The Relationship between Restraints of Trade and Garden Leave

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Abstract

The purpose of the article is to examine the relationship between a so-called "garden leave" clause and a post-termination restraint of trade clause in employment contracts, in view of the decision in *Vodacom (Pty) Ltd v Motsa* 2016 3 SA 116 (LC). The Labour Court grappled with the question of whether the enforcement of the garden leave provision impacts on the enforcement of a post-termination restraint of trade clause. Enforcement of both these types of clauses may be problematic. It can result in unfairness if an employee ends up being commercially inactive for a long period. The author argues that garden leave has a direct effect on the enforcement of a post-termination restraint of trade clause. Accordingly, a restraint of trade will be enforced only if the employer's proprietary interest requires additional protection beyond what is achieved under the garden leave clause.

Keywords

Employment contract; restraint of trade; garden leave; proprietary interest; reasonableness.

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1 Introduction

A restraint of trade is a contractual term or agreement in terms of which a person is restricted in his or her freedom to carry on a trade, profession, business or perform other economic activity.[1] Restraints of trade clauses are often included in employment contracts and other commercial contracts.[2] A garden leave clause is a contractual term which requires the employee whose employment has been terminated by him or her giving notice to serve out the duration of the notice period from home.[3] The purpose of garden leave is to "quarantine" the employee from further contact with clients, and from accessing any confidential information while serving out the notice period.[4]The article focuses on the relationship between garden leave and a restraint of trade in an employment contract that contains both clauses, such as in the contract in issue in *Vodacom (Pty) Ltd v Motsa.*[5] This is the first case in which the Labour Court has meticulously set out in detail the law regarding garden leave clauses and their applicability in South Africa. As such it is a precedent-setting case, which merits further scrutiny.

The inclusion of both a garden leave provision and a restraint of trade in an employment contract may be problematic and is open to abuse. Their simultaneous enforcement may result in unfairness: an employee could end up being commercially inactive for a long period. The questions which the article poses are, first, what the nexus is between garden leave and a post-termination restraint of trade clause. Secondly, whether garden leave has an impact on the enforcement of a restraint of trade clause. In other words, the question is whether a court should enforce both clauses if they are contained in an employment contract.

These questions are answered by first considering the purpose and implications of restraints of trade and garden leave respectively. Thereafter, a discussion of the facts and decision in *Vodacom (Pty) Ltd v Motsa* and an

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1 Hutchison and Pretorius *Law of Contract* 195; Van Huyssteen *et al Contract General Principles* 208. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A).

2 It can also be included in a sale of the goodwill of a business, a partnership, or a franchise agreement: Hutchison and Pretorius *Law of Contract* 195-126.

3 Collins, Ewing and McColgan *Labour Law* 155.

4 Kemp 2005 *Stell LR* 261.

5 *Vodacom (Pty) Ltd v Motsa* 2016 3 SA 116 (LC) (hereafter *Vodacom (Pty) Ltd v Motsa*).

analysis of the findings by Van Niekerk J on the reasonableness of the enforcement of a restraint provide insight. Foreign authorities are relied upon as they have persuasive force regarding the interaction between garden leave and a post-termination restraint of trade.[6] It is concluded that garden leave has a direct effect on the enforcement of a post-termination restraint of trade clause as the two clauses are inextricably intertwined.

2 The post-termination restraint of trade and garden leave

2.1 Restraint of trade clause

The object of a restraint of trade clause is to protect the employer's economic interests after the employment contract is terminated,[7] for example: its goodwill and trade connections, and confidential information or trade secrets like price lists, chemical formulae, and strategic business plans.[8] The question regarding the constitutional validity of a restraint of trade agreement was settled in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis.*[9] The Appellate Division held that a contract in restraint of trade is in principle valid and enforceable unless the restraint denier can prove that it is contrary to public interest.[10] Moreover, an agreement in restraint of trade which is contrary to public policy is not void, but unenforceable only.[11]

The enforcement of a restraint of trade agreement creates tension between the principles of the sanctity of contract and the freedom of trade.[12] The freedom of trade, occupation, and profession is entrenched in section 22 of the *Constitution of the Republic of South Africa,* 1996 ("the *Constitution"*).

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6 Section 39(1)(c) of the *Constitution of the Republic of South Africa*, 1996.

7 Van Huyssteen *et al Contract General Principles* 208; Van Jaarsveld 2003 *SA Merc LJ* 330. See generally *NRG Office Solutions (Pty) Ltd v Alexander* (686/2015) 2016 ZAECGHC 14 (1 March 2016); *Magna Alloys and Research (SA) (Pty) Ltd* 1984 4 SA 874 (A); *Basson v Chilwan* 1993 3 SA 742 (A) (hereafter *Basson v Chilwan*); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA).

8 *Reeves v Marfield Insurance Brokers (Pty) Ltd* 1996 3 SA 766 (SCA); *Super Group Trading (Pty) Ltd v Naidoo* (12726/2014) 2015 ZAKZDHC 64 (25 August 2015); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA); *NRG Office Solutions (Pty) Ltd v Alexander (686/2015)* 2016 ZAECGHC 14 *(1 March 2016); New Reclamation Group (Pty) Ltd v* Davies (A5033/2014) 2015 ZAGPJHC 7 *(30 January 2015).*

9 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A). This case involved a situation where the employee undertook for a period of two years following the termination of his employment not to work in competition with his employer within a radius of 10 km of a geographical area specified in the contract.

10 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 890-891. Also see *Basson v Chilwan* para 46.

11 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 895D. Also see Van Huyssteen *et al Contract General Principles* 212.

12 Hutchison and Pretorius *Law of Contract* 196.

However, the right to participate in the commercial world without restriction is superseded by the freedom and sanctity of contract, which is the preferred value.[13] Public policy is rooted in the *Constitution* and the fundamental values it enshrines.[14] This has the effect that the sanctity of contract prevails except in instances where the enforcement of a contractually agreed upon clause would be unjust or unreasonable.[15] The evidentiary burden to prove that the enforcement of the restraint of trade agreement is contrary to public policy rests on the restraint denier or employee.[16]

The reasonableness of a restraint of trade often hinges upon the nature of the restricted activity, the geographical area or period of the restriction, or on all these three elements taken together.[17] In *Basson v Chilwan*,[18] Nienaber JA developed the *Basson test* as it later became known. In terms of this test a court must ask four questions when considering the reasonableness of a restraint of trade clause. The first is whether there is an interest that is worthy of protection. If the answer is no, the enquiry ends there.[19] It was observed in *Super Group Trading (Pty) Ltd v Naidoo*[20] that an employer cannot enforce a restraint of trade agreement if she or he does not have an interest that is worthy of protection. The enforcement of the restraint of trade will be against public policy.[21]

If, on the other hand, the answer is in the affirmative, the enquiry proceeds. The court must ask the question whether that interest is being threatened by the conduct of the employee. If so, the court must weigh up the

13 Van Huyssteen *et al Contract General Principles* 210.

14 *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 91-95; *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) para 24; Bhana, Bonthuys and Nortje *Student's Guide* 141.

15 *Barkhuizen v Napier* 2007 5 SA 323 (A) paras 70, 73.

16 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 893A-D; *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) 795G-H; *New Reclamation Group (Pty) Ltd v Davies* (17200/2013) 2014 ZAGPJHC 63 (20 March 2014) para 4. Also see Neethling 2008 *SA Merc LJ* 89.

17 Christie and Bradfield *Christie's Law of Contract* 391; Van Huyssteen *et al Contract General Principles* 210-211.

18 *Basson v Chilwan* 1993 3 SA 742 (A). The court had to determine the enforceability of a restraint of trade signed by Basson. The clause restrained Basson, who was skilled in the art of building and designing buses, from working for any similar business in the whole of Southern Africa for a period of five years.

19 *Basson v Chilwan* para 9.

20 *Super Group Trading (Pty) Ltd v Naidoo* (12726/2014) 2015 ZAKZDHC 64 (25 August 2015).

21 In *Super Group Trading (Pty) Ltd v Naidoo* (12726/2014) 2015 ZAKZDHC 64 (25 August 2015) para 14 the employer sought an order against a former employee who was working for a direct competitor in contravention of a restraint of trade clause which prohibited the disclosure of trade secrets and confidential information to a competitor after leaving his or her employ.

competing interests of the parties: the right to protection of the interest of the employer against the interest of the other party to be economically active and productive. Lastly, the court must ascertain whether there is another aspect of public policy that requires the restraint of trade agreement to be either enforced or rejected.[22] An example of this would be a restraint of trade agreement preventing a former employee from providing a specialised or essential service which is in short supply to the public.[23] Therefore, the enforceability of a restraint of trade agreement is determined by public policy considerations which seek to balance the conflicting rights and the interests of the parties.[24] The test has proved to be authoritative and the Supreme Court of Appeal reaffirmed the approach in *Reddy v Siemens Telecommunications (Pty) Ltd*.[25]

The approach adopted by South African courts is similar to that of foreign jurisdictions such as New Zealand and Australia. In English law, the restraint of trade should be reasonable to be enforceable, as demonstrated in *Mason v Provident Clothing Co*[26] where an employee who had been employed to sell clothes in Islington was restrained from conducting a similar business within 25 miles radius of London. The restraint was held to be too broad given the nature of the work and the dense population of the area. Accordingly, the court decided not to enforce it.[27] Further, it was held that when an employer has deliberately framed a restraint in unreasonably wide terms, courts should not come to his assistance by severing the void part as this would benefit the party with the "longer purse".[28] This is because by severing the unreasonable portion of a restraint and enforcing the remainder of the agreement, the court would have come to the employer's assistance. What would have been an unenforceable restraint of trade would be found to be enforceable in such a case.

Severance, as applied in South Africa, is done when a contract has parts that are independent of one another. It should not affect the meaning of the

22 *Basson v Chilwan* para 9.
23 Dooka 1999 *JBL* 137.
24 Cohen 1998 *SA Merc LJ* 385.
25 *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) paras 16-17, 20. Also see Bhana, Bonthuys and Nortje *Student's Guide* 165; *Den Braven v Pillay* 2008 6 SA 229 (D) para 4. In *Reddy* the court held that the restraint agreement was not against public policy and should be enforced as its terms were reasonable.
26 *Mason v Provident Clothing Co* 1913 All ER 400.
27 *Mason v Provident Clothing Co* 1913 All ER 400 405; *Beckett Investment Management Group Ltd v Hall* 2007 IRLR 793; *Fitch v Dewes* 1921 2 AC 158.
28 *Mason v Provident Clothing Co* 1913 All ER 400 411.

remaining part of the contract.[29] If the unreasonable portion is not severable, the whole clause fails.[30] Reasonableness is therefore a yardstick which the court uses to decide whether to enforce a restraint of trade clause.

2.2 Garden leave clauses

Garden leave is a means by which an employer seeks to restrain the activities of a departing employee.[31] Figuratively, the employee is given an opportunity to tend to her garden during the notice period. The employee is not allowed to work for anyone else, or to go into business on his or her own during the stipulated notice period as he or she is still in essence attached to the employer.[32] In return, an employee will be entitled to his or her financial or non-financial benefits such as paid holiday during the period of garden leave.[33]

The purpose of garden leave is to ensure that confidential information to which the employee had access becomes "sterile". The principle originates from English law. Since 1986, English courts have granted injunctions to enforce garden leave arrangements whenever the employer's legitimate interests would otherwise be harmed.[34] The garden leave mechanism forces the employer to bear the costs of having made the employee idle by keeping her out of work. Therefore, employers are likely to impose the restraint when it is considered necessary to protect their interests, and only for the time needed, in order to minimise the potential harm that may be caused to the former employee.[35] Generally, the period of garden leave is restricted to between three and six months.[36]

Garden leave provides a relatively fair exchange between the employer and employee.[37] However, it does not account for the psychological harm that the employee suffers due to exclusion from performing work. The assumption exists that the financial benefit is the only concern for the employee. The psychological impact of being commercially inactive and

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29 Christie and Bradfield *Christie's Law of Contract* 382. Van Huyssteen *et al Contract General Principles* 200. Also see *Drewtons (Pty) Ltd v Carlie* 1981 4 SA 305 (C); *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) 794C-796D; *Turner Morris (Pty) Ltd v Riddell* 1996 4 SA 397 (E) 407.

30 Christie and Bradfield *Christie's Law of Contract* 381.

31 Marson *Beginning Employment Law* 41; Kemp 2005 *Stell LR* 261.

32 Marson *Beginning Employment Law* 41.

33 Marson *Beginning Employment Law* 41; Kemp 2005 *Stell LR* 261.

34 Kemp 2005 *Stell LR* 261.

35 Kemp 2005 *Stell LR* 266.

36 Kemp 2005 *Stell LR* 266.

37 A legitimate interest justifies the enforcement of a garden leave. See Jeffers "Non-Competition and Employment Issues" 59.

absent from one's relevant field of specialisation is ignored. In New Zealand it has been accepted that the employee's becoming "impotent commercially" is a factor relevant to contractual justice.[38] Arguably then, this consideration should also be factored into cases in South African courts when deciding upon the enforceability of a garden leave clause. The effect of a garden leave clause and the restriction that it places on an employee's right to exercise his or her skills for a specified duration is highlighted further in *Vodacom (Pty) Ltd v Motsa,* discussed next.

3 *Vodacom (Pty) Ltd v Motsa*

3.1 Facts

The first respondent, Mr Godfrey Motsa (Motsa), was employed by the applicant, Vodacom (Pty) Ltd (Vodacom), as a senior executive.[39] He was later appointed to the post of Chief Officer Consumer Business Unit and as a director of Vodacom. Motsa advised Joosub, Vodacom's Chief Executive Office, that he had received an offer from the second respondent, MTN, a competitor of Vodacom. This was followed by Motsa's resignation in an e-mail.[40] The resignation was to be effective from 1 January 2016. It was not clear if Motsa intended to serve his six month contractual notice.[41]

Vodacom brought an urgent application seeking to enforce a notice period of six months in the form of garden leave and a restraint of trade undertaking for a further period of six months after the expiry of the notice period in terms of clause 16 of the employment contract. Clause 16 provided:

> 16.1 Either party shall be entitled to terminate this Agreement by furnishing the other Party with not less than 6 (six) months' prior written notice ...
>
> 16.6 The Company may, in its sole and absolute discretion, for any reason whatsoever, not require the Executive to work or to attend to his ordinary employment related duties and responsibilities during his notice period but require the Executive to be available during this period to assist the Company and provide a seamless transition of his responsibilities at the request of the Company. The Executive may not in such circumstances have any contact with customers and/or clients of the Company during the Executive's notice period without the prior written consent of the Company.
>
> 16.7 The Executive will be required to work his notice period in terms of clause 16.1, however, the Company may elect to pay the Executive

38 *Marshment v Sheppard Industries Ltd* 2010 NZEmpC 98 para 54.
39 *Vodacom (Pty) Ltd v Motsa para 1.*
40 *Vodacom (Pty) Ltd v Motsa* para 8.
41 *Vodacom (Pty) Ltd v Motsa* para 9.

> in lieu of notice, in which event the Executive will not be required to work his notice period.[42]

Clauses 16.6 and 16.7 are an example of a "garden leave" clause in a contract. In terms of this clause Motsa had to be available during the notice period in order to assist the company, and to provide a seamless transition of his responsibilities. Accordingly, Motsa was supposed to refrain from taking up any other work in order to ensure that he would be available if called upon by the employer.

Clause 18 of the employment contract outlined a series of restraint of trade obligations that would apply after termination of the employment contract.[43] The period of the restraint of trade was six months. Motsa was effectively restrained from being employed, or otherwise engaged in the business of any competitor within a defined geographic area.[44]

The central issue before the Labour Court was whether Vodacom had, based on the facts, waived its right to have Motsa work during his notice period by electing to terminate Motsa's employment with immediate effect, and to pay him in lieu of notice as he contended.[45] Moreover, the court had to consider the question of whether any period of enforced commercial inactivity by way of a garden leave clause or a restraint of trade clause, or both, is unreasonable having regard to the proprietary interests that the employer sought to protect.[46]

3.2 Decision

The Labour Court held that no reason existed why Motsa should not be held to the terms of the contract which expressly afforded Vodacom the discretion to enforce the garden leave clause.[47] Motsa had failed to discharge the onus of proving that Vodacom had elected to waive its rights to enforce the notice period in terms of his contract of employment. There was also no evidence to suggest that the contract had not been freely and voluntarily concluded. Motsa knew what he was signing when he entered into the employment contract. Accordingly, Motsa was bound by the garden leave clause in the employment contract.

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42 *Vodacom (Pty) Ltd v Motsa* para 5: Emphasis added.
43 *Vodacom (Pty) Ltd v Motsa* para 6.
44 *Vodacom (Pty) Ltd v Motsa* para 6.
45 *Vodacom (Pty) Ltd v Motsa* para 27.
46 *Vodacom (Pty) Ltd v Motsa* para 26.
47 *Vodacom (Pty) Ltd v Motsa* para 37.

With regards to the enforceability of the restraint of trade clause, the Labour Court accepted that Motsa had intimate knowledge of Vodacom's short- and longer-term strategic plans. It was obvious to the court that access to this information would benefit a direct competitor.[48] Given the useful life of the information to which Motsa had been exposed, the Labour Court concluded that Vodacom was entitled to enforce the post-termination restraint of trade clause.[49] The enforcement of the restraint was regarded as reasonable.[50] Motsa was interdicted and restrained from disclosing any confidential information to a competitor.[51] The court enforced both the garden leave clause and the post-termination restraint of trade. Van Niekerk J stated that the period of twelve months - six month garden leave and six month restraint of trade periods - was reasonable in the circumstances.[52]

In writing his judgment Van Niekerk J relied on a foreign judgement, *Air New Zealand v Kerr.*[53] In that case, the court likewise had to decide on the enforcement of garden leave and a post termination restraint clause contained in an employment contract.[54] Van Niekerk J concluded that the correct approach to be adopted was that the inclusion of a garden leave clause should be taken into account when considering the reasonableness of the restraint of trade clause.[55] He held that:

> … any period of enforced commercial inactivity prior to the termination of employment is relevant to the assessment of the reasonableness of any restraint that applies post termination.[56]

This approach is consistent with the broader public interest, which militates against rendering experienced and competent employees inactive, and requiring that their skills atrophy for an unreasonably long period.[57]

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48 *Vodacom (Pty) Ltd v Motsa* para 41.
49 *Vodacom (Pty) Ltd v Motsa* para 42.
50 *Vodacom (Pty) Ltd v Motsa* para 42.
51 *Vodacom (Pty) Ltd v Motsa* para 43.
52 *Vodacom (Pty) Ltd v Motsa* para 41.
53 *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13.
54 *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13 paras 1-4.
55 *Vodacom (Pty) Ltd v Motsa* paras 25-26; *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13 para 71.
56 *Vodacom (Pty) Ltd v Motsa* para 26.
57 *Vodacom (Pty) Ltd v Motsa* para 26.

