Restraint of trade
The rise and fall of the doctrine
A C Oosthuizen, advocate, Cape Town

In the recent case of Drewsins (Pty) Ltd v Carle 1981 4 SA 305 (C), the applicant, a clothing business, sought to interdict the respondent, a former employee of the applicants, from contravening an agreement in restraint of trade entered into between the parties while the respondent had been in the applicant's employ. The agreement provided that the respondent would refrain from selling any goods normally stocked by the applicant to any of the applicant's customers for a period of one year from the date of termination of the respondent's employment with the applicant. The full bench of the Cape provincial division upheld the restraint. Each of the judges gave a separate judgment. In the course of his judgment, Van den Heever J raised two questions relating to the doctrine of restraint of trade as presently applied in our law. These questions will be discussed below.

Is the doctrine part of Roman-Dutch law?
Van den Heever J reiterated the view expressed in earlier judgments, namely that this doctrine is entirely foreign to Roman-Dutch law. The following statement by Voet in Commentarius ad Pandectas 2.14.16 could be relevant:

"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, nor yet things impossible, or senseless and silly, or yet things base or shameful, such as clash with good morals or enice to wrongdoing" (Cane's translation) (see also Grumm, Interlego de Hollandia, recht-volkerleven 3.1.42 and 43).

Nowhere is it suggested by the old writers that agreements in restraint of trade are contrary to public law, redound to the public injury or that they clash with good morals. On the contrary, Van Bynkersbock Observations tumultuariae (vol 2 par 1359) mentions a decision of the Hooge Raad of 9 July 1717, where two partners had dissolved a partnership in the wood trade, the one partner undertaking not to enter into another partnership in the trade nor to sell or buy wood for another. The Hooge Raad upheld this restraint, and made no mention of such restraints being contrary to public policy. Similarly, Pauw Observations tumultuariae novae (vol 2 par 876) mentions a case where the Hooge Raad on 22 July 1763 upheld an agreement in restraint of trade coupled to the sale of a business. Once again the validity of the restraint is not questioned.

Our law
How did this doctrine then come to be incorporated into our law? Agreements in restraint of trade are first mentioned in our case law in Willett v Blake 1848 (vol 3 Menes Reports 343). The plaintiff sought to enforce an agreement which prohibited the defendant from setting up a boating business or any other business in Simontown. The defendant contended that the agreement was invalid, "being an improper restraint on his natural liberty". The report states, in somewhat sketchy fashion, that this proposition was held untenable in law. No mention is made of the applicability of the doctrine of restraint of trade to South African law.

In Stephen Brothers v Loubser 1877 (7) Buch 137, a lessee had bound himself not to allow any business of whatever nature on any portion of the lessor's property during the subsistence of the lease. The court held that this restraint should be construed strictly. If there was any ambiguity in a contract such as this, the court should favour a construction in favour of freedom in trade. No authority was quoted for these propositions.

The next development occurred in Hendricks v Dooroom 1898 (13) EDC 25. A barber's assistant in Grahamstown had agreed, in his contract of service, that, on terminating his services, he would not enter into the same line of business, either directly or indirectly. No mention was made of the area within which the restraint would operate. The court held that contracts of this nature were "contrary to the policy of law and cannot be enforced. Once again, no authority was cited for incorporating this rule into our law.

In Edgcombe v Hodgson 1902 (19) SC 224 De Villiers CJ attempted to justify the adoption of this rule so wholly foreign to Roman-Dutch law. After referring to the text of Voet which I have quoted above, the judge stated:

"He [Voet] does not mention the encouragement of trade as a matter of public policy but in our time it can hardly be doubted that any general restraint of trade must necessarily be detrimental to the community."

The chief justice thus labelled restraints of trade as per se contrary to the public interest. As pointed out above, his view is not supported by any of the old Roman-Dutch authorities.

