen may be and always is different in some respects from what did happen. A covenant of this kind is invalid \textit{ab initio} or valid \textit{ab initio}. There cannot come a moment at which it passes from the class of invalid into that of valid covenants."

Hierdie siening van die saak word gekritiseer in Heydon \textit{The Restraint of Trade Doctrine}, waarna ek hierbo verwys het. Die geleerde skrywer sê onder meer (op 135):

\textit{RABIE HR}

"If it is permissible to consider what is foreseeable, is it not even better to consider what actually happened?"

En op 136:

"... concentration on the time of agreement alone is surely unduly narrow. If the covenantor is in fact suffering severe hardship at the time of breach, or hindsight reveals that the public is suffering some disadvantage, why should the Court exclude its knowledge of this from its consideration?"

In Suid-Afrika het PRICE R in Aling and Streak v Olivier 1949 (1) SA 215 (T) 'n standpunt soortgelyk aan die bogemelde Engelse benadering ingeneem. Daar is ook blyke van hierdie standpunt in 'n aantal latere sake: kyk byvoorbeeld \textit{Strathsomars Estate Co Ltd v Nei} 1953 (2)

\textit{Copyright Juta & Company}
SA 254 (OK) op 259E - F; *Weinberg v Mervis* 1953 (3) SA 863 (K) op 867G - H; *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W) op 579H; *Diner v Carpet Manufacturing Co of SA Ltd* 1969 (2) SA 101 (D) op 105G - H; *Stewart Wrightson (Pty) Ltd and Another v Minnitt* 1979 (3) SA 399 (K) op 403F - H en *Allied Electric (Pty) Ltd v Meyer and Another* 1979 (4) SA 325 (W) op 330G - H. Ek meen nie dat hierdie benadering gevolg behoort te word nie. ’n Ooreenkoms wat ’n beperking op die handelsvryheid van ’n party plaas, is nie ’n nietige ooreenkoms nie, maar ’n ooreenkoms wat onafdwingbaar is wanneer dit in stryd met die openbare belang is. Die belangrike vraag is dus nie of ’n ooreenkoms van so ’n aard is dat dit *ab initio* ongdelig is nie, maar of dit ’n ooreenkoms is wat die Hof, gesien die vereistes van die openbare belang, nie behoort af te dwing nie. Ek meen derhalwe dat die mening wat deur BOTHA R in *National Chemsearch (SA) v Borrowman and Another* (*supra*) en deur VAN DEN HEEVER R in *Drewtons (Pty) Ltd v Carlie* (*supra*) oor hierdie aangeleentheid uitgespreek is, korrek is. In eersgenoemde saak het BOTHA R onder meer gesê (op 1107G - H):

"With regard to agreements in restraint of trade, it seems to me that the Court's concern is to assess the effect of an order enforcing the agreement in the light of the dictates of public policy, and that the proper time for making that assessment is the time when the Court is asked to make the order, taking into account the relevant circumstances existing at that time."

In die *Drewtons*- saak het VAN DEN HEEVER R onder meer gesê (op 312F):

"The only enquiry is whether the Court should compel compliance with a particular agreement or not at a given time."

En (op 313D - E):

"... the Court will not enforce certain contracts, not because they are void *ab initio*, but on the grounds of expedience because performance will detrimentally affect the interest of the community..."

Met wat hierbo gesê is, wil ek nie te kenne gee dat die oomblik waarop die Hof gevra word om aan ’n beperkende bepaling gevolg te gee, in alle gevalle die enigste oomblik is wat ter sake sal wees nie. Ander tye kan denkbaar ook relevant wees. In ’n geval soos die onderhawige, byvoorbeeld, waar vergoeding weens verbreking van ’n beperkende bepaling ten opsigte van ’n sekere tydperk geëis word, sou dit ’n relevante vraag wees of die beperking gedurende die geheel van daardie tydperk afdwingbaar was. Om ’n ander geval te neem: Indien A byvoorbeeld ’n interdik sou vra om ’n beperking af te dwing wat, volgens die ooreenkoms tussen hom en B, nog twee jaar moet loop, sou die Hof, so goed hy kan, ag slaan op omstandighede wat waarskynlik gedurende daardie tydperk sal bestaan.

1984 (4) SA p896

**RABIE HR**

Aanvaarding van die sienswyse dat wanneer ’n Hof gevra word om ’n beperkende bepaling af te dwing, hy ag slaan op omstandighede wat heers wanneer hy gevra word om die beperking af te dwing, bring myns insiens verder logies mee dat die Hof op daardie tydstip moet beslis of hy gaan beveel dat die geheel, of slegs ’n gedeelte, of geen gedeelte, van die beperking afgedwing behoort te word. Dit sou miskien gesê kan word dat die afdwing van enigiets minder as die geheel van die beperking waarop die partye oorspronklik ooreengekom het, daarop neerkom dat die Hof se bevel op ’n wysiging van die ooreenkoms wat die partye aangegaan
het, neerkom, en in 'n sekere sin is dit natuurlik so. Hou 'n mens egter in gedagte dat die vraag waarom dit gaan die afdwingbaarheid al dan nie van die beperkende bepaling is en, verder, dat oorwegings van die openbare belang bepaal of so 'n beperking afdwingbaar behoort te wees, dan is dit myns insiens logies en realisties om die houding in te neem dat indien die afdwing van enige gedeelte van 'n beperking op die relevante tydstip vir die gemeenskap skadelik sou wees, die Hof by magte moet wees om te beveel dat daardie gedeelte nie agedwing kan word nie. Hierdie gedagte dat die Hof nie daartoe beperk moet wees om te kan sê dat 'n beperking in sy geheel of afdwingbaar of onafdwingbaar is nie, maar dat hy ook by magte moet wees om in 'n gepaste geval, in die lig van die vereistes van die openbare belang, te kan sê dat 'n beperking slegs ten dele afdwingbaar of onafdwingbaar is, is reeds in sekere onlangse beslissings uitgespreek, en ek stem daarmee saam. Kyk die opmerkings van BOTHA R in National Chemsearch (SA) v Borrowman and Another (supra) op 1114F - 1115D, en van VAN DEN HEEVER R in Drewtons (Pty) Ltd v Carlie (supra) op 312C - D en 313B - F.

Daar is namens die respondent betoog dat die reg wat ons Howe tot nog toe met betrekking tot ooreenkomste wat 'n beperking op 'n party se handelsvryheid plaas, toegespas het, onveranderd gelaat moet word, al sou dié reg ook Engelse reg wees wat nie in ooreenstemming met die beginsels van ons reg is nie. Die betoog lui dat daar moontlik talle ooreenkomste aangegaan is in die geloof dat die reg, soos tot nog toe toegespas, gevestigdie reg is en dat baie persone dalk skade kan ly indien daardie reg nou verander sou word. Ek kan nie met hierdie betoog saamstem nie. Wanneer iemand 'n ooreenkomst aangaan waarin hy toestem dat sekere verpligtinge op hom gelê word, kan normaalweg verwag word dat hy ernstig bedoel om daardie verpligtinge na te kom, en ek is nie bereid om te aanvaar dat daar dalk baie persone is wat sulke verpligtinge op hulle geneem het in die geloof dat hulle daarvan bevry sal word omdat hulle teenparty nie sal kan bewys dat die ooreenkomst inter partes redelik is nie. Die benadering dat 'n persoon wat 'n ooreenkomst wat hy aangegaan het, wil aanveg, die las moet dra om te bewys dat die ooreenkomst teen die openbare belang is, is myns insiens nie 'n nuwigheid wat nie toegelaat moet word nie. In hierdie verband wys ek ook daarop dat (soos reeds hierbo aangedui), hoewel die Engelse reg bepaal dat die persoon wat hom op 'n ooreenkomst beroep, moet bewys dat die ooreenkomst redelik teenoor die ander party is, dit terselfdertyd bepaal dat die persoon wat beweer dat 'n ooreenkomst onafdwingbaar is omdat dit teen die openbare

RABIE HR

belang is, die las dra om te bewys dat dit inderdaad teen die openbare belang is. Ek wys verder daarop dat die benadering tot die reg op die onderhawige gebied wat ek voorstaan, nie meebring dat oorwegings van die redelikheid of onredelikheid van beperkende bepaling in 'n ooreenkomst nie langer relevant is nie. Met betrekking tot die mening dat die vraag van die afdwingbaarheid van 'n beperking beoordeel moet word in die lig van die omstandighede wat daar heers wanneer die Hof gevra word om die beperking af te dwing, kan dit nie as 'n feit aanvaar word dat dié benadering 'n swaarder las op die persoon wat die afdwing van die ooreenkomst teenstaan, sal plaas as wanneer daar net op die omstandighede wat by die aangaan van die ooreenkomst geheers het, gelet sou word nie. Dit sal van die feite van die betrokke geval afhang of dit so sal wees. Die feite sou denkbaar sodanig kon wees dat die gemelde benadering tot die voordeel van die persoon wat die afdwing van die ooreenkomst
teenstaan, sal wees. Verder wys ek daarop dat my sienswyse oor die moment wanneer die afdwingbaarheid van 'n beperking beoordeel moet word nie heetemal nuut is nie. Soos reeds aangedui is, het 'n Volle Regbank van die Transvaalse Provinsiale Afdeling reeds in 1979 in die National Chemsearch-saak supra, per BOTHA R, beslis dat die vraag van die afdwingbaarheid van 'n ooreenkoms beoordeel moet word in die lig van die omstandighede wat daar heers wanneer die Hof gevra word om 'n beslissing te gee. In die Drewtons-saak supra het VAN DEN HEEVER R in 1981 ook so in die Kaapse Afdeling beslis. (Die ander twee Regters wat in die saak gesit het, het hulle nie oor die aangeleentheid uitgespreek nie.)

Voordat ek tot die bespreking van die getuienis wat in die saak afgelê is, oorgaan, is dit miskien gewens om die belangrikste punte in die bespreking van die regsposisie hierbo kortliks saam te vat:

(1) In ons gemene reg is daar niks te vind wat verklaar dat 'n bepaling in 'n ooreenkoms wat 'n party se handelsvryheid inkort, ongeldig of onafdwingbaar is nie.

(2) Die benadering wat in talle Suid-Afrikaanse beslissings gevolg is dat 'n bepaling in 'n ooreenkoms wat 'n beperking op die handelsvryheid van 'n party plaas, prima facie ongeldig of onafdwingbaar is, is 'n benadering wat uit die Engelse reg afkomstig is.

(3) Die Engelse reg hou in dat elke inkorting van 'n party se handelsvryheid prima facie onafdwingbaar is as sydte teen die openbare belang, en dat 'n party wat so 'n bepaling wil afdwing, die las dra om te bewys dat die bepaling inter partes redelik is. Wat die kwessie van bewyslas betref, geld die verdere reël dat die party wat beweer dat 'n beperkende bepaling teen die openbare belang is, moet bewys dat dit so is.

(4) Dit is 'n beginsel van ons reg dat ooreenkomsse wat teen die openbare belang is, nie afgedwing kan word nie, en 'n mens sou dus kon sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang, en dus onafdwingbaar is, indien die omstandighede van die betrokke geval sodanig is dat die Hof van oordeel is dat die afdwing van die ooreenkoms die openbare belang sou skaad.

(5) Dit is in die openbare belang dat ooreenkomsse wat vryelik aangegaan is, nagekom moet word. Dit is egter ook, in die algemeen gesê, in die openbare belang dat iedereen hom vir sover moontlik vryelik in die handels- en beroepswêreld moet kan laat geld. Dit kan aanvaar word dat 'n beperking van 'n persoon se handelsvryheid wat onredelik is, waarskynlik ook die openbare belang sou skaad indien die betrokke persoon daaraan gebonde gehou sou word.

RABIE HR

aangegaan is, nagekom moet word. Dit is egter ook, in die algemeen gesê, in die openbare belang dat iedereen hom vir sover moontlik vryelik in die handels- en beroepswêreld moet kan laat geld. Dit kan aanvaar word dat 'n beperking van 'n persoon se handelsvryheid wat onredelik is, waarskynlik ook die openbare belang sou skaad indien die betrokke persoon daaraan gebonde gehou sou word.

(6) Die vraag of 'n beperkende bepaling afdwingbaar is, moet in ons reg beoordeel word in die lig van die vraag of die afdwing daarvan die openbare belang sou skaad.

(7) Aanvaarding van die sienswyse in (6) hierbo genoem, bring sekere gevolge mee, onder andere dat wanneer iemand beweer dat hy nie gebonde is aan 'n beperkende bepaling waartoe hy in 'n ooreenkoms toegestem het nie -

(a) hy die las dra om te bewys dat die afdwing van die bepaling teen die openbare belang sal wees;

(b) die Hof moet let op die omstandighede wat geld op die tydspan waarop hy gevra
word om die beperking af te dwing; en

(c) die Hof nie daartoe beperk is om te bevind dat 'n beperkende bepaling in sy geheel afdwingbaar of onafdwingbaar is nie, maar ook by magte is om te beslis dat 'n gedeelte van so 'n bepaling afdwingbaar of onafdwingbaar is.

Ek let vervolgens op die getuienis wat daar in die saak afgelê is. Die appellant, wat die eerste getuienis voor die Hof afgelê het, het net twee getuies opgeroep, naamlik mnr J Barclay, 'n streeksbestuurder van die appellant in die gebied waar die respondent as verkoopsman opgetree het, en mnr J P Gower, die appellant se besturende direkteur. Die respondent het self getuig, en daarby het 11 ander persone vir hom getuig.

Barclay het getuig oor die artikels wat deur die appellant se verkoopsmanne verkoop word; die opleiding in die verkoopkuns wat aan die respondent gegee is toe hy hom by die appellant aangesluit het; die leiding in verband met allerlei aangeleenthede wat oor 'n tydperk van etlike maande aan die respondent gegee is om hom met die werwing van klante te help; inligtingstukke wat aan die respondent gegee is om hom in staat te stel om aan klante inligting oor die hoedanighede en gebruik van die appellant se produkte te gee; en boeke wat aan die respondent gegee is waarin hy ontvang het van alle persone wat hy in die loop van sy werwingswerk gehad het. Dit was gemene saak tussen die partye dat die respondent 'n bedrewe en ervare sweiser was, maar dat hy geen ondervinding as verkoopsman gehad het toe hy hom by die appellant aangesluit het nie. Volgens Barclay het dit heelwat tyd tyd geneem voordat die respondent in die verkoopkuns bedrewe geraak het, maar, het hy getuig, die respondent was naderhand so 'n goeie verkoopsman dat die appellant dit as 'n verlies gevoel het toe hy in Januarie 1979 by die appellant weg is en verkoopsman gaan word het by 'n maatskappy wat 'n mededinger van die appellant was, naamlik Welding Advisory Services (Pty) Ltd. (Daar is in die getuienis na hierdie maatskappy as "WASP" verwys, en ek sal dit ook so noem.)

RABIE HR

Barclay het getuig dat die appellant se verkoopsmanne vir hom 'n belangrike bate is. "We regard them", het hy gesê, "as very valuable assets to the company. It is the only way to get money." Dit is 'n duur proses, het hy gesê, om 'n verkoopsman op te lei, en wanneer 'n verkoopsman wat in 'n sekere gebied bekend geword het, weggaan, veroorsaak dit heelwat onkoste voordat 'n ander persoon opgelei en in sy plek aangestel kan word. Dit bring ook heelwat ontwrigting mee, het hy gesê, veral wanneer 'n verkoopsman wat by die appellant weggaan daarna 'n verkoopsman by 'n mededinger van die appellant word en in dieselfde gebied werksaam bly waarin hy vir die appellant as verkoopsman opgetree het. Barclay het in hierdie verband ook onder meer gesê dat die appellant heelwat klante verloor het toe die respondent by hom weg is en dat die appellant heelwat moeite ondervind het om hierdie klante terug te wen. In kruisondervraging op hierdie punt het hy gesê dat hy nie die name van hierdie klante kon noem nie, "as I am not in charge of that area".

Aan die einde van sy hoofgetuienis is aan Barclay 'n vraag gestel oor die nodigheid vir 'n beperkende bepaling soos dié wat in die ooreenkoms tussen die appellant en respondent
voorkom. Die vraag, en die getuie se antwoord daarop, lui soos volg:

"Now Mr Barclay, as one of the senior people in the defendant company responsible for sales activities, can you express a view as to the need for having a restraint clause to protect the interest of the company? Are you able to say what would happen if there weren't such a restraint clause in the employment contract? - My Lord, if there weren't any restraint clause we would have had more people doing this. This would be - well we consider this industrial espionage. We train them, we give them areas, we supply customer history records, and then they simply move over into any sphere, or any field to any opposition, and virtually move the customers with them. We would go bankrupt in a very very short time if we did not have this restraint clause."

Hierdie bewerings van Barclay is nie in kruisondervraging aangeval nie. Hy is geen vrae daaroor gevaar nie.

Die kruisondervraging van Barclay was in hoofsaak daarop toegespits om aan hom te stel wat die respondent se saak oor sekere punte was en wat sy advokaat sou betoog, veral (a) dat die opleiding en algemene voorligting wat die respondent van beamptes van die appellant ontvang het nie van veel praktiese waarde was nie en dat die respondent se sukses as verkoopsman hoofsaalik te danke was aan sy eie persoonlikheid en aan sy vermoë as bedrewe sweiser om die gebruik van die apparaat wat hy verkoop, prakties te demonstrer; en (b) dat die appellant teen die einde van 1976 nie sy verkoopsmanne van al die nodige produkte kon voorsien het om hulle bestellings uit te voer nie; dat dit, tesame met die feit dat die appellant se produkte duurder as dié van sy mededingers was, meegebring het dat die respondent se omstandighede wat ná die aangaan van die ooreenkoms ontstaan of bestaan het. (Dit is dui lkelik dat hierdie aangeleenthede nie verband hou met die inhoud van die ooreenkoms tussen die partye nie, maar met omstandighede wat ná die aangaan van die ooreenkoms ontstaan of bestaan het.) Wat (a) betref, is dit ook aan Barclay gestel dat alle "goodwill" wat die respondent opgebou het, "goodwill" was "which he built up in his own way, and that is what he took away with him when he left your employment". Barclay se antwoord op hierdie en ander dergelijke stellings was dat toe die respondent by die appellant weg is, hy "the knowledge of where to apply these products, how to apply these products... and what best use each type of rod could be put to" met hom saamgeneem het. Hy het ook gesê dat die respondent in "various sales techniques" onderrig is. Wat (b) betref, was dit gemene saak tussen die partye dat die appellant, wat nagenoeg al sy produkte van die buiteland af invoer, weens 'n beperking wat destyds op invoer uit die buiteland geplaas is, teen die einde van 1976 sekere probleme met die invoer van produkte ondervind het. Wat die kwessie van die pryse van die appellant se produkte betref, het Barclay getuig dat dit die appellant se benadering is dat "price becomes secondary when a customer is accustomed to using a product...", en, verder, dat in die agt jaar wat hy by die appellant was, die appellant steeds gegroei het, "so prices have no reflection on this". Barclay het toegegee dat daar moontlik 30 maatskappye in die Vaal Driehoek en omliggende gebiede was wat produkte soortgelyk aan dié van die appellant voorsien het.

Gower het getuig dat die appellant in 102 lande van die wêreld sake doen, dat dit oral van
dieselfde verkoopstegnieke gebruik maak, en dat dit die grootste verskaffer van "maintenance welding consumables" in die Suidelike halfrond is. Die getuie het, net soos Barclay, die belangrikheid van verkoopsmanne vir die appellant beklemtoon, en volgens hom is die "hiring, training and retaining of sales agents" n belangrike saak. Sonder "sales agents", het hy getuig, "we would not have an organisation at all". Gower het ook, net soos Barclay, getuig dat 'n groot bedrag in die opleiding van 'n verkoopman belê word, en sy mening is dat dit derhalwe wenslik is "that the company's investment be protected by some form of restraint". Geen vrae is oor hierdie mening in kruisondervraging aan Gower gestel nie.

Gower het, met verwysing na dokumente wat deur die respondent blootgelê is, aangetoon dat die respondent met heelwat meer as 100 maatskappye en ander klante sake gedoen het terwyl hy verkoopman by die appellant was, en dat hy ook met baie van hierdie maatskappye en ander klante sake gedoen het nadat hy by WASP verkoopman geword het. Dit blyk onder meer uit hierdie dokumente dat die respondent tussen Februarie 1977 en Januarie 1979 (dit wil sê die twee jaar wat hy by WASP verkoopman was nadat hy by die appellant weg is) van vier groot klante van die appellant bestellings ter waarde van sowat R123 000 verkry het. Wat al hierdie getuienes betref, moet egter bygevoeg word dat dit blyk dat baie van die klante van die appellant na wie Gower verwys het - onder andere die vier van wie die begemelde groot bestellings verkry is - ook klante van WASP was vóórdat die respondent verkoopman by WASP geword het, en dat Gower nie die name kon noem van klante wat by die appellant was nie nadat die respondent by WASP verkoopman geword het nie. Die getuie was netemin van mening dat, aangesien die respondent heelwat "goodwill" in sy gebied opgebou het, dit waarskynlik was dat die appellant klante verloor het toe die respondent by die appellant weg is en in

1984 (4) SA p901

RABIE HR

dieselfde gebied verkoopman by WASP geword het. Dit is aan die getuie gestel (net soos dit aan Barclay gestel is) dat al die "goodwill" wat deur die respondent opgebou is, die resultaat van sy "own efforts" was. Gower se antwoord hierop was: "These efforts, my Lord, were made possible because of the training given by our company and specifically by Mr Barclay."

Die respondent het sy getuienes afgelê nadat al sy getuies getuig het. Hy het getuig, kort gestel, dat die appellant teen die einde van 1976 'n tekort aan sekere produkte ondervind het en dat sy gevolglike onvermoë om al die bestellings van sy verkoopsmanne uit te voer, tesame met die feit dat die appellant se produkte so duur was, meegebring het dat sy (die respondent se) kommissietjek in Desember 1976 tot sowat R200 en in Januarie 1977 tot sowat R260 gedaal het nadat dit tevore sowat R1 000 of R1 100 per maand was. Hy is gevolglik by die appellant weg. In antwoord op die vraag van sy advokaat waarom hy na WASP toe oorgegaan het, het hy gesê: "Daar is vir my dieselfde area geofer wat ek in werk, ek het - op 'n pensioen - hulle vir my gesê ek kom op 'n pensioen, 'n siekefonds". Hy het pas by WASP begin toe hy deur die appellant gewarsku is dat hy in stryd met sy ooreenkoms met die appellant optree. Hy het egter besluit om hom nie by die ooreenkoms te hou nie, want, hy het in kruisverhoor gesê, "wie sal dan vir my vrou en kinders sorg". Die respondent het verder getuig dat hy geen geheime inligting van die appellant af na WASP toe geneem het nie; dat die appellant hom, wat die

Copyright Juta & Company
verkoopkuns betref, "niks wat waardevol is" geleer het nie, en dat hy geen klante van die appellant af weggeneem het nie. Die respondent wou in kruisverhoor nie eintlik reguit antwoord op die vraag of dit hom bevoordeel het dat hy as verkoopsman van WASP in dieselfde area aangestel is waarin hy as verkoopsman van die appellant opgetree het en baie klante gehad het nie. Sy getuienis op hierdie punt kom daarop neer dat dit hom in 'n sekere mate bevoordeel het, maar nie veel nie, omdat baie van sy vroeëre klante hom gewantrou het en gevra het hoe hy WASP se produkte kon aanprys as hy vroeër die appellant se produkte as die beste aan hulle vorgehou het.

Ek let vervolgens op die getuienis van die getuies wat ten behoewe van die respondent getuig het.