4 Analysis

4.1 The principle of sanctity of contract

The decision in *Vodacom (Pty) Ltd v Motsa* reaffirms the words of an English judge, which have been quoted with approval by South African courts:[58]

> If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts of justice.[59]

This principle is premised on the understanding that the creation of a contract is the result of a free choice without external interference, and that agreements voluntarily entered into between the parties are sovereign. It is also presumed that the parties had equal bargaining power when they negotiated the terms of the contract.[60] This is particularly correct for an employment contract which involves a person who is qualified and experienced like Motsa, who occupied a senior position.

Once a court is satisfied that the contract was freely entered into and that its terms are not contrary to the public interest, it should uphold and enforce the contractual terms.[61] The court neither has discretion to refuse to enforce a valid contractual term, nor is it entitled to relieve a party from contractual obligations freely assumed.[62]

Restraint of trade and garden leave clauses are treated just like any other contractual terms. They are in principle valid and enforceable. In *Barkhuizen v Napier*[63] the court stated that it would be contrary to *pacta sunt servanda* and unfair to the respondent to allow a party who may have neglected to comply with a contractual provision to avoid its consequences in circumstances where he or she could have complied with it.[64]

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58 *Wells v South African Aluminite Company* 1927 AD 69 73.

59 Jessel MR in *Printing and Numerical Registering Company v Sampson* 1875 19 Eq 462 465.

60 Hutchison and Pretorius *Law of Contract* 23.

61 Hutchison and Pretorius *Law of Contract* 23; *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) paras 23-24.

62 See generally *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA); *Bredenkamp v Standard Bank of South Africa* 2010 4 SA 468 (SCA).

63 *Barkhuizen v Napier* 2007 5 SA 323 (CC).

64 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 85.

Didcott J stated in a different case that:

> … freedom of trade does not vibrate nearly as strongly through our jurisprudence … it is intrinsically the less commanding of the two ideas … .[65]

Therefore, as a general rule, sanctity of a contract prevails over freedom of trade. This implies that when a restraint agreement is reached and/or a garden leave clause is included in an employment contract voluntarily entered into, the protection of the employer's interests enjoys preference over the employee's interest to be economically active. The justification is that public policy requires parties to honour their contractual undertakings as evidenced in *Vodacom (Pty) Ltd v Motsa* and many other cases.[66] The Supreme Court of Appeal argued in *Reddy v Siemens Telecommunications (Pty) Ltd* that this view is consistent with the constitutional values of dignity and autonomy.[67] It appears at both common law and part of public policy that employees may contractually waive their right to participate freely in the economy.

Employees must not sign employment contracts without fully understanding the implications of the terms. Whereas previously employees could escape the negative consequences of enforcement by relying on the public policy and more particularly the unequal bargaining power between the parties, the view that employers and employees are not on an equal footing when they conclude an employment contract has become outmoded.[68] An urgent reason for a desire to contract does not necessarily result in unequal bargaining power. An employee is also no longer regarded as being in a weaker bargaining position.[69] Accordingly, a party that freely and voluntarily concludes a contract is bound by the terms.

4.2 The nexus between a restraint of trade and garden leave clause

Garden leave clauses are similar to restraint of trade clauses[70] as both of them impose a restriction on an employee, but for a different purpose. A restraint of trade usually becomes operational upon the termination of

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65 *Roffey v Catterall, Edwards and Goudre (Pty) Ltd* 1977 4 SA 494 (N) 505F.

66 *Basson v Chilwan* para 50; *Zero Model Management (Pty) Ltd v Barnard* (25541/2009) 2009 ZAWCHC 232 (18 December 2009) paras 59-71; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A); *Wells v South African Alumnite Company* 1927 AD 69 73; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn 2*008 2 SA 375 (C).

67 *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) para 21.

68 Christie and Bradfield *Christie's Law of Contract* 383; *Basson v Chilwan* para 59.

69 Van Huyssteen *et al Contract General Principles* 211.

70 Turner *Unlocking Employment Law* 150.

employment[71] whilst a garden leave applies to the period before the termination of the employment contract. In *Vodacom (Pty) Ltd v Motsa* the restraint of trade clause was aimed at protecting Vodacom's trade secrets, confidential information, and trade connections.[72] Garden leave, on the other hand, was aimed at ensuring that the confidential information to which the employee had access becomes stale, and that the employee would be "kept out of the clutches of a competitor".[73] In essence, garden leave is a form of restraint. It renders the employee entirely inactive, whilst a restraint of trade allows the employee to work outside the bounds of the restricted field.[74]

A garden leave clause is, in principle, enforceable. The same basic principles apply to garden leave as to restraint of trade clauses: they must be reasonable in their duration, and they should be used to protect a legitimate proprietary interest.[75] A court will not enforce contractual terms that are found to be unreasonable.[76] The period of the garden leave is taken into consideration when assessing the reasonableness of a restraint of trade agreement.[77] The question of whether the applicant has a proprietary interest worthy of protection that requires additional protection also becomes crucial in this determination.[78] This approach ensures that employers do not abuse or exploit an employee by enforcing an unnecessary post-termination restraint of trade clause.

A post-termination restraint of trade agreement may be declared unreasonable, in view of the garden leave period, for example when it would give the employer unnecessary protection.[79] Whether garden leave and a post-termination restraint of trade clause should both be enforced is a question of fact which depends on the circumstances of each case. A court may reduce the length of a restraint period to what is proportionate to ensure

71 Christie and Bradfield *Christie's Law of Contract* 389.

72 *Vodacom (Pty) Ltd v Motsa para 39.*

73 *Vodacom (Pty) Ltd v Motsa* paras 22, 39.

74 *Vodacom (Pty) Ltd v Motsa* para 22. Also see *William Hill Organisation v Tucker* 1998 IRLR 313 (CA); *Credit Suisse Management v Armstrong* 1996 ICR 882 (CA).

75 Turner *Unlocking Employment Law* 151.

76 See generally *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Carmichele v Minister of Safety and Security* 2001 4 SA 983 (CC); *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ).

77 *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13 para 71; *Vodacom (Pty) Ltd v Motsa* para 25.

78 *Vodacom (Pty) Ltd v Motsa* para 25.

79 See *Seven Network (Operations) Ltd v Warburton* 2011 NSWSC 386 in which the court held that a 12 month restraint of trade would give more protection to Seven Networks in respect of its confidential information, clients and staff than was required.

that the enforcement of the clause is just, fair and reasonable.[80] The garden leave clause and restraint of trade clauses must be enforced simultaneously and not independently or sequentially, as this has the potential to prejudice the employee. This approach attempts to balance the interests of the employer and the interests of the employee, which is commendable.

4.3 Fairness and reasonableness

The concept of fairness or "fair dealing" applies to both the employer and the employee. Fairness requires balancing the interests of the employer, on the one hand, with those of the employee, on the other hand.[81] The weight to be attached to these respective interests depends largely on the circumstances of each case. Ngcobo J in *Barkhuizen v Napier*[82] stated that a court should ask two questions when determining whether the enforcement of a contractual term is fair or not.[83] The first question which a court must ask is whether the clause itself is unreasonable. Secondly, if the clause itself is reasonable, the question should be posed whether the clause should be enforced in the light of the circumstances.[84] The court in this case was required to assess whether the limitation brought about by the enforcement of the contractual term was fair and reasonable in the circumstances. The majority decided that the facts did not disclose any reason for non-compliance which would render the enforcement of the time limitation clause unjust and unfair.[85] This interpretation is consistent with the approach of the court in *Vodacom (Pty) Ltd v Motsa.* The court found that a restraint period that effectively spans twelve months was reasonable given the useful life of the information to which Motsa had been exposed.[86]

By taking into account the nature, geographical area, and the duration of the restraint of trade agreement, a court intends to balance the interests of the parties to ensure that the enforcement is fair and reasonable. It follows that reasonableness is an important factor in determining whether a restraint

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80 Christie and Bradfield *Christie's Law of Contract* 383; *GFI Group Inc v Eaglestone* 1994 IRLR 119 (HC). In *GFI Group Inc* the garden leave clause provided for twenty weeks, but the court granted an injunction for only 13 weeks.

81 Jagwanth and Kalula *Equality Law* 112-123. S 1 of the *Labour Relations Act* 66 of 1995 states that one of the purposes of the Act is to promote social justice or equity in the workplace.

82 *Barkhuizen v Napier* 2007 5 SA 323 (CC). This case concerned the fairness of a time limitation clause that limited the right of access to the courts in a short-term insurance contract. However, the principles laid down in it remain relevant in respect of the enforceability of contractual clauses in general.

83 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 56.

84 *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56-59.

85 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 86.