Invalid
This unfortunate dictum opened the floodgates. Thereafter it was invariably accepted that restraints of trade were in our law regarded as prima facie invalid. Various grounds for justifying the rule were advanced, inter alia that, as Lord De Villiers had pointed out, the rule had its origin in Roman-Dutch law (see Ko-Operatieve Wyhbovers van ZA Bptk v Botha 1923 CPD 429) and that our law was identical to English law (see Trimmle v Jameson & Co 1903 (24) NLR 53; SA Breweries Ltd v Munet 1905 (26) NLR 562; Federated Insurance Corporation Ltd v Van Altena 1908 (25) SC 940; Holnes v Gonzal & Williams 1916 CPD 35 42). It was even suggested in Denvours v Smit 1936 EAL 330 333 that the foundation of this rule "rests on universal reason and is therefore common to both the English and our systems".

When one considers the reception of the doctrine of restraint of trade into our law, one cannot but agree with Wessels that "[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" (The law of contract in South Africa par 539).

Desirability
Doubts as to the desirability of this state of affairs have been expressed in several cases. In Diamond Cycle Works v Hirschmann 1916 TPD 241 244 De Villiers J said:

"I would like to say that the doctrine of contracts in restraint of trade has been before our court but no single authority from our law has been quoted to today. Now I wish to guard myself against being taken to lay down that this court is bound by the decisions of the English courts in this respect. Our courts are only bound insofar as the general principles of our law are the same as those of the English law."

The court went on to find that the restraint before it was in any event reasonable and therefore found it unnecessary to decide what extent the doctrine formed part of our law.

In Katz v Effingham 1948 4 SA 602 (ODP) 610 the court confirmed that the doctrine was foreign to Roman and Roman-Dutch law, but accepted that it had become engrafted into our system of law. In Van der Pol v Silberman 1952 2 SA 561 AD 569 the appellate division accepted that the doctrine was not part of Roman-
Dutch law and found it unnecessary to investigate to what extent it had been incorporated into South African law, as the restraint was in any event held to be unreasonable.

The matter was raised again in SA Wire Co (Pty) Ltd v Durban Wire & Plastics Ltd 1968 2 SA 777 (D) by Leon J who said (at 781):

"Although English law appears to have been followed in this field it is, of course, not binding but it may be persuasive. If our law differs then our law must be followed and not English law."

He added:

"It seems to me that the reason why our Courts refuse to enforce contracts which are in restraint of trade is because such contracts are contrary to public policy.

Once again a full investigation is unnecessary as the court held that the particular contract was not in restraint of trade.

Recent decisions

Nearly a decade later Dickson J in a well-reasoned judgment, stated boldly:

"I have therefore come to the conclusion 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" (Roffey v Coulter, Edwards & Gourley (Pty) Ltd 1977 4 SA 904 (N) 508).

In the full bench decision of National Cements (SA) (Pty) Ltd v Borrowman 1979 3 SA 1092 (T) Botlih, it seems, agreed as a matter of personal opinion with the abovementioned view of Dickson J, but held that there was not sufficient reason to depart from the long line of cases in which English law had been followed.

In delivering her judgment in the Dredworth case, Van den Heever J clearly was in favour of the approach adopted by Dickson J as appears from the following:

"It seems to me that a proper approach would be to determine whether this full Bench is prevented by stare decisis from applying the principles of Roman-Dutch law pertaining to contracts, and in particular whether there was any agreement to contracts in restraint of trade and, if not, what those principles of Roman-Dutch law are."

After pointing out that the "engrafting" of the English law principle of restraint of trade occurred only in provincial divisions, Van den Heever J concludes:

"I doubt whether it should today be accepted as axiomatic that an agreement in restraint of trade is prima facie adverse to the interests of the community."

It is hoped that the appellate division will be called upon to resolve the conflict in the near future. In the meantime, however, it seems that, at least in so far as the Cape and Natal provincial divisions are concerned, the English rule that agreements in restraint of trade are prima facie void, no longer applies.

Morality and public policy

The result of this return to Roman-Dutch law is simply that an agreement in restraint of trade will be upheld unless it is shown to be contrary to morality or public policy. These, as pointed out by Van den Heever J (supra), are not static concepts, since "what may be true for Pofadder does not necessarily hold good in Pretoria."