Mnr C Davidson, 'n voormalige streekbestuurder en verkoopsman van die appellant, se hoofgetuienis was, kort gestel, dat die respondent (vir wie hy geken het toe hy verkoopsman by die appellant was) sy eie verkoopsmetodes gevolg het; dat daar niks unieks was in die opleiding wat die appellant sy verkoopsmanne gegee het nie; dat daar niks unieks in die appellant se produkte of in sy verkoopstegnieke was nie; dat daar 30 of meer maatskappye in die Vaal Driehoek, insluitende die Witwatersrand en Pretoria, was wat produkte soos dié van die appellant verkoop het en dat hulle produkte goeër koper as die van die appellant was; en dat wanneer 'n verkoopsman by die appellant weggaa, hy geen besondere kennis met hom saamneem en oor geen geheime inligting beskik nie. Die getuie het getuig dat hy by die appellant weg is vanweë die tekort aan produkte wat die appellant aan die einde van 1976 ondervind het, en dat hy toe verkoopsman by WASP geword het. Hy het 'n maand by WASP gebly.

RABIE HR

Davidson het ook gesê dat hy die beperking wat sy ooreenkoms met die appellant op hom geplaas het (dieselfde beperking as in die geval van die respondent) as onredelik beskou het. Dit blyk dat hy dit om persoonlike redes sou beskou het: hy het 'n huis in die Johannesburgse gebied gekoop en dit sou hom nadelig getref het as hy moes weggetrek het om elders te gaan woon. In herverhoor het hy, in antwoord op 'n leidende vraag, gesê dat dit immorele optrede van die kant van die appellant was om sy ooreenkszoms met sy voormalige verkoopsmanne af te dwing nadat hy hulle nie van voldoende produkte voorsien het om 'n behoorlike bestaan te kon maak nie.

In kruisondervraging het Davidson gesê dat die appellant se verkoopsmetodes effektief was om sy eie produkte te verkoop, maar nie noodwendig om die produkte van ander te verkoop nie. Hy het toegegee dat hy waardevolle ondervinding by die appellant opgedoen het, ook wat verkoopstegniek betref, en dat dit hom gehelp het om 'n aanstelling te kry by die maatskappy vir wie hy ten tyde van die verhoor gewerk het. Dit het hom gehelp, hy gesê, "in that I was presumed to be a person who would be able to sell effectively in that area".

Die respondent se tweede getuie, mnr N Derman, het in 1974 as verkoopsman by die appellant begin werk, en nadat die respondent in Januarie 1977 by die appellant weg is, het hy vir 'n tyd lank as verkoopsman opgetree in die gebied waarin die respondent verkoopsman was. Volgens
sy getuienis het hy - skynbaar uit die staanspoor - goeie sake in die gebied gedoen. Hy is opgevolg deur ene Miljo, wat deur hom opgelei is, en ook Miljo het (volgens die getui) ’n goeie bestaan gemaak. Volgens Derman het hy geen verkoopsweerstand ondervind omdat die respondent nie langer die appellant se verkoopsman in die gebied was nie. Die getuijie het ook oor ander aangeleentheede getuig, soos byvoorbeeld die prys van die appellant se produkte en die tekort aan produkte wat teen die einde van 1976 ontstaan het. Dit is nie nodig om meer daaroor te sê nie. Derman het ook, soos sommige van die ander van respondent se getuiies, gesê dat appellant se verkoopsmetodes effektief was om die respondent se produkte te verkoop, maar dat dit nie noodwendig in die geval van ander se produkte effektief sou wees nie. In kruisondervraging het hy onder meer gesê dat, anders as wat sekere ander verkoopsmanne ondervind het, die hoë pryse van die appellant se produkte hom nie in sy verkope gestrem het nie.

Mnr H E Nel, ’n sweiser by "Veldmaster", het getuig oor ’n insident in Oktober 1976 waarby die respondent betrokke was. Dit is nie van belang nie en geen besonderhede hoef daaroor gegee te word nie. Hy is nie gekruisvra nie.

Mnr M Louw, ’n dienstevoorman by "Veldmaster", het getuig dat prys ’n belangrike rol by die koop van elektrodes speel. Hy is nie gekruisvra nie.

Mnr A Parker was ’n verkoopsman by die appellant en het in Julie 1978 na WASP gegaan, waar hy ook verkoopsman was. Volgens sy hoofgetuienis beoordeel, is Parker as getuie opgeroep bloot om verskeie punte van kritiek op die appellant uit te spreek, onder meer

RABIE HR

met betrekking tot die hoë pryse van die appellant se produkte, die kwaliteit van die produkte, die tekort aan produkte wat daar ontstaan het, en die nasorgdiens wat deur die appellant verskaf is. Dit is nie nodig om na die besonderhede van die kritiek te verwys nie. Die getuijie het die appellant se verkoopsmetodes as "gimmickry" bestempel. Dit is in kruisverhoor aan Parker gestel dat waar ’n verkoopsman wat oor ’n tydperk van ’n jaar of agtien maande in ’n sekere gebied as die verkoopsman van ’n maatskappy se produkte bekend geword het na ’n mededingende maatskappy in dieselfde gebied oorgaan, hy makliker verkope met betrekking tot dieselfde soort produkte sal kan beklink as iemand wat nuut as verkoopsman by die eersgenoemde maatskappy begin. Sy antwoord was: "Yes, to a degree that would be true".

Die getuijie D Botha was ten tyde van die verhoor ’n verkoopsman by WASP in dieselfde area waar hy voorheen ’n verkoopsman van die appellant was. Sy hoofgetuienis was daarop gerig om te sê dat die appellant se pryse hoog was, dat die appellant minder produkte aanhou as WASP, dat die appellant se rekeningstelsel swak is, en dat die appellant se verkoopstegnieke maar net "little stories" is. In kruisverhoor het hy gesê dat hy verwag het dat hy by WASP uit die staanspoor goeie sake sou doen met mense wat sy klante was toe hy nog by die appellant was, maar dat hy gevind het dat hy in ’n mate aan geloofwaardigheid ingeboet het omdat hy eers die een maatskappy se produkte aangeprys het en daarna die ander s’n. Dus, hy het getuig,
"many of the customers I had... as Magna customers, I still even haven't got back today as WASP customers"

- 'n bewering wat skyn in te hou dat hy wel sommige van die appellant se klante oorreed het om klante van WASP te word.

Mnr F C Platt is die besturende direkteur van WASP. In sy hoofgetuenis het hy onder meer gesê dat pryse 'n groot rol by kopers speel en dat daar 35 of selfs meer maatskappye is wat dieselfde soort produkte as die appellant en WASP verkoop. Hy het verder getuig dat WASP dit nog nooit nodig geag het om 'n "restraint clause" in sy ooreenkoms met sy verkoopsmanne op te neem nie. WASP vind dit onnodig, het hy gesê, omdat die mark groot is, en buitendien meen WASP dat dit nie 'n goeie beleid is om verkoopsmanne te beperk nie: "The way to retain customers", het hy as sy mening gegee,

"is to retain the agents, not to stop them selling after they have left, but to retain them so they continue to sell for you".

Maar, het hy in hierdie verband verder in kruisverhoor gesê,

"if Magna wishes to keep a restraint clause in their contract, that is their right, and they are quite entitled to do that".

Dit blyk uit Platt se getuenis dat WASP wel 'n "restraint clause" het in ooreenkoms wat hy met sy direkteure aangaan.

'n Aansienlike deel van Platt se getuenis is gewy aan 'n bespreking van 'n suggestie dat WASP met die respondent saamgespan het om die appellant se teeneis te bestry en dat WASP die respondent se koste in verband met die saak betaal. Ek verwys nie verdere na hierdie aangeleentheid nie, behalwe om te sê dat dit 'n rol gespeel het by die Verhoorregter se beslissing om prokureur-en-kliënt-koste teen die appellant toe te ken.

RABIE HR

Mnr A R Memel het omtrent vier jaar by die appellant gewerk en het sy diens in Mei 1977 verlaat. Hy het getuig oor die tekort wat die appellant aan sekere produkte ondervind het in die tyd toe die respondent by die appellant weg is. Hy is nie gekruisvra nie.

Mnr P Lockhart-Ross was 'n verkoopsman by die appellant net nadat die respondent daar gekom het, en hy was verkoopsman by WASP toe die respondent in Januarie 1977 daar gekom het. Hy het getuig dat die appellant se produkte duur was, dat die appellant se verkoopsmetodes "gimmick selling" was, en dat die respondent se sukses as verkoopsman toe te skrywe was aan sy vermoë om praktiese demonstrasies te gee van die gebruik van die apparaat wat hy wou verkoop.

Mnr E L Marais, 'n prokureur, en mev A M Ellis, die eggenote van die respondent, se getuenis was beperk tot die punt dat die respondent self vir die koste van die saak teen die appellant betaal het.

Ek vind niks in die ooreenkoms tussen die partye of in die getuenis wat 'n bevinding sou kon
regverdig dat die beperking wat die respondent opgelê is, strydig met die openbare belang is nie. In sy uitspraak in die Hof a quo sê die geleerde Regter dat hy tot die gevolgtrekking gekom het dat "the restraint agreement was unreasonable as between the parties and contrary to the public interest". Daar word nie gronde vir die bevinding dat die beperking teen die openbare belang is in die uitspraak aangegee nie, behalwe as dit te vind is in die Verhoorhof se siening dat die beperking onredelik teenoor die respondent was. In die betoogpunte wat vir die doel van die appêl opgestel is deur die advokate wat die respondent in die Hof a quo verteenwoordig het (hulle het nie in hierdie Hof verskyn nie), word daar gesê dat die beperking teen die openbare belang is omdat dit meebreng dat die publiek die geleentheid onteem word om met die respondent sake te doen. Ek kan, in die lig van die feite van die saak, in die feit dat die publiek vir 'n beperkte tyd in 'n beperkte area die geleentheid onteem word om 'n sekere soort apparaat (wat, volgens die getuienis, vryelik beskikbaar is) van 'n enkele verkoopsman soos die respondent te koop, geen sodanige benadeling van die publiek sien wat die bevinding kan regverdig dat die afdwing van die beperking teen die openbare belang is nie.

Wat die kwessie van die onredelikheid van die ooreenkoms teenoor die respondent betref, kan ek ook nie saamstem met die gevolgtrekking waartoe die Hof a quo gekom het nie. Die geleerde Verhoorregter het die saak beslis op die grondslag dat die appellant nie bewys het dat die beperking redelik was nie, maar ek meen dat selfs indien 'n mens hierdie benadering sou volg - 'n benadering wat, soos hierbo gesê, na my mening verkeerd is - die bevinding van die Hof nogtans nie korrek was nie. Die Hof was die mening toegekend dat die appellant se doel nie was om hom op 'n redelike wyse te beskerm nie, maar dat dit bloot gepoog het "to exclude competition", en dat die beperking niks anders was nie as 'n "restraint against mere competition per se", which of course is not enforceable". Ek kan met hierdie siening nie saamstem nie.

Sowel Barclay as Gower het getuig oor die belangrikheid van verkoopsmanne vir die appellant en die nodigheid vir 'n beperkende bepaling. Hierdie getuienis is geensins in kruisverhoor betwis nie, en ook die Verhoorhof het geen vraie aan hulle oor hierdie getuienis gestel nie. Daar is ook nooit aan hulle gesuggereer dat die appellant 'n oogmerk gehad het soos deur die Verhoorhof bevind is nie, en dit blyk nie waarop daardie bevinding gegrond is nie. Die Verhoorhof het ook geen oorweging geskenk aan die erkenning van die respondent in klousule 6 (a) van die ooreenkoms (hierbo aangehaal) oor die noodsaaklikheid vir die beperking nie. Ek wil geensins te kenne gee dat hierdie erkenning van deurslaggewende belang in hierdie verband is nie, maar dit is darem ook nie sonder beteekenis nie, en die respondent kan in die aangesig daarvan beswaarlik beweer dat die appellant se doel bloot was om mededinging uit te skakel. Hier kan kortliks bygevoeg word dat (soos hierbo aangedui is) een van die respondent se getuies gesê het dat hy die beperking as onredelik beskou het, maar dat dit blyk dat die redes vir sy mening van bloot persoonlike aard was.

