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# 'Garden leave' clause permitted in employment contracts

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The concept of 'garden leave' primarily originates from English law. A garden leave clause forms part of an employee's contract of employment, whereby the employer may elect to relieve the employee from performing his/her duties for the duration of any notice period, on full pay. Essentially, during the garden leave, the employee remains an employee and must remain accessible to the employer.



Garden leave is a relatively new concept to South African jurisprudence and is not provided for in the Basic Conditions of Employment Act. It is comparable to the concept of paid leave of absence at the request of the employer. There are several reasons why employers may find the inclusion of a garden leave clause necessary in contracts of employment especially when managing perceived risks to the employer entity's intellectual property, trade secrets, confidential information and business contacts.

## Garden leave case law in South Africa

The reasons necessitating the import of this concept into South African law were recently explored in Vodacom v Godfrey Motsa in a judgment delivered by Judge Van Niekerk in the Labour Court.

The employee, Godfrey Motsa, having been appointed as a senior executive by Vodacom in April 2015, tendered his resignation on 23 December 2015. The resignation, which would be effective on 1 January 2016, was as a result of Motsa receiving an offer of employment from Vodacom's competitor MTN. Motsa's employment contract provided that either party would be entitled to terminate the employment contract by furnishing the other party with not less than six months' notice. The contract stated that Vodacom had the sole discretion not to require Motsa to attend to his ordinary employment responsibilities during his notice period but should remain available to the employer to assist with the transition of responsibilities.

Importantly, the termination clause states that for the duration of the notice period, Motsa could not engage with Vodacom's clients without giving prior notice to Vodacom. This goes to the heart of garden leave clause and would suggest that employers realise that employees at an executive level with access to confidential information, which is critical to an entity's revenue and goodwill, could disseminate such confidential information to competitors. Although difficult to regulate the activities of employees on garden leave, such clauses allow employers to mitigate the risk of falling victim to the disclosure of proprietary information.

In addition to the garden leave clause, the contract restricted Motsa from taking up employment opportunities with Vodacom's competitors within the geographic region comprising Southern, East and West Africa for a period of six months.

## Interpretation of communique

Subsequent to Motsa informing the Vodacom CEO of his resignation, Vodacom issued a communique to its entire staff advising that Motsa "will be leaving with immediate effect to pursue other opportunities" Primarily, the dispute between Vodacom and Motsa was triggered by this communique, which was interpreted differently by Motsa and Vodacom.

Motsa was of the view that by virtue of its communique to staff, Vodacom had expressed an election to terminate his employment immediately and held the belief that he was no longer bound to serve the six months' garden leave. Furthermore, he expected that if he would not be expected to serve the notice he would then receive payment from Vodacom in lieu of notice. On the other hand, Vodacom argued that the communique simply meant that Motsa would not be required to attend the Vodacom offices or to perform the functions of his office during the duration of the notice period.

At the Labour Court, counsel for Motsa argued that Vodacom could not conflate garden leave and the contractual restraint of trade provisions as doing so would render the restraint of trade provisions unenforceable. The essence of this reasoning is that the restraint was for a six months' period and Vodacom would continue to enjoy the restraint they sought to enforce by virtue of enforcing the garden leave.

Counsel for Vodacom on the other hand argued that both the six months' garden leave and the six months' restraint of trade post termination of employment were independently enforceable. The Court endorsed Vodacom's argument and ordered Motsa to comply with both the garden leave and the restraint of trade obligations. In dismissing Motsa's contention that Vodacom would meet its objectives of protection by enforcing its garden leave election, the Court confirmed the principles in restraint of trade authorities such as Magna Alloys and Research v Ellis in 1984 and Den Braven SA v Pillay and another in 2008.

## Restraint of trade agreements enforceable

South African courts have consistently held that restraint agreements are enforceable unless they were unreasonable and that the party seeking to avoid a restraint bears the onus of proving on a balance of probabilities that the restraint is unreasonable. With respects to the test applied to determine the reasonableness or not, of restraint agreements the Court, in Motsa's case confirmed the test in Basson v Chilwan and others in 1993. This decision concerned itself with weighing the competing interests of employer parties and employees and whether, weighed qualitatively and quantitatively, it is reasonable that the employee party should not be economically active and productive.

Despite the presence of extensive common law authorities on the subject of restraint of trade agreements, the Labour Court was influenced by decisions from foreign jurisdictions when engaging the relationship between garden leave and restraint of trade agreements given that South African Courts had never before been called to scrutinise such a relationship.

As espoused in the UK Court of Appeal decision of Credit Suisse v Armstrong in 1996 and the New Zealand Employment Court decision of Air New Zealand v Grant Kerr in 2013, in the Motsa case, the labour Court adopted an approach of considering the length of a garden leave obligation when considering the reasonableness of a restraint agreement as well as the duration thereof.

## Labour Court's decision

When the Labour Court analysed the facts of the matter, it concluded that at no point had Vodacom elected to waive the garden leave clause in Motsa's contract of employment on an objective assessment of the wording of the communique of 24 December 2012. Motsa sought to rely upon the communique in his claim that Vodacom had waived the garden leave clause in his contract. The Labour Court held that the garden leave clause was indeed enforceable.

With respects to the restraint undertakings, the Labour Court considered the executive level of Motsa at Vodacom, and all the confidential and proprietary information, trade secrets and business connections accessible to Motsa on a daily basis which Vodacom had a legitimate right to protect in light of the fact that they were knowledgeable that Motsa was set to join their industry competitors, MTN. The Court noted that in his testimony, Motsa did not deny being privy to Vodacom business strategy and decisions, which would no doubt be of use to a direct business competitor. It was therefore found not to be unreasonable for Motsa to comply with the restraint obligations in his contract.

## Conclusion

It is clearly a desirable risk mitigating measure for employers to impose garden leave on a high-level executive who in all likelihood will continue to be a prospect for headhunting by industry competitors, even after a significant absence from commercial activity. Such high-level employees are usually within a remuneration bracket that compensates for any length of absence from their field. This is even more so the case when the executives are in technological niche fields which demand constant innovation. The intellectual assets of highly competitive commercial entities will require protection at some point or another.

However, when contemplating the inclusion of garden leave clauses in contracts of employment, cognisance must also be taken of the length thereof in comparison to any restraint of trade clauses sought to be enforced. To this end, Judge Van Niekerk stressed that the broader public interest requires skilled and experienced employees to not be commercially inactive for long periods of time, which could result in their trade abilities being blunted and of no benefit. Despite this, the flowerbeds of employees subject to garden leave will surely benefit from the extra attention in the interim and something positive has been gained.

ABOUT THE AUTHOR

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