I don't see how it could possibly be against public policy for a seller who had sold a business for the goodwill of which he had received a substantial sum, to be restrained from opening up another business in competition to the one which he had sold and in that way be able to still enjoy the benefit of the goodwill which he is supposed to have parted with.

Employees

Restraints imposed by employers on their employees are more difficult. It is not, I submit, against the public interest for an employer to prevent a former employee from using the employer's trade connections or trade secrets of which the employee acquires a knowledge whilst in the service of the employer, in order to compete against the employer. But it is contrary to public policy for an employer to protect himself against competition per se from former employees (see Fillen v Van Straaten 1965 2 SA 575 (W); Aling & Stowels v Olivier 1949 1 SA 215(T); Tension Envelope Corp (SA) (Pty) Ltd v Zeller 1970 2 SA 333 (W)).

The question to be asked in each instance is whether the restraint is contrary to public policy.

The onus

Van den Heever J also deals with the question of the onus of proving that the restraint is or is not reasonable.

Traditionally our courts held the view that, in our law as in English law, the onus rested on the party seeking to enforce the restraint to prove that the restraint was reasonable (see Durban Pickfords Ltd v Bull 1933 N 479 493; Gordon v Van Blerk 1927 T 770 772; and Baldwin & Lessing v Muller 1958 2 SA 500 (T) 501G).

In Van der Pol's case supra the appellate division, acting on the assumption that our law had adopted the English principle relating to restraint of trade, followed the English rule and stated that the onus was on the party seeking to enforce the restraint. As mentioned before, the appellate division did not actually consider whether this doctrine did, in fact, form part of our law. The question of onus was also not investigated by the court.

In the SA Wire Co case supra, the court mentioned that the approach of our courts to the question of onus might possibly have to be considered, but left this question open (787-788).

In O'Keefe's case there was a departure from the traditional approach. The court said the following:

"Although often couched as such, the real problem, one therefore notices, is not where the onus of proof lies in restraint of trade cases. It concerns rather what must be proved and that, in turn, depends on whether covenants in restraint of trade are or are not prima facie void. If they are, with the result that their reasonableness must be shown before they can be upheld, those seeking to enforce them bear the onus of proving such reasonableness. If, however, they are enforceable as a general rule, but not when they are unreasonable, then the fact must be proved by those resisting their enforcement" (Roffey's case supra 504A-C).

Dickson J went on to hold that agreements in restraint of trade weren't prima facie void and that the onus was therefore on the person seeking to escape the restraint to show that the restraint was unreasonable.

Foreign principle

Roffey's case was followed in Stewart Wrightson (Pty) Ltd v Munitions 1979 3 SA 399 (C) and Madoor (Pty) Ltd v Wallace 1979 2 SA 957 (T). On the other hand the traditional approach, namely that the onus was on the party seeking to enforce the restraint, was adhered to in Highlands Park Football Club v Viljoen 1978 3 SA 191 (W). Vermeulen J in that case criticized the reasoning of Dickson J in Roffey's case (199 of Viljoen's case). It is respectfully submitted that Vermeulen J did not fully consider the question as to why our law should follow an English legal principle so totally foreign to Roman-Dutch law.

Viljoen's case was approved by the Transvaal full bench in the Borrowman case, supra, which in turn was followed by Allied Electrical (Pty) Ltd v Meyer 1979 4 SA 325 (W).

In Dredworth (Pty) Ltd v Carlile supra Van den Heever J opted for the approach advocated in Roffey's case. The judge stated (at 313B):

"As regards the onus, it seems clear that he who has seriously conclud-

*See A Becker & Co (Pty) Ltd v Becker 1981 3 SA (A) 414.
agree. The court pointed out that a waiver must be clearly shown and is never lightly inferred. The court, in distinguishing *Kruit v Butler* 1966 4 SA 448 (E), held that "a mere consent to allow taxation in my absence does not mean that I will abide the ruling of the taxing master, no matter what it might be. If I am to be held to have waived my right to review, there must be something more than a mere consent to taxation in absentia" (566C).