Die respondent het blykbaar teen Januarie 1977, toe hy by die appellant weg is, 'n suksesvolle besigheidsverhouding met baie klante opgebou ('n "customer connection", soos die appellant se advokaat dit genoem het), en toe hy direk ná sy bedanking by die appellant by WASP verkoopsman geword het in dieselfde gebied waarin hy vir die appellant verkoopsman was, was
dit na my mening vir die appellant redelik om die beperking af te dwing. Hier kan bygevoeg word dat daar nooit in die kruisverhoor van Barclay of Gower gesuggereer is dat die tydperk van die beperking of die gebied waarin dit sou geld, onbillik of onregverdig was nie.

Die Verhoorhof het dit as uitermate onredelik beskou dat die appellant besluit het om die beperking af te dwing nadat die respondent by die appellant weg is omdat die appellant 'n tekort aan produkte ondervind het, soos hierbo genoem. Hierdie siening van die saak is nie geregtig nie, want al was die appellant nie in staat om die respondent van genoegsame produkte te voorsien om te verkop nie, was dit nog geen regverdiging vir die respondent om, in stryd met sy ooreenkoms met die appellant, vir 'n mededinging van die appellant verkoopsman te word in dieselfde gebied waar hy vir die appellant verkoopsman was nie. In die appellant se gemelde betoogpunte word gesê dat die appellant kontrakbreuk gepleeg het toe hy die respondent nie van voldoende produkte vir die doel van verkop kon voorsien nie en dat die respondent gevolglik ook van sy verpligtinge onder die ooreenkoms bevry is. Die respondent het niets van hierdie aard gepleit nie en daar steek in ieder geval ook niets in die betoog nie. Die appellant het nie kontrakbreuk gepleeg nie. Hier kan kortlik bygevoeg word dat daar nie getuenis was dat die tekort aan produkte nie bloot tydelik was nie, en ook geen getuenis oor hoe lank daar verwag is dat die tekort sou duur nie. Volgens die getuenis van Derman, kan hiervan gesê word, kon die tekort nie lank geduur het nie.

Die Verhoorhof het die ooreenkoms om 'n verdere rede as onredelik beskou, naamlik omdat dit bepaal dat die respondent die appellant R250 per week skadevergoeding moet betaal vir solank die respondent die ooreenkoms verbreek. Dit is 'n verkeerde siening van die saak. Die kwessie van die betaling van skadevergoeding kom alleen ter sprake indien bevind word dat die beperking regtens afdwingbaar is. Die bepaling dat skadevergoeding betaalbaar is as die ooreenkoms verbreek word, kan nie gebruik word om te sê dat die ooreenkoms onafdwingbaar is nie.

Ek kom nou by die vraag van die appellant se eis om die betaling van skadevergoeding, soos in sy teeneis uiteengesit.

Die eis is gegrond op klousule 6 (d) van die ooreenkoms tussen die partye, en dit is gemene saak dat die klousule voorsiening maak vir die betaling van 'n strafbedrag, soos bedoel in die Wet op Strafbedinge 15 van 1962. Artikel 3 van hierdie Wet lui soos volg:

"Indien dit by die verhoor van 'n eis om 'n strafbedrag vir die Hof blyk dat daardie bedrag buite verhouding is tot die nadeel deur die skuldeiser gely weens die doen of late ten opsigte waarvan die straf beding is, kan die Hof die strafbedrag vermindre in die mate wat hy onder die omstandighede billik ag; Met dien verstande dat die Hof by die bepaling van die omvang van bedoelde nadeel nie slegs die skuldeiser se vermoënsbelange in ag neem nie, maar ook enige ander regmatige belang wat deur die betrokke doen of late geraak word."

Met betrekking tot die vraag van die bewyslas wanneer daar beslis moet word of 'n strafbedrag buite verhouding is tot die nadeel wat 'n skuldeiser gely het, soos in bogenoemde art 3 bedoel, het hierdie Hof in Smith v Bester 1977 (4) SA 937 soos volg beslis (per KLOPPER WN AR op
942D - E):

"Na my mening blyk dit dat waar 'n Hof met 'n strafbedrag te doen kry, rus die bewyslas op die skuldenaar om te bewys dat die strafbedrag buite verhouding is tot die nadeel wat die skuldeiser gely het en dat dit gevolglik verminder behoort te word en tot welke mate. In werkelikheid is dit 'n vergunning wat die skuldenaar vir die Hof vra, naamlik dat die Hof sy diskresie om die strafbedrag te verminder, in sy guns uittoefen omdat dit anders onregverdig teenoor hom sou wees as dit nie gedoen word nie. Wanneer die skuldenaar prima facie bewys gelewer het dat die strafbedrag verminder behoort te word dan rus daar 'n weerleggingslas op die skuldeiser om die skuldenaar se prima facie saak te ontsenu, indien dit vir hom moontlik is."

Die respondent se pleit op die appellant se eis is bloot 'n ontkenning van aanspreeklikheid, gegrond op die bewering in die pleit dat die beperking wat in klousules 6 (b) en (c) van die ooreenkoms op die respondent gelê is, ongeldig is. Die pleit, wat geen verwysing na die Wet op Strafbedinge bevat nie, toon geen blyke van 'n besef dat daar 'n bewyslas, soos hierbo genoem, op die respondent rus indien bevind sou word dat die beperking afdwingbaar is nie, en dit swyg dan ook oor die vraag wat die Hof met betrekking tot die betaling van die strafbedrag (of 'n gedeelte daarvan) moet beveel indien bevind sou word dat die beperking afdwingbaar is. Hierdie versuim om die kwessie van die bewyse van die respondent se eis in sy pleit te behandel, het hom ook geopenbaar in die wyse waarop die respondent se saak in die Hof a quo gevoer is. Daar is naamlik geen poging aangewend om - byvoorbeeld met verwysing na boeke of dokumente wat op die appellant se sakebedrywighede oor die relevante tydperk betrekking het - inligting voor die Hof te lê op grond waarvan die Hof sou kon besluit of die strafbedrag verminder moet word nie. Al wat die respondent se advokate in hierdie verband gedoen het, was om vrae van 'n algemene aard aan Barclay en Gower in kruisverhoor te stel. Barclay is gevra of hy enige getuienis kon lever oor hoe die "profit history" van die

