

# **‘I am the master of my fate; I am the captain of my soul’**

The restraint of trade clause and entrepreneurs in contemporary South Africa.

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The current economic climate in South Africa, especially considering the consequences that Covid-19 has had on the possible economic capabilities of a multitude of South Africans, various might ponder the wealth and riches that entrepreneurial endeavours could provide them and which might save them from total economic ruin. But how does one go about becoming the master of your own fate<sup>[1]</sup> when a restraint of trade clause stares you in the face?

The purpose of a restraint of trade clause, most typically, is to prevent and/or oblige employees to refrain from competing with their previous employer for the business and/or commerce of such an employer. But how does one enter the market as an entrepreneur in the industry for which one is trained and educated without unlawfully contending with your previous employer, without undergoing unreasonable changes such as moving away from the area of your previous employer’s business activities?

Below, I discuss various possibilities as considered in case law, available to the restrained employee to contest the restraint of trade clause they may have imposed against him or her; or possibly have such a clause declared invalid.

## **A SHORT HISTORY:**

Before the legitimacy and enforceability of a restraint of trade clause can be dissected in terms of legislation and case law, it is important to understand where restraint of trade clauses found its birth.

## **THE COMMON LAW:**

It is important to note that in South African law there is no codified legal principle of restraint of trade. The concept of restraint of trade is therefore birthed from the principle of unlawful competition and codified in a contract through a restraint of trade clause.<sup>[2]</sup> Historically, restraint of trade clauses found their foundation in the South African common law, through the Roman law part of the Roman-Dutch common law, applicable in South Africa.<sup>[3]</sup>

Since restraint of trade clauses are founded in the principle of unlawful competition, one should study what constitutes unlawful competition.

## **THE LEGITIMACY OF THE RESTRAINT OF TRADE CLAUSE:**

### **LEGISLATION:**

An analysis of the relevant legal principles applicable to a restraint of trade clause therefore must commence with a study of the legislative provisions on which the relevant labour and competition laws are founded, as it applies to the common law principle of unlawful competition.

The founding principles of all labour laws in South Africa, are found in the Constitution of the Republic of South Africa, 1996<sup>[4]</sup> (hereinafter referred to as the ‘Constitution’):

- Section 18 of the Constitution<sup>[5]</sup> affords each South African citizen the right to freedom of association;
  - Section 22 of the Constitution<sup>[6]</sup> affords each South African citizen the right to choose their trade, occupation, or profession freely; and
  - Section 23 of the Constitution<sup>[7]</sup> affords each South African citizen the right to fair labour practices.
- Section 1 of the Labour Relations Act, Act 66 of 1995<sup>[8]</sup> (hereinafter referred to as the ‘LRA’), postulates the purpose of the LRA, being:
  - ‘...to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are’; and
  - ‘to give effect to and regulate the fundamental rights conferred by Section 23 of the Constitution of the Republic of South Africa, 1996’<sup>[9]</sup>.
- Section 5 of the LRA<sup>[10]</sup>, provides that no person may discriminate against an employee for exercising any right conferred by the LRA in favour of that employee.
- Section 5 of the LRA<sup>[11]</sup> furthermore provides that no one, without limiting the general protection provided for in same, may or threaten to, prevent an employee or a person seeking employment from exercising any right conferred by the LRA or from participating in any proceedings in terms of same.
- The Competition Act, Act 89 of 1998<sup>[12]</sup> (hereinafter referred to as the ‘CA’) does not provide a clear definition of unlawful competition but postulates to prohibit same through its purpose, being:

“...to promote and maintain competition in the Republic in order to[13]–

- To promote the efficiency, adaptability and development of the economy[14];
- To provide consumers with competitive prices and product choices[15];
- To promote employment and advance the social and economic welfare of South Africans[16];
- To expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic[17];
- To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy[18]; and
- To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons[19].”

The CA further prevents horizontal[20] and vertical practices[21] between firms, the definition of which includes a natural person[22] such as an employee, if such practices has the effect of substantially preventing or lessening competition in a market. However, if a party to the agreement can prove that any technological, efficiency or other pro-competitive gain, resulting from the agreement, outweighs the effect, such horizontal and vertical practices can be allowed.[23]

Although legislation does not provide a clear and concise response to the claim of unlawful competition based on an alleged common law duty, the South African Courts have dealt decisively therewith, on various occasions.