86 *Vodacom (Pty) Ltd v Motsa* para 41.

of trade agreement should be enforced. Strangely, in *Basson v Chilwan*[87] the court enforced a restraint of trade agreement which applied to the whole of Southern Africa for five years.[88] Both the area and duration appeared to be unreasonable as the Chilwans' Bus Services were, at that time, operating only in South Africa.[89] The clause restrained Basson, who was skilled in the art of building and designing buses, from working for any similar business in the whole area for an extended period.[90] The court held that, because the geographical ambit of the restraint and the period of its duration had not been placed before it, the court did not need to consider it.[91]

Botha JA and Milne JA, in their dissenting judgement, correctly argued that Basson should not have been faulted for not having proposed a lesser area of restraint as being reasonable.[92] The judges also held that the Chilwans were in essence seeking to prevent Basson from using his skill and experience, and his innate or acquired abilities, and that a man's skills and abilities are a part of his person, and that he cannot ordinarily be precluded from making use of them by a contract in restraint of trade.[93]

The dissenting judges' conclusion that the Chilwans were "simply bent" on putting Basson's superior skills out of action is to be preferred.[94] This is because the Chilwans did not have a legitimate interest *per se* and they had managed to replace Basson.[95] There was no suggestion that they had experienced any real problems in doing so.[96] The dissenting judges' conclusion that they were not aware of a restraint of trade so oppressive in scope ever having been countenanced by South African courts is valid.[97] This was, in my view, one of the "clearest cases" in which the court should not have shrunk from the duty to declare a contract contrary to public policy on the basis of unreasonableness and unfairness.[98]

Whilst judges play their role of being "neutral umpires",[99] the circumstances in *Basson v Chilwan* required the court to intervene by reducing the duration

87 *Basson v Chilwan* 1993 3 SA 742 (A).
88 *Basson v Chilwan* para 64.
89 *Basson v Chilwan* para 2.
90 *Basson v Chilwan* paras 13-17.
91 *Basson v Chilwan* para 62.
92 *Basson v Chilwan* dissenting judgment para 11.
93 *Basson v Chilwan* dissenting judgment para 8.
94 *Basson v Chilwan* dissenting judgment paras 5-6.
95 *Basson v Chilwan* dissenting judgment paras 5-6.
96 *Basson v Chilwan* dissenting judgment para 10.
97 *Basson v Chilwan* dissenting judgment para 10.
98 *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) para 12.
99 Hutchison and Pretorius *Law of Contract* 23.

and the geographical area relevant to the restraint of trade clause to ensure that there was substantive fairness. The same test would apply when considering the enforceability of garden leave and a post-termination restraint of trade clause. Van Niekerk J did not, however, see the need to reduce the duration of the restraints in *Vodacom (Pty) Ltd v Motsa* as it was reasonable.[100]

It is not sufficient for a court simply to enforce the agreement reached by the parties. This will only ensure procedural rather than substantive fairness in contracts.[101] In *Zero Model Management (Pty) Ltd v Barnard*,[102] which dealt with the enforcement of a restraint of trade, Breitenbach AJ expressed concern about the territory to which the restraint of trade applied. It was held that where the applicant has businesses only in a certain geographical area, the order enforcing the restraint ought to be limited to that area. The area of application was restricted and confined to the Cape Town Metropolitan area since the applicant's business to manage models was concentrated in Cape Town.[103] A restraint which casts the net too wide would be unreasonable. This is the reason why Breitenbach AJ had to reduce the territory. In *Vodacom (Pty) Ltd v Motsa* the restraint of trade agreement should reasonably have applied only to South Africa, Tanzania, DRC, Mozambique, and Lesotho and not to the greater part of Southern Africa and parts of East and West Africa as provided in the employment contract.[104] This is because Vodacom (Pty) Ltd did not require protection in these other countries and imposing a restraint would therefore have been unfair.

Ford J's decision in *Air New Zealand v Kerr*[105] is instructive regarding the enforcement of garden leave and restraint of trade clauses. Ford J found that Air New Zealand had a legitimate interest in its confidential information and that the six month post-termination restraint of trade in Kerr's employment agreement was reasonable.[106] The judge nonetheless decided not to enforce the post-termination restraint because Kerr had already spent the last six months of his employment on garden leave. In Ford J's view, the six months garden leave afforded Air New Zealand sufficient time to protect

100 *Vodacom (Pty) Ltd v Motsa* para 41.
101 Hutchison and Pretorius *Law of Contract* 23.
102 *Zero Model Management (Pty) Ltd v Barnard* (25541/2009) 2009 ZAWCHC 232 (18 December 2009).
103 *Zero Model Management (Pty) Ltd v Barnard* (25541/2009) 2009 ZAWCHC 232 (18 December 2009) paras 50-51, 71.
104 *Vodacom (Pty) Ltd v Motsa* paras 6, 43.
105 *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13.
106 *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13 para 89.

its confidential information.[107] Therefore, Air New Zealand was not entitled to additional protection through the enforcement of the post-termination restraint of trade clause, and Kerr was free to start working for Jetstar Airways Limited.

The decision supports the view that employers must be cautious about using garden leave provisions alongside post-termination restraint of trade agreements. An employer will not be entitled to additional protection where garden leave has provided the employer with all the benefits of a post-termination restraint of trade clause. Even if the restraint of trade clause itself is found to be reasonable, it will not be enforced as it will not be fair and just for the employee. Therefore, the employer must have a legitimate protectable interest for a restraint of trade, and/or a garden leave clause to be enforced.

