

https://dspace.org/

Garden leave in South Africa: Vodacom (PTY) Ltd v Motsa & another 2016 (3) SA 116 (LC)

Do Cabeco, Anneline De Sousa

2018

https://hdl.handle.net/10539/26807

Do Cabeco, Anneline De Sousa (2018) Garden leave in South Africa :Vodacom (PTY) Ltd v Motsa and another 2016 (3) SA 116 (LC), University of the Witwatersrand, Johannesburg, <http://hdl.handle.net/10539/26807>

Downloaded from a DSpace repository. https://dspace.org/



GARDEN LEAVE IN SOUTH AFRICA:
VODACOM (PTY) LTD v MOTSA & ANOTHER 2016 (3) SA 116 (LC).

Submitted in partial fulfilment of the requirements for the degree of Master of Laws by Coursework and Research Report at the University of Witwatersrand, Johannesburg

BY

ANNELINE DE SOUSA DO CABECO
STUDENT NUMBER: 302499

Prepared under the supervision of Ms Karmini Pillay at the Faculty of Law, University of Witwatersrand

28 February 2018

All thanks and praise to God for all He has done for me. Special thanks to Karmini Pillay for being my supervisor and guiding me throughout this process. Thank you to my mother, Ivone do Cabeco, and to Carlos de Abreu for assisting me to realise my academic dreams. And to you, Tiago Oliveira, thank you for your undying support, I could not have completed this paper without you.

TABLE OF CONTENTS

Abstract 3
I. INTRODUCTION 4
II. BACKGROUND TO THE *VODACOM* JUDGMENT 6
III. STATEMENT OF THE CASE 9
IV. ANALYSIS OF THE *VODACOM* JUDGMENT 12
a) The distinction between garden leave and restraints 12
b) An employee's right against having his skills atrophy 16
i) A closer examination of the applicant's 'confidential information' in the Vodacom judgment 18
ii) The role of public policy when determining the reasonableness of a restraint 20
iii) Balancing high remuneration packages against an employee's right to not have his skills atrophy 21
c) An employee's right to work 23
i) An implied right to work in employment contracts 27
ii) Unwillingness of an employee to perform work during garden leave 28
V. GARDEN LEAVE IN SOUTH AFRICA – THE WAY FORWARD 30
VI. CONCLUSION 34
VII. BIBLIOGRAPHY 35
a) South African legislation 35
b) South African case law 35
c) Foreign case law 36
d) Journal articles 37
e) Internet sources 39
f) Textbooks 41

Abstract

Employers increasingly impart corporate knowledge to their employees to sustain and grow their businesses. As a result, employers have become more reliant on their employees to remain in their employ. This augmented reliance on human capital has inflamed employers' need for more strenuous control of employee mobility. Employers resultantly look to legal mechanisms to restrict employees who defect from imparting invaluable confidential information and trade secrets to new employers, who are often competitors. Garden leave is one such legal mechanism.

Garden leave is aimed at sterilising defecting employees of their corporate knowledge in order to prevent such defecting employee from divulging such knowledge to a new employer. This is usually achieved by removing the defecting employee from the workplace for the duration of the garden leave period. Although the employee continues to receive remuneration during the garden leave period, it has a negative impact on the defecting employee, particularly with regards to his inability to work and exercise his skills during this period.

Internationally, in jurisdictions such as the United Kingdom and New Zealand, garden leave provisions have become a common feature of employment contracts, particularly those of senior employees. In South Africa, provisions on garden leave has also found its way into employment contracts, as is evident from the Vodacom (Pty) Ltd v Motsa & another 2016 (3) SA 116 (LC) case. The Vodacom judgment is the first South African judgment dealing with garden leave. There is currently no other jurisprudence or legislation in South Africa relating to the principles of garden leave. This paper intends to illustrate the desperate need in South Africa for judicial and/or legislative direction with regards to garden leave. In doing so, this paper aims to critically analyse the Vodacom judgment. Within this critical analysis, this paper will investigate the principle of garden leave as established in the United Kingdom and New Zealand respectively. This paper will conclude with recommendations on how South African courts, in future, should use the principles from these jurisdictions as a way forward in overseeing garden leave in South Africa.

I. INTRODUCTION

During the course of employment, many employees come to possess confidential information and trade connections.[1] This is regarded as human capital.[2] An employer's reliance on the strength of its human capital has increased, and with it, potential economic harm caused by a defecting employee.[3] This has resulted in employers relying on legal mechanisms to address and control employee mobility for a certain period of time.[4] Bishara and Westermann-Behaylo identify three examples of such legal mechanisms.[5] Garden leave, which is the focus of this paper, is one of them.[6]

Garden leave is where an employee, who has tendered his resignation, is required by an employer to either refrain from performing his normal duties or stay away from work, for the duration of his notice period.[7] A notice period is a prominent feature of garden leave.[8] Garden leave provisions are commonly found in employment contracts, particularly those of senior employees.[9] The purpose of garden leave is to protect an employer's business interests through sterilising a defecting employee's corporate knowledge by making his knowledge of confidential information go stale during the garden leave notice

---

[1] Norman D Bishara 'Covenants not to compete in a knowledge economy: Balancing innovation from employee mobility against legal protection for human capital investment' (2006) 27(2) *Berkeley Journal of Employment & Labor Law* 287 at 300; and Lawrence F Carnevale 'Contractual restraint on employee conduct' available at *http://www.clm.com/docs/6603465_3.pdf*, accessed on 17 July 2017.

[2] Bishara op cit note 1 at 296–298.

[3] Norman D Bishara & Michelle Westermann-Behaylo 'The law and ethics of restrictions on an employee's post-employment mobility' (2012) 49(1) *American Business LJ* 1 at 1.

[4] Bishara op cit note 1 at 296 at fn 36.

[5] Bishara & Westermann-Behaylo op cit note 3 at 4–7.

[6] Ibid.

[7] Bob Hepple, 'The duty of employee loyalty in English law' (1999) 20 *Comparative Labor LJ & Policy Journal* 205 at 214. See Bishara & Westermann-Behaylo op cit note 3 at 6; and IGC Stratton 'Restraint of trade during and on the termination of a contract of employment' (1997) 12(1) *Denning LJ* 107 at 111.

[8] Kate Gallafent 'Garden Leave' at 2, available at *https://www.blackstonechambers.com/documents/136/Garden_Leave*, accessed on 6 December 2017; and *Tullett Prebon Plc v BGC Brokers LP* (2010) EWHC 484 para 16.

[9] *Provident Financial Group Plc v Hayward* (1989) 3 All ER 298 at 301. See Bishara op cit note 1 at 305; Norman D Bishara 'Fifty ways to leave your employer: Relative enforcement of covenants not to compete, trends, and implications for employee mobility policy' (2011) 13(3) *University of Pennsylvania Journal of Business Law* 751 at 760; and Tanuja M Dehne, Christopher P Stief & Risa B Boerner 'Restrictive covenants for multinational employers: Strategies for effective drafting and implementation' available at *https://www.acc.com/chapters/del/upload/2016-04-19_Fisher-Phillips_Restrictive_CovenantsPPTX*, accessed on 17 July 2017.

period.[10] Employees on garden leave remain bound to their employment contracts and they also continue to receive remuneration during this period.[11] However, such employees often spend their notice periods at home, unable to exercise their skills and are usually prevented from working for other employers, even if they are non-competing.[12]

The reality is that garden leave provisions are onerous on employees,[13] and South African employees are now facing the risk of having these provision in their employment contracts, without legislative regulation or judicial guidance.[14] However, there is a glimmer of hope for South African employees due to *Vodacom (Pty) Ltