Chapter 54
Freedom of Trade, Occupation and Profession

Dennis Davis

54.1 The history of the Interim Constitution S 26 and the final Constitution S 22

Section 26 of the Interim Constitution[1] contains a broad, but by no means transparent, formulation of the right to economic activity. It reads:

> (1) every person shall have the right of freely to engage in economic activity and to pursue a livelihood anywhere in the national territory;
>
> (2) sub-section (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices and equal opportunities for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Generating a best rendering of IC s 26 was not without difficulty. The Court in *S v Lawrence; S v Negal; S v Solberg* was left with two basic choices. As Chaskalson P observed:

> The first [alternative] focuses on a meaning of free participation and an economic activity and the pursuing of a livelihood. In a modern democratic society a right 'freely' to engage in economic activity and to earn a livelihood does not imply a right to do so without any constraints whatsoever. . . . The alternative approach is to read s 26(1) and (2) together as indicating that all constraints upon economic activity and the earning of a livelihood which fall outside the purview of s 26(2) will be in breach of s 26. This construction is less restrictive of 'free economic activity.[2]

1 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

2 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) ('*Solberg*') at paras 32, 37. Later in the same judgment, Chaskalson warned that:

The *Solberg* Court opted for the second, less expansive approach to IC 26. By contrast, section 22 of the Final Constitution[3] leaves little room for alternative readings. FC s 22 turns the core protections of IC s 26 into a substantially more limited right.[4] That said, the concatenation of the Constitutional Court's

narrowreading of IC s 26, the linguistic similarity of FC s 22 and IC 26 and our courts continued reference to the cases decided under IC s 26 justify our ongoing reliance on the jurisprudence generated by IC s 26.

54.2 The logic of S 22

(a) An Overview

FC s 22 provides as follows:

> Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Despite the similar juridical constructions of IC s 26 and FC 22, the difference of wording between s 22 and its predecessor s 26 must represent the starting point for our analysis of FC 22. In short:

(i) the right contained in s 22 appears to be granted only to South African citizens[5];

> [S] 26 should not be construed as empowering a court to set aside legislation expressing social or economic policies infringing 'economic freedom' simply because it may consider the legislation to be ineffective or is of the opinion that there are other and better ways of dealing with the problems. If s 26(1) is given the broad meaning for which the appellants contend, of encompassing all forms of economic activity and all methods of pursuing a livelihood, then, if regard is had to the role of the courts and democratic society, s 26(2) should also be given a broad meaning. To maintain a proper balance between the roles of the Legislature and the courts, s 26(2) should be construed as requiring only that there is a rational connection between the legislation and the legislative purpose sanctioned by the section.
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> Ibid at 44.

3 Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

4 In examining the ambit of the Interim Constitution s 26, Chaskalson P in *Solberg* noted that: Certain occupations call for particular qualifications prescribed by law and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in such occupations. For instance, nobody is entitled to practice as a doctor or as a lawyer unless he or she holds the prescribed qualifications, and the right to engage 'freely' and economic activity should not be construed as conferring such a right on unqualified persons; nor should it be construed as entitling persons to ignore legislation for regulating the manner in which particular activities have to be conducted, provided always that such regulations are not arbitrary.

5 The restriction of the right to 'every citizen' was the subject of an objection during the Certification process. The objectors contended that in order to comply with Constitutional Principle II the right of occupational choice should be extended to everyone, irrespective of citizenship. The Constitutional Court rejected this argument on the grounds that even where international human rights instruments recognize the right of occupational choice, there is nothing in these documents that would prohibit States Parties from imposing suitable conditions limiting the rights of non-nationals in respect of freedom of occupational choice. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 17 and 18.

(ii) the more specific formulation of choice of trade, occupation and profession has replaced the more general phrase regarding engagement in economic activity; and

(iii) the use of every citizen requires that the provision's benefits be restricted to individuals and not extended to juristic bodies.[6]

Finally, IC s 26's expansive language could have been read as a neo-liberal, free market bulwark against interventionist economic policies. FC s 22, on the other hand, must be read as a corrective to historical employment inequities created by Apartheid. In *JR 1013 Investments CC and Others v Minister of Safety and Security and Others*, Jones J noted:

> We have a history of repression in the choice of a trade, occupation or profession this resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-Constitution era implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions on where and

> how long they could reside in particular areas, and the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races. The result was that all citizens in the country did not have a free choice of trade, occupation or profession. Section 22 is designed to prevent a perpetuation of this state of affairs.[7]

(b) Comparative Jurisprudence

A number of foreign constitutions possess a right similar to that of FC s 22. Article 12(1) of the German Basic Law provides that all Germans have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations and professions may be regulated by statute. Japan's 1947 Constitution contains two provisions that guarantee freedom of economic activity: (1) article 22 provides freedom to change residence and freedom to choose an occupation; and (2) article 29 provides for the right to property.

At a minimum, the comparative jurisprudence suggests that a South African court should, in light of the second proviso of s 22, require a rational connection between the purpose of the regulatory statute under scrutiny and the objective it seeks to vindicate.[8] The purpose of this proviso — which authorizes regulation to govern trades, occupation and the professions — thereby gives content to the right itself. FC 22 clearly protects choice. However, the space to exercise such choice is constrained by the legitimate need for the state to police any given market for the common good.

> The Court further observed that this right is not contained in a number of different international instruments. The European Convention for the Protection of Human Rights and Fundamental Freedoms contains no right to occupational choice, and neither does the International Covenant on Civil and Political Rights. Article 6.1 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to 'the opportunity to gain his living by work which he freely chooses or accepts'. Ibid at 18.

6 See *City of Cape Town v AD Outpost (Pty) Ltd and Others* 2000 (2) SA 733 (C), 747 A-C, 2000 (2) BCLR 130 (C).

7 1997 (7) BCLR 950, 980B-E (E)

(i) German case law

The German courts have generally taken the view that the regulation of a profession as a commercial practice is easier to justify than barriers of entry into the profession itself. David Currie writes:

> A great many limitations of occupational freedom have been upheld by the [German] courts, such as compulsory retirement ages for chimney sweeps and midwives, the sale of headache remedies to pharmacists, the closure of shops on Saturday afternoons, Sundays, holidays and in the evening and the requirement that employers must hire the handicapped, limit the number of notaries and require them to serve welfare applicants without charge.[9]

Despite upholding this series of limitations upon the right, German courts have insisted on strong measure of rationality review. For example, the German Constitutional Court has held that article 12(1) was unjustifiably infringed when licences to practise law were denied or revoked on the because the applicant

engaged in employment thought to be menial and therefore inconsistent with the integrity or image of the legal profession.[10]

This last case suggests that the protection of individual choice remains the departure point for analysis. In *German Pharmacy*, the German Constitutional Court wrote:

> The practice of an occupation may be restricted by reasonable regulation predicated on considerations of the common good. The freedom to choose an occupation, however, may be restricted only in so far as an especially important public interest compellingly requires . . . [and] only to the extent that protection cannot be accomplished by a lesser restriction on freedom of choice.[11]

At issue in *German Pharmacy* was the decision of the state of Bavaria to pass laws restricting the number of pharmacies that could be licensed in a given community. The state's Apothecary Act provided for the issue of additional licences only if *(a)* the new pharmacy was commercially viable and *(b)* the new pharmacy caused no economic harm to nearby competitors. The applicant — a qualified pharmacist from East Germany — had been denied a licence to open a pharmacy.

In applying article 12 of the Basic Law to the state's Apothecary Act, the court stated that a practice or occupation could be restricted by *reasonable* regulations predicated on considerations of the common good. However, the freedom to choose an occupation could be restricted only for the sake of

> *a compelling public interest*; that is, if after careful deliberation the legislature determines that a common interest must be protected, then it may impose restrictions

8 But see *SA Post Office Ltd v Van Rensburg & another* 1998 (1) SA 796 (E), 805G–806B, 1997 (11) BCLR 1608 (E) ('*SA Post Office I*') (Lang AJ appears to suggest that any form of licensing system will automatically satisfy the requirements of s 22).

9 David P Currie *The Constitution of the Federal Republic of Germany* (1994) 303.

10 87 *BVerfGE* 287 (1992).

11 7 *BverfGE* 377 (1958) as cited in Currie (supra) at 300.

> in order to protect that interest — but only to the extent that the protection cannot be accomplished by a lesser restriction on freedom of choice. In the event that an encroachment on freedom of occupational choice is unavoidable, law-makers must always employ the regulative means least restrictive of the basic right.[12]

Bavaria's Apothecary Act failed the court's *compelling public interest* test. The court found that the legislature intended to impose a restriction on admission in order to protect practising pharmacists from competition. Indeed, the court held that the Act reflected a set of naked preferences designed, not to safeguard public health, but to advance the pecuniary interests of existing pharmacies and pharmacists. It wrote:

> . . . between the lines of the legislation, we . . . can discern the political aims of a pharmacy profession at work to protect its [narrow] interests and the traditional concept of the "apothecary".[13]

German Pharmacy stands for the proposition that a relatively strict standard of review must be applied where there is regulation of occupational choice. The state

may regulate such choice only in so far as it is necessary to ensure proper and adequate training of an individual wishing to embark upon the trade which the legislature purports to control.

This strict standard of review for occupational choice does not preclude state intervention designed to further the common good. In *Long-Haul Truck-Licensing*,[14] transportation officials refused to grant permits to certain companies because the quota for such permits, fixed by law, had already been filled. The court found that in the light of the nature, complexity and cost of long-haul freight traffic, this restriction was indeed a justifiable and adequate means of preventing a major threat to a compelling public interest. The court stated that:

> The federal railroad is indispensable for the national economy. This is true not only for passenger transportation but for freight traffic as well, whose protection fixed quotas are meant to serve. The modern economy based on the division of labour cannot do without this means of transportation, which moves great volumes of freight quickly and over long distances . . . [S]upplying the population with vital goods could not be guaranteed without the railroad; thus the railroad helps to safeguard the existence of every individual.[15]

Of additional interest is the social democratic cast of the German Basic Law's economic activity jurisprudence. In *Numerus Clausus*[16]*,* the German Constitutional Court declared that the right to obtain a professional education is worthless if the state did not provide one. Access to public education is, therefore, not a matter of legislative discretion. Accordingly, the court has applied art 12(1) together with the

12 See Donald P Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 288. (Emphasis added).

13 Ibid at 290.

14 40 *BVerfGE* 296 (1975).

15 *Long-Haul Truck-Licensing* (supra) at 297-8.

16 33 *BVerfGE* 303 (1972).

equality guarantee in terms of art 3(1) and the social state principle to analyse carefully any restriction on access of applicants to public educational facilities.[17] Given the social democratic or transformative character of the South African Constitution, a South African court would be justified in reading s 7(2)[18] together with s 22 and s 29(1)*(b)*[19] to arrive at a similar conclusion.

(ii) Japanese Case Law

As I noted above, article 22 of the Japanese Constitution has a similar provision to FC s 22: namely that every person shall have the freedom to choose his or her occupation to the extent that it does not interfere with the common good. The 'common good' *proviso* has been given content similar to that of our own IC s 26(2).

In *Gypsy Taxi Cab*,[20] an unlicensed taxi operator was charged with a violation of the road transportation law. The law prohibited the use of private automobiles for such commercial activities as transporting passengers for profit. Upon conviction, the cab operator appealed to the Supreme Court on the grounds that the provision unreasonably restricted his freedom of occupation. The court rejected his appeal. The court observed that the objective of the transportation law was to promote the public welfare by ensuring fair competition and the proper and orderly operation of the road transportation system. The court held that leaving the 'paid transportation business' unregulated by promoting the use of non-commercial vehicles would not only lead to the development of unlicensed business but would render 'regulation less effective under the licensing system'. As a result, the law — which granted a vehicle transportation license only upon compliance with certain standards — did not contravene the constitutional guarantee. The law was a manifestly justifiable restriction designed to improve existing state of traffic and road transportation in Japan. It is worth noting that in reaching its decision, the court emphasized that the justification for its decision flowed from the need to regulate a commercial practice. It did not view its decision through the prism of an individual's right to choose a field of employment.

But regulations of commercial practice do not always justify curtailment of individual autonomy. In 1972, the Supreme Court had to determine the constitutionality of the Retail Business Adjustment Special Measures Act. The Act controlled retail markets by requiring that entrants into new markets be licensed. The court identified two categories of occupational restriction. The first category — a negative restriction — maintains public safety and order. The second category — a

17 See D Currie (supra) at 303.

18 Final Constitution s 7(2), Rights, reads as follows: '(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

19 Final Constitution s 29(1)*(b)*, Education, reads as follows:

> '(1) Everyone has the right —
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> *(b)* to further education, which the state, through reasonable measures, must make progressively available and accessible.'

20 *Koizumi v Japan* 17 Keishu 12 (1963) 2434, translated and reprinted in Hiroshi Itoh & Lawrence W Beer *The Constitutional Case Law of Japan. Selected Supreme Court Decisions, 1961—1970* (1963) 80–1.

positive restriction — advances welfare state socio-economic policies. With respect to this second category, positive or affirmative restrictions will be found unconstitutional if *(a)* they are patently unreasonable and *(b)* the legislation reflects the naked preferences of its legislators and some cohort of constituents. However, because the Retail Business Adjustment Special Measures Act was an affirmative restriction enacted to protect small or medium-sized enterprises from economic collapse caused by an excess numbers of retail markets, the court held the law to be constitutional.[21]

In 1975, the Supreme Court had another opportunity to examine economic zoning practices. In its review of the zoning provisions of the Pharmaceutical Business Act, the court first held that a negative restriction's purpose *(a)* had to be necessary and reasonable and *(b)* could only impose minimum restrictions on occupational activity. In reviewing the necessity and reasonableness of zoning pharmacies, the court found that zoning criteriator a new pharmacy were

negative restrictions designed mainly to protect life and health. Employing a strict reasonableness or strong rationality test, the court rejected the state's purely speculative argument that there was a danger of supplying defective medicine caused by a sudden increase of competition and the instability of the pharmaceutical business.[22]

54.3 Section 22 jurisprudence

At issue in *South African Post Office v Van Rensburg and another*[23] was the operation of a private business that collected and delivered letters, accounts and documents. The Post Office sought an interdict restraining the respondent from conducting this service because it contravened s 7 of the Post Office Act.[24] Section 7 grants the Post Office the exclusive power to conduct any and all postal services. Relying on FC s 22, the respondent contended that s 7 of the Post Office Act contravened his right to freedom of trade.

Lang AJ noted that while FC s 22 was the 'direct successor' of IC s 26, 's 26 had both a different title and materially different wording'.[25] Lang AJ observed that the Minister, under s 90A of the Post Office Act, could grant another party permission to run a postal service if he deemed it to be in the public interest. Lang AJ held that the respondent's rights under s 22 had not been infringed or denied, but simply regulated by law.[26]

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21 See Mutsu Nakamura 'Freedom of Economic Activities and the Right to Property' (1990) 53 *Law and Contemporary Problems* 1–5. While the infringement of occupational choice in the context of regulation of trade could be examined as a limitation problem in terms of FC s 36, it will, as we shall see, must often be treated as a inquiry engaged by the second proviso of s 22 itself.

22 Nakamura (supra) at 6–7.

23 *SA Post Office I* (supra).

24 Act 44 of 1958 ('the Post Office Act').

25 *SA Post Office I* (supra) at 805D.

In *Van Rensburg v South African Post Office Ltd*,[27] a Full Bench had the opportunity to consider the appeal against the decision in *South African Post Office I*. In writing for the *SA Post Office II* court, Jones J stated that:

> the content of the right in s 22 of the Constitution is the right to choose a trade, occupation or profession, within the framework of any lawful regulation which controls its practice. The power of government to control the practice of a trade, occupation or profession necessarily involves the power to place such restrictions on the practice of a particular trade, occupation or profession as are considered necessary or desirable.

The test for such restrictions is that they must 'be reasonable'.[28] In dismissing the appeal, the *SA Post Office II* court held that it was permissible and reasonable for the Post Office Act to give the Post Office an exclusive franchise over the

postal service in South Africa. The Act did not negate the appellant's right to trade. In reasoning similar to that of Lang AJ in *SA Post Office I,* the *SA Post Office II* court found that the appellant's right was 'reasonably' limited to a range of exceptions set out in s 7(1)*(c)* of the Act.[29] In coming to this conclusion, the *SA Post Office II* court implicitly gave the word 'trade' a broad extension. That is, it did not restrict the section to a class of employment, but suggested that that all forms of business or employment fall within the protective ambit of s 22.[30]

Dictum in *SA Post Office II* that any restriction of trade in terms of a regulation must be reasonable raises, but does not answer, the question of the relationship between such a test and that required by the general limitations inquiry under s 36. Even if the regulation is found to be unreasonable under s 22, the party relying on

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26 *SA Post Office I* (supra) at 805G–806B. In arriving at this conclusion Lang AJ considered and then distinguished the decision in *Grand Slam Entertainment Centre v Minister van Veiligheid en Sekuriteit* 1996 (2) BCLR 213 (O). In *Grand Slam*, an unqualified prohibition in terms of s 6 of the Gambling Act was deemed unconstitutional. In the instant case, the Post Office Act did not impose an unqualified prohibition. *S A Post Office I* (supra) at 806F. It would appear that the wording of the legislation rather than the practical possibility of running an alternative service by gaining permission determined the conclusion reached by the court.

27 1998 (10) BCLR 1307 (E) ('*SA Post Office II*').

28 *SA Post Office II* (supra) at 1322E.

29 These exceptions relate to any letter —

'*(a)* sent or conveyed to or from any post office;

(b) exceeding the dimensions prescribed for letters;

(c) continuing process of or proceedings or pleadings in any court of justice or affidavits or depositions;

(d) exclusively concerning goods sent and to be delivered therewith; or

(e) sent by any person exclusively concerning his private affairs or the private affairs of the bearer or the receiver.'

30 Trade' is given a similar meaning in the Income Tax Act 58 of 1962 as amended. Trade means every profession, trade, business, calling, occupation or venture, including the letting of property. This definition captures *SA Post Office II*'s notion that all forms of business or employment fall within the protective ambit of s 22.

the regulation could still — technically — have an opportunity to justify the law in question in terms of the general test set out in s 36. Under s 36, reasonableness is but one important part of the analysis.[31] The *SA Post Office II* court also left open, perhaps wrongly, the question of whether s 22 applies only to natural persons and not corporate bodies.[32]

The phrase 'regulated by law' in s 22 represents an important restriction on the ability of the government to limit the practice of a trade, occupation or profession. In *Janse van Rensburg NO en 'n ander v Minister van Handel en Nywerheid en 'n ander*[33], the Minister invoked provisions of the Harmful Business Practices Act[34] in order to curtail certain practices of the applicant's enterprise.

Van Dijkhorst J found that the Act was designed to protect consumers. As a result, the general and uniform restrictions placed on business did not breach the provisions of s 22.[35] However, Van Dijkhorst J went on to say that any restrictions imposed under the Act had to be set out in the form of a law of general application. In terms of s 8(5)*(a)* of the Act, the Minister was empowered to take steps to prevent a business from continuing to operate and to attach and seize assets. The *Janse van Rensburg* court found that because the section empowered the Minister to take *ad hoc* administrative action to restrict the activities of individuals, such measures did not fall within the category of regulations authorized by s 22.[36]

54.4 Restraint of trade clauses

31 On the relationship between internal limitations and the general limitations clause, see S Woolman 'Limitations' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz and S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, 5th Revision, 1999) and S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. As a general matter, a failure to satisfy the requirements of 'reasonableness' at the rights stage will make it difficult to satisfy the requirements of the general limitations test.

32 The court most certainly exercised excessive caution. The section must attach only to natural persons. Chapter 2 of the Constitution employs the words 'every person' and 'citizen' to indicate to whom the any given right attaches. Where 'citizen' is used, the right attaches only to natural persons with South African citizenship.

Note, however, that because of the doctrine of objective unconstitutionality, a corporate applicant will not need to show that a law infringes its own constitutional rights to challenge the validity of that law. If a law unconstitutionally violates the s 22 rights of natural persons, it is objectively invalid, and any corporate applicant with an interest in setting aside the law has standing to challenge its constitutional validity. See *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 27–30 and 158–68.

33 1999 (2) BCLR 204 (T) ('*Janse van Rensburg*').

34 Act 71 of 1988.

35 *Janse Van Rensburg* (supra) at 212A.

36 Ibid at 221D. See also *Janse Van Rensburg NO v Minister of Trade and Industry* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) (Constitutional Court confirms order).

IC s 26 elicited a number of challenges to covenants in restraint of trade. These challenges foundered on the shoals of *dicta* set out in the pre-constitutional *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[37]. In *Magna Alloys,* the court wrote that a restraint of trade clause within a contract was *prima facie* valid and that whoever wished to prove the contrary bore the onus of showing that 'the restriction conflicted with the public interest.'[38].

The more restrictive formulation of FC s 22 has not prevented further challenges to the validity of agreements in restraint of trade. In *Coetzee v Comitis and Others*[39], the court was confronted with rules of the National Soccer League (NSL) that provided that any footballer wishing to play professional football (1) had to register with the NSL; (2) had to obtain a clearance certificate from his club before he could be registered by the NSL as a player of a new club; (3) had to ensure that after conclusion of a contract with a new club, his former club was duly compensated; and (4) had to remain a registered player of the club with which he was last employed for a period of thirty months (only after this period would the club no longer be entitled to compensation). The applicant asked for an

order declaring these restraints unconstitutional. Traverso J began by noting that the jurisprudence generated under IC s 26 had 'been uniformly dismissive of a suggestion that the Interim Constitution necessitated a revision of the restraint of trade law.'[40] She went on to add that:

> [c]onsideration 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. . . . If we should therefore find that the regulations of 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.[41]

According to Traverso J,

> the rules of NSL were akin to treating players as goods and chattels who are at the mercy of the employer once their contract has expired. In my view, these rules violate the most basic values underlying our Constitution.[42]

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37 1984 (4) SA 874 (A) ('*Magna Alloys*').

38 For examples of such unsuccessful challenges, see *Waltons Stationery Co. (Pty) Ltd v Fourie and Another* 1994 (4) SA 507 (O), 1994(1) BCLR (50) (O); *Kotze en Genis (Edms) Bpk v Potgieter* 1995 (3) SA 783 (C), 1995 (3) BCLR 349 (C); *AK Entertainment CC v Minister of Safety and Security* 1995 (1) SA 783, 793 (C), 1994 (4) BCLR 31 (C); *Knox D'Arcy (Ltd) and Another v Swar and Another* 1996 (2) SA 651 (W), 1995 (12) BCLR 1702 (W).

39 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C).

40 Ibid at para 30.

41 Ibid at para 32.

42 Ibid at para 38.

By arriving at the conclusion that the contractual regime reflected in the governing rules of the NSL constituted a restraint of trade that was both unreasonable and contrary to public policy, the court altered the approach endorsed in *Magna Alloys*. The court found that the onus now lay with the NSL to satisfy the court that the contractual regime was a reasonable and justifiable limitation on the freedom of trade, occupation and profession.[43]

Liebenberg J adopted a similar approach in *Fidelity Guards v Pearmain*.[44] After setting out the *Magna Alloys* test and confirming that restraint clauses could only be enforceable if they were *not* in conflict with public policy, Liebenberg J went on to say:

> In terms of *Magna Alloys* . . . the onus in matters of this nature is on the party wishing to show that the restraint should not be enforced. It seems that the position in terms of the Constitution *may* now be that onus will be on the party wishing to enforce it to show that it complies with the provisions of the Constitution.[45] (italics added).

Unfortunately Liebenberg J stopped just short of determining exactly where the onus lay.

The significance of these judgments is that they invite an investigation into the nature of the restraint of trade agreement within the context of current public policy considerations. Such considerations were unquestionably not present at the time when Rabie CJ adopted the traditional approach in *Magna Alloys*.[46] In

Comitis, the court correctly examined the effect of the restraint of trade and the nature of the power relations between the contracting parties in coming to the conclusion that the contract violated important public policy considerations made manifest in the Constitution.