---

RABIE HR

appellant in die jare 1975 - 1976 vergelyk met dié in die jare daarna. Sy antwoord was dat "this is not in my sphere at all", en dat hy nie weet nie. Gower is ook gevra of hy kon getuig oor die appellant se "profit history" in 1975 - 1977. Sy antwoord was dat hy dit nie kon onthou nie. Hy is toe niks verder gevaar gevra nie. Toe hy gevra was of hy kon onthou wat die appellant se "profit history" in die jare daarna was, het Gower gesê: "The current year, yes, my Lord". Hy is niks verder daaroor gevra nie. Later in sy kruisverhoor is hy gevra: "Can you point to any loss suffered by your company as a result of Mr Ellis' leaving you?" en sy antwoord was:

"My Lord, we did experience a loss inasmuch as that we experienced resistance from the customers which were serviced or looked after by Mr Ellis, as it is said that maintenance people buy with their hearts and not with their heads, and all our salesmen build up a friendly rapport with their customers, which, should they leave, this rapport has to be redeveloped, so the company obviously experiences a loss."

Daarop is dit aan Gower gestel dat "such goodwill as Mr Ellis built up, was built up entirely by his own efforts". Gower se antwoord hierop (reeds hierbo genoem) was: "These efforts, my Lord, were made possible because of the training given by our company and specifically by Mr Barclay". Die appellant, kan hier bygevoeg word, het van die standpunt uitgegaan dat die bewyslas op die respondent was om te toon dat die betrokke bedrag nie betaalbaar was nie, en het nie getuienis voorgelê oor die omvang van skade wat inderdaad gely is nie.
In die bogemelde antwoorde van Barclay en Gower op die vroeë wat aan hulle gestel is, is niks te vind wat 'n besluit dat die strafbedrag verminde moet word, sou kon regverdig nie. In die skriftelike betoogpunte van die respondent se advokate (hierbo genoem) word aangevoer dat daar getuienis deur Derman gelewer is wat toon dat die appellant geen skade gely het nie. Hierdie getuienis van Derman was dat hy ná die vertrek van die respondent op 'n deelyds basis verkoopsman van die appellant geword het in die gebied waarin die respondent vóór hom verkoopsman was, dat hy "quite successful" was, en dat hy geen besondere verkoopsweerstand wat deur die vertrek van die respondent veroorsaak is, ondervind het nie. (Dit blyk dat Derman vir 'n tydperk van vier of ses weke op bogenoemde wyse as verkoopsman opgetree het, en dat hy daarna ene Miljo opgelei het om sy plek in te neem. Miljo het nie getuig nie.) Hierdie getuienis van Derman, lui die betoog, is prima facie bewys dat die appellant gedurende die tydperk Januarie 1977 tot Januarie 1979 geen skade gely het vanweë die feit dat die respondent verkoopsman by WASP gaan word het nie. (In die alternatief word aangevoer dat indien bevind sou word dat die respondent sy ooreenkoms met die appellant verbreek het, hierdie Hof "nominal damages" aan die appellant moet toeken, maar hom sy koste moet onteem.) Die bogemelde stukkie getuienis van Derman bied na my mening geen goeie grond vir die vermindering van die strafbedrag nie. 'n Mens staan dus voor die posisie dat nie positief gesê kan word dat daar getuienis is wat die vermindering van die strafbedrag sou kon regverdig nie, maar dat jy terselfdertyd 'n gevoel het - die bekende feite laat 'n mens nie bra toe om dit sterker as dit te stel nie - dat as die respondent ten tyde van die verhoor bewus sou gewees het van die bewyssas wat daar op hom gerus het, daar moontlik getuienis voorgelê sou kon gewees het wat sy saak in hierdie verband sou kon bevorder het. Dit is egter nie nodig om meer hieroor te sê nie. Die appellant se advokaat het aan ons te kenne gegee dat, indien bevind sou word dat die beperking wat op die respondent geplaas is, afdwingbaar is, die appellant nie aandring op betaling van die volle bedrag wat hy geëis het nie, en dat 'n bevel wat die respondent gelas om die bedrag van R1 500 te betaal, die appellant tevrede sou stel. Die advokaat het gesuggereer dat hierdie bedrag gesien kan word as werlike skade wat die appellant gely het vanweë die bogemelde transaksies ten bedrae van sowat R123 000 wat die respondent gedurende die tydperk Januarie 1977 tot Januarie 1979 met vier klante van die appellant aangegaan het. Ek meen nie dat die getuienis met betrekking tot die gemelde transaksies 'n mens enigsins in staat stel om te bevind dat enige spesifieke bedrag skade gely is nie, maar dit doen nie af aan wat ek hierbo in verband met die vraag van die respondent se aanspreeklikheid vir die ooreengekome strafbedrag gesê het nie. 'n Bevel wat, soos deur die appellant se advokaat gesuggereer, die respondent sou gelas om R1 500 aan die appellant te betaal, hou 'n tegemoetkoming van die kant van die appellant teenoor die respondent in, en ek meen derhalwe dat so 'n bevel uitgereik moet word.

Uit hoofde van al die voorgaande word soos volg beveel:

(1) Die appèl slaag met koste, insluitende die koste van twee advokate.

(2) Die geheel van die bevel van die Hof a quo word tersyde gestel en deur die volgende
bevel vervang, nl:

"Die eiser word gelas om aan die verweerder R1 500, met koste, te betaal, insluitende die koste van twee advokate. Die bepalings van Hooggeregshofreël 69 is nie van toepassing op die kostebevel nie."

KOTZÉ AR, JOUBERT AR, TRENGOVE AR en VAN HEERDEN AR het saamgestem.

Appellant se Prokureurs: Mendelow, Browde, Fluxman Ing, Johannesburg; Lovius, Block, Meltz, Steyn & Yazbek, Bloemfontein. Respondent se Prokureurs: Leon Maartens & Marais, Johannesburg; J G Kriek & Cloete, Bloemfontein.
Endnotes

1 (Popup - Popup)

Die respondent se hoofde van betoog is deur W G Muller SC en N van der Walt opgestel, maar J van Aswegen het namens respondent by die verhoor van die appèl verskyn.