The assessment committee disallowed every single one of the items in R's second bill *mero* (or suo) *motu*. None was objected to. For Q, the interested party, was not there to object. Every item in the second bill was disallowed without any objection by anyone. In the circumstances, the court held that R did not lose his right of review. The point in *limine* was therefore dismissed.

As the whole taxation was in any event invalid in the first place, for want of notice to Q, the court set aside the *allotment* and the taxation (assessment) was ordered to take place *de novo* upon proper notice to both R and Q. No order as to costs was made.

Spoliation order

*Erasmus v Dorsey Farms (Pty) Ltd* 1982 2 SA 107 (T)

Eloff J 20 November 1981

The applicant applied for a spoliation order in respect of the possession of certain cattle which he had bought from the respondent. A cheque for the amount of R4 500 in respect of the purchase price had been dishonoured. According to the respondent, the parties agreed that the cheque would once again be presented for payment and that, if it should be dishonoured, the sale would be regarded as cancelled, the ownership of the cattle would revert to the respondent, and the latter would have the right, without further notice, to take the cattle. The applicant in his affidavit denied that the cheque had once again been dishonoured, with the result that he regarded the agreement as cancelled and handed to an employee a letter in which the applicant was requested to deliver the cattle to the employee. The applicant in his founding affidavit alleged that the respondent had deprived him of his possession of the cattle against his will and without his consent.

The court accepted that it had been established that the applicant had not agreed to the delivery and that his employee had had no authority to effect such delivery.

On behalf of the applicant it was argued that the agreement on which the respondent relied was void, because it purported to give the respondent a right to self-help (*Nino Bonino v De Lange* 1906 TS 120 at 123-124).

The respondent argued that, even if the agreement was void, the respondent's conduct was lawful. He had also, in bona fide belief that he had a right to take the cattle, openly sent an employee with a letter to fetch the cattle. In this regard the respondent relied upon the decision in *Martin v Ingle* 1920 NPD 1.

The court could not clearly ascertain what the ratio decidendi in *Martin* 's case was, and associated itself with the decision in *Luna v Kreutzner* 1947 3 SA 591 (W), in which the court expressly refused to follow *Martin* 's case. The court held that if the person in control of the cattle in *Martin* 's case had had no authority to deliver it, it was irrelevant that he acted bona fide. The only issue was whether the principal of the person in control had assented. If not, there was spoliation. In the present case it was clear that the applicant had not assented to the removal of the cattle, and that he would have refused if he had been asked. Moreover, it had to be accepted that his employee had no authority in this regard.

The court granted a spoliation order.

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**Restraint of trade (Continued from page 333)**

ed an agreement from the consequences of which he wishes to escape, should satisfy the court that there is good reason why the normal consequences of a contract, which is neither illegal nor immoral, should not follow.

Van den Heever J is supported, albeit obiter, by certain remarks made by Tegnitz J in his judgment in the same case.

Here too the appellate division will hopefully clarify the position. If one accepts that the ordinary principles of our law of contract apply to agreements in restraint of trade, then there is much to be said for the attitude adopted by Dicott J in *Roffey* 's case and by Van den Heever J in *Drewe* 's case.

**Summary**

- In Roman-Dutch law all contracts save those which are immoral, illegal or contrary to public policy, were enforceable.
- Contracts in restraint of trade were never regarded as contrary to public policy in Roman-Dutch law.
- The restraint of trade doctrine of English law was incorporated into our law as a result of the mistaken view that our law was the same as English law in this regard.
- The appellate division has never properly considered this doctrine. Recent full bench decisions in both the Natal and the Cape provincial divisions have departed from the English law approach and reverted to the position as it existed in Roman-Dutch law.
- Hopefully this latter approach will eventually be uniformly applied. This would mean that all restraints of trade are binding unless they are shown to be contrary to public policy. The onus of proving this should lie with the party wishing to avoid the restraint.