54.5 The regulation of conduct by professionals and those engaged in trade

The second proviso of s 22 — that the practice of a trade occupation of professionals may be regulated by law — acknowledges that

> certain occupations call for particular qualifications described by law and one of the constraint of economic spheres that persons who lack such qualifications may not engage in such occupations.[47]

43 *Magna Alloys* (supra) at para 40.

44 2001 (2) SA 853 (SE), 1997 (10) BCLR 1443 (SE).

45 Ibid at 862 G.

46 The jurisprudence confirmed in *Magna Alloys* (supra) and the failure to recognize the effect of power relations in restraint of trade clauses was not greeted with unqualified acceptance even at the time of the judgement. See, for example, Brahm Du Plessis and Dennis Davis 'Restraint of Trade and Public Policy' (1984) 101 *SALJ* 86.

47 *Solberg* (supra) at para 33.

In *Law Society of the Transvaal v Machaka and Others (No. 2)*[48], the respondents failed to take such constraints seriously and had their names struck from the roll of attorneys. Respondents raised an issue *in limine* in which they argued that the Constitution deprived the court of the right to strike an attorney from the roll or to suspend him from practice on the basis that such action, *inter alia,* would deny respondents 'their right to chose their trade, occupation or profession freely'. In dismissing this argument, Kirk-Cohen J wrote:

> The respondents have in fact exercised their rights under s 22. They have freely chosen their occupation, profession and exercised those rights. The point they overlook is that the Constitution, both old and new, does not provide that a person may abuse the right enshrined on the s 22 of the new Constitution. Taken into its logical conclusion, the submission of the first and third respondents would be that attorneys would be entitled to commit any offence, including theft of trust moneys, but not be liable to be struck off the roll or suspended from practice because the new Constitution has impliedly repealed s 22 of the Attorneys' Act and also the Courts inherent power over practitioners who practice within its jurisdiction.[49]

As *Machaka* makes clear, the right to choose one's trade, occupation or profession freely does not mean that this right creates an unqualified freedom. In *Ernst and Young v Beinash and Others*,[50] the applicant sought an order in terms of the Vexatious Proceedings Act[51] against the respondents to the effect that no legal proceedings could be instituted by the respondents against any person in any division of the High Court of South Africa or an inferior court without the leave

of that court or any judge of the High Court.[52] The respondents sought sanctuary in s 22. Fevrier AJ rejected their prayer. He correctly held that the order itself would not prohibit any person from choosing a trade, occupation or profession. He noted that there were many cases where an adverse court order may create a perception that a person is an unattractive employee or business associate:

> One need merely consider a person who has been convicted for fraud, theft or other crimes. He may thereby become a most unattractive business associate. An insolvent, against whom a final order of sequestration has been made, may also labour under a

48 1998 (4) SA 413 (T) ('*Machaka*')

49 Ibid at 416

50 1999 (1) SA 1114 (W) ('*Beinash*'). See also *Beinash v Ernst and Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC).

51 Act 3 of 1956.

52 *Beinash* (supra) at 1146C. The respondents had launched forty five different proceedings against applicants, only one of which had been successful and all of which turned on events relating to the winding up of a company. In opposing the application respondents argued, *inter alia*, that were such an order to be granted

> one must ask oneself whether anyone would ever become a partner of the respondents and run the risk in due course of finding that a valid and enforceable claim against a third party which would have to be taken in the name of a partnership would not succeed unless the respondents first obtain the permission of the Court to be a plaintiff in such proceedings.
>
> Ibid.

> disadvantage when seeking employment. It would be ludicrous to suggest that the provisions of the law, pursuant to which such orders and findings are made, should be struck down as being unconstitutional.[53]

In short, the respondents' argument was fundamentally flawed because it was not the Vexatious Proceedings Act that violated a person's choice of trade, occupation or profession. Rather, it was the person's conduct itself that gave rise to an order being granted in terms of the Act.[54]

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53 *Beinash* (supra) at 1146G-H.

54 See, for a similar treatment of the argument that s 22 provides an unqualified right, *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA), 589-590, 2001 (6) BCLR 545 (SCA).