## CASE LAW:

For a claimant to be successful with a claim for damages (based on common law) for unlawful competition, the South African Courts require proof all the elements of a delict.[24]

The Labour Court, in *ABSA Insurance and Financial Advisors (Pty) Ltd v Johan Leon Jonker and Momentum Consult (Pty) Ltd*[25], and *Absa Insurance and Financial Advisors (Pty) Ltd v Teresa Jonker and Momentum Consult (Pty) Ltd*[26] (hereinafter referred to as the ‘*ABSA v Jonker*’) confirmed that South African law recognises two forms of unlawful competition, being:

- Unfair use of a competitor’s fruits and labour; and
- The misuse of confidential information in order to advance one’s business interests and activities at the expense of a competitor.
- The Labour Court furthermore referred to the judgment in *Waste Products Utilisation (Pty) Ltd v Wilkes and Another*[27] (hereinafter referred to as ‘*Waste products*’), which matter stated the elements which a claimant needs to satisfy to prove the existence of unlawful competition, which elements can be summarised as follow:
  - The claimant must have an interest in the confidential information, but such interest does not have to be ownership;
  - The information in which the claimant has an interest is of a confidential nature;
  - A relationship must exist between the claimant and the defendant, unto whom the claimant seeks to impose a duty to preserve the confidence of information imparted unto him or her, such as the relationship between an employer and an employee;
  - The defendant must have knowingly appropriated the confidential information;
  - The defendant must have made improper use of that information, whether as a springboard or otherwise, to obtain an unfair advantage for him- or herself; and
  - The claimant must have suffered damage as a result of such improper use.
- The Labour Court also referred to the case of *Roberts v Etwell’s Engineers Ltd (1972) 2 All ER 890*[28] (hereinafter referred to as ‘*Roberts*’), in which the honourable Lord Denning Mr at 894 held that a former employee may be allowed to:

“without fear of legal consequences, canvass for the custom of his late master’s customers, whose names and addresses he has learned during the period of his service, so long as he does not take a list of them away with him”.

- The predominant principle as specifically found in *ABSA v Jonker*, and also in *Forwarding African Transport Services CC t/a FATS v Manica Africa (Pty) Ltd & others*[29] (hereinafter referred to as ‘*FATS*’), can be summarised as follows:
  - A previous employee cannot be restrained by a previous employer from entering into competition with it if the employee, as a result of such restraint, whether through contract or through fear of litigation, would render such a previous employee economically in-active and unproductive; and
  - A previous employee cannot be restrained as mentioned above, irrespective of the period of the restraint.

Of importance to instances of restraint of trade clauses in instances of entrepreneurial endeavours, is the concept of trade connections. In the matter between *Rawlins and Another v Caravantruck (Pty) Ltd*[30] (*Rawlins*), the Appellate Division held that an employee could be found liable for damages in a claim based on unlawful competition, if the employee used the trade connections of his previous employer in an improper manner, to advance his or her own agenda.

(For the sake of completeness, the cases referred to in the footnote below, can also be read[31]).

## **CONCLUSION: THE MASTER OF YOUR OWN FATE:**

Based on the provisions of Section 18, 22 and 23 of the Constitution<sup>[32]</sup>, as well as the principles set out by the courts in the judgments of *Waste Products*<sup>[33]</sup>, *ABSA V Jonker*<sup>[34]</sup> and *FATS*<sup>[35]</sup>, I opine that an entrepreneurs' previous employer' will not be able to restrain him or her from continuing with starting their own company, if the business is carefully considered not to be in violation of the principles as set out in the discussion above.

In essence, if the entrepreneur does not make improper use of that information gained from previous employment, whether as a springboard or otherwise, to obtain an unfair advantage for him- or herself; and the previous employer does not suffer damage as a result of such use (therefore the use is not improper), a litigant will battle to enforce the restraint of trade.

A restraint of trade should therefore not be used to prevent the entrepreneur from entering the economic sector again, but rather to proportionally protect the interest of the previous employer against improper use and abuse by the ex-employee.

It is also important to note that the finding in *Rawlins*<sup>[36]</sup>, could result in a court awarding damages against an entrepreneur in favour of an entrepreneur's previous employer, in the instance where the entrepreneur approached the clients of such an entrepreneur's previous employer, prior to establishment of his or her own company and/or leaving the employ of his or her previous employer, as the court might infer that the entrepreneur improperly used the trade connections of his previous employer, which include its customers, to further his or her own business interests. This is furthermore substantiated by the judgments in *Waste Products*<sup>[37]</sup>, *ABSA V Jonker*<sup>[38]</sup> and *FATS*<sup>[39]</sup>, and the principle of the reasonable person, as same would result in contravention of the provisions contained in Section 22 and 23 of the Constitution<sup>[40]</sup>.

The reasons for my opinion can be summarised as follows:

- The courts have continuously found in favour of protecting an employee's, and therefore, an entrepreneur's right to choose their trade, occupation and/or profession freely<sup>[41]</sup>;
- Restraint of trade clauses in such instances would constitute an unfair and discriminatory labour practice which is prohibited by the Constitution and the LRA<sup>[42]</sup>; and
- Restricting an entrepreneur's business and commerce activities would furthermore result in rendering an entrepreneur economically inactive and/or unproductive which is indirect contravention of the judgments in *ABSA v Jonker*<sup>[43]</sup> and *FATS*<sup>[44]</sup>.

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[1] 'Invictus', William Ernest Henley.

[2] JT Schoombe 'Agreements in restraint of trade: the appellate division confirms the new principles' 1985 *THRHR* 127, 138; Lukas Johannes Van der Merwe *Die Beskerming van Handelsvryheid in die SuidAfrikaanse Kontraktereg* (1998 unpublished thesis Potchefstroom) 4142; DV Cowen 'Survey of the law relating to the control of monopolies in South Africa' 1954 *SAJE* 124, 132 and see the reference to *Tohill v Gordon* 1930 WLD 99, 110111; EE Bekker 'Monopolies and the role of the Competition Board' 1992 *TSAR* 618, 621; HJO van Heerden & J Neethling *Unlawful Competition* (1995) 23.

[3] *Supra* footnote 2; See also the discussion of cartels, vertical agreements and franchises *infra*. For the manner in which it should be determined whether a provision is in restraint of trade see: *SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd* 1968 2 SA 777 (D); *Hunt v Derman* [1997] 4 All SA 665 (T); *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) 324328; Philippus Johannes Sutherland *The Restraint of Trade Doctrine in England, Scotland and South Africa* (1997 unpublished thesis Edinburgh) 4458. See the English case of *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 229, 321347.

[4] The Constitution of the Republic of South Africa, 1996.

[5] Section 18 of the Constitution of the Republic of South Africa, 1996.

[6] Section 22 of the Constitution of the Republic of South Africa, 1996.

[7] Section 23 of the Constitution of the Republic of South Africa, 1996.

[8] Section 1(1) of the Labour Relations Act, Act 66 of 1995.

[9] Section 1(1)(a) of the Labour Relations Act, Act 66 of 1995.

[10] Section 5(1) of the Labour Relations Act, Act 66 of 1995.

[11] Section 5(2)(b) of the Labour Relations Act, Act 66 of 1995.