The enforcement of both restraints in *Vodacom (Pty) Ltd* does not set a precedent. There is no guarantee that courts will, in the future, all adopt the same approach when they come across a situation where a contract includes both of these clauses. Where the facts present that the employer's legitimate interest would have been served during the period of garden leave there will be no justification for the further enforcement of a restraint of trade.[108] On the other hand, a court will not set-off the restraint of trade against garden leave when no legal basis exists for doing so.[109] A court has to take into consideration the length and scope of both garden leave and the post-termination restraint of trade clause to prevent the imposition of unnecessary restrictions on former employees. If the period of garden leave and the period of the restraint of trade agreement, when taken together, result in the employee's being commercially inactive for longer than is reasonably necessary, it must result in the period of the restraint of trade agreement being held to be unreasonable.[110] The need to protect the former

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107 *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13 para 89.

108 *Seven Network (Operations) Ltd v Warburton* 2011 NSWSC 386; *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13, para 89.

109 The restraint of trade can be set off against the garden leave period if an employment contract contains a post-termination restraint clause which expressly makes provision for set off; it needs to be a term of the contract: see an Australian case *Tullet Prebon (Australia) Pty Ltd v Purcell* 2008 NSWSC 852, para 12.

110 *Seven Network (Operations) Ltd v Warburton* 2011 NSWSC 386; *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13; DuMoulin 2016 http://www.lexology.com/library/detail.aspx?g=8fb6b0ac-7ee2-4f7c-80b5-a9b3bc618e20.

employer's interests should be weighed up against the former employee's interest in being active and productive.[111]

The relationship between garden leave and post-termination restraints has been a subject of debate in several jurisdictions. Courts have been called upon to consider the validity of a post-termination restraint of trade clause in the light of garden leave.[112] What is clear from these decisions is that a garden leave and post-termination restraint of trade clauses are valid and enforceable. Both clauses were accordingly enforced in *Vodacom (Pty) Ltd v Motsa*.[113] The enforcement of a garden leave and post-termination restraint of trade clauses must, however, be fair and reasonable, and in accordance with the norms of public policy derived from the transformative *Constitution*.[114] Seemingly, including a garden leave clause in a contract of employment is becoming commonplace.[115] The introduction of the garden leave mechanism and the fact that the Labour Court has deliberated on the issue show that South African courts are keeping up with international trends.

5 Concluding remarks

Garden leave has a direct effect on the enforcement of a post-termination restraint agreement. The two cannot be treated in isolation. Their sequential or simultaneous complete enforcement could be unfair to the employee. This is particularly true if garden leave would suffice to provide the employer with all the benefits of a post-termination restraint of trade clause. In deciding whether to give effect to a post-termination restraint of trade agreement and the extent to which it should apply, a court will consider the reasonableness of the duration and terms of both restraints together. Accordingly, garden leave and post-termination restraint of trade clauses are inextricably intertwined and garden leave must be taken into account.

111 *Zero Model Management (Pty) Ltd v Barnard* (25541/2009) 2009 ZAWCHC 232 (18 December 2009) para 58.

112 *TFS Derivatives Ltd v Morgan* 2004 EWHC 3181 (QB); *Brake Brothers Ltd v Ungless* 2004 EWHC 2799 (QB); *Intercall Conferencing Services Ltd v Steer* 2007 EWHC 519 (QB); *Tullet Prebon (Australia) Pty Ltd v Purcell* 2008 NSWSC 852; *Seven Network (Operations) v Waburton* 2011 NSWSC 386; *Marshment v Sheppard Industries Ltd* 2010 NZEmpC 98.

113 *Vodacom (Pty) Ltd v Motsa* paras 37-42.

114 *Zero Model Management (Pty) Ltd v Barnard* (25541/2009) 2009 ZAWCHC 232 (18 December 2009) para 59.

115 *Brake Brothers Ltd v Ungless* 2004 EWHC 2799 (QB); *Intercall Conferencing Services Ltd v Steer* 2007 EWHC 519 (QB); *Corporate Express Ltd v Day* 2004 EWHC 2943 (QB), *Air New Zealand v Kerr* 2013 NZEmpC 153 ARC 38/13.

By placing an employee on garden leave, an employer may be trading off his or her right to enforce a post-termination restraint of trade clause. The court will not enforce a post-termination restraint which goes beyond what is needed adequately to protect the employer's legitimate interests. The protection afforded to the employer's interest must be proportionate to the employee's interest to remain active and productive. The onus rests on the employer to show that additional protection is necessary after the enforcement of the garden leave clause. Enforcement will be unnecessary, unreasonable and contrary to public policy if there is no need for the further protection of the employer's interests.

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List of Abbreviations

JBL	Juta's Business Law
SA Merc LJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review