- [12] The Competition Act, Act 89 of 1998.
- [13] Section 2 of the Competition Act, Act 89 of 1998.
- [14] Section 2(a) of the Competition Act, Act 89 of 1998.
- [15] Section 2(b) of the Competition Act, Act 89 of 1998.
- [16] Section 2(c) of the Competition Act, Act 89 of 1998.
- [17] Section 2(d) of the Competition Act, Act 89 of 1998.
- [18] Section 2(e) of the Competition Act, Act 89 of 1998.
- [19] Section 2(f) of the Competition Act, Act 89 of 1998.
- [20] Section 4 of the Competition Act, Act 89 of 1998.
- [21] Section 5 of the Competition Act, Act 89 of 1998.
- [22] Section 1(1) of the Competition Act, Act 89 of 1998.
- [23] Section 4 and 5 of the Competition Act, Act 89 of 1998.
- [24] *Ingelheim Pharmaceuticals (Pty) Ltd v Novartis SA (Pty) Ltd and another* [2005] 4 All SA 453 (W). Also see, *Pexmart CC and others v H Mocke Construction (Pty) Ltd and another* [2019] 1 All SA 335 (SCA), *Motion Transfer & Precision Roll Grinding CC v Carsten and another* [1998] 4 All SA 168 (N), *Rawlins and another v Caravantruck (Pty) Ltd* [1993] 1 All SA 389 (A).
- [25] *ABSA Insurance and Financial Advisors (Pty) Ltd and Johan Leon Jonker and Momentum Consult (Pty) Ltd – C741/2017*.
- [26] *ABSA Insurance and Financial Advisors (Pty) Ltd and Johan Leon Jonker and Momentum Consult (Pty) Ltd – C742/2017*.
- [27] *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) at 571 F-G.
- [28] *Roberts v Etwell's Engineers Ltd* (1972) 2 All ER 890.
- [29] *Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd & others* [2005] 1 BLLR 104 (D).
- [30] *Rawlins and another v Caravantruck (Pty) Ltd* [1993] 1 All SA 389 (A).
- [31] *American Natural Soda Ash Corporation and another v Competition Commission of SA and others* [2005] 3 All SA 1 (SCA), *Uniplate Group (Pty) Ltd v New Number Plate Requisites CC* [2013] 1 All SA 231 (GSJ), *Value Car Group Ltd and another v Value Car Hire (Pty) Ltd and others* [2005] 4 All SA 474 (C), *JR1013 Investments CC and Others v Minister of Safety and Security and Others* 1997 (7) BCLR 925 (E), *Tap Wine Trading CC and another v Cape Classic Wines (Western Cape) CC and another* [1998] 4 All SA 86 (C), *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd and another* [2014] 4 All SA 241 (GJ), *Nino's Coffee Bar & Restaurant CC v Nino's Italian Coffee & Sandwich Bar CC and another* [1998] 3 All SA 527 (C), *City of Cape Town v Ad Outpost (Pty) Ltd and Others* 2000 (2) BCLR 130 (C), *Knox D'Arcy Limited and Another v Shaw and Another* 1995 (12) BCLR 1702 (W), *Commissioner, Competition Commission v General Council of the Bar of SA and others* [2002] 4 All SA 145 (SCA), *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation (Attorney-General intervening)* 1995 (9) BCLR 1262 (Z), *Waltons Stationary Company (Pty) Ltd v Fourie and Another* 1994 (1) BCLR 50 (O), *Kotze en Genis (EDMS) Bpk v Potgieter en Andere* 1995 (3) BCLR 349 (C), *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* [1977] 4 All SA 482 (N), *Ackermann-Göggingen Aktiengesellschaft v Marshing* [1973] 3 All SA 438 (C), *Biografic (Pvt) Ltd v Wilson* [1974] 2 All SA 503 (R), *Filmer and another v Van Straaten* [1965] 2 All SA 518 (W) and *Vital Administration CC v Irengo (Pty) Ltd and others* [2004] 4 All SA 354 (T).
- [32] Section 18, 22 and 23 of the Constitution, 1996.
- [33] *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) at 571 F-G.
- [34] *ABSA Insurance and Financial Advisors (Pty) Ltd and Johan Leon Jonker and Momentum Consult (Pty) Ltd – C741/2017* and *ABSA Insurance and Financial Advisors (Pty) Ltd and Johan Leon Jonker and Momentum Consult (Pty) Ltd – C742/2017*.
- [35] *Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd & others* [2005] 1 BLLR 104 (D).
- [36] *Rawlins and another v Caravantruck (Pty) Ltd* [1993] 1 All SA 389 (A).
- [37] *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) at 571 F-G.
- [38] *ABSA Insurance and Financial Advisors (Pty) Ltd and Johan Leon Jonker and Momentum Consult (Pty) Ltd – C741/2017* and *ABSA Insurance and Financial Advisors (Pty) Ltd and Johan Leon Jonker and Momentum Consult (Pty) Ltd – C742/2017*.
- [39] *Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd & others* [2005] 1 BLLR 104 (D).

[\[40\]](#) Section 23 of the Constitution, 1996.

[\[41\]](#) Section 22 of the Constitution, 1996.

[\[42\]](#) Section 23 of the Constitution, 1996 and Section 1 and 5 of the Labour Relations Act, Act 66 of 1995.

[\[43\]](#) ABSA Insurance and Financial Advisors (Pty) Ltd and Johan Leon Jonker and Momentum Consult (Pty) Ltd – C741/2017 and ABSA Insurance and Financial Advisors (Pty) Ltd and Johan Leon Jonker and Momentum Consult (Pty) Ltd – C742/2017.

[\[44\]](#) Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd & others [2005] 1 BLLR 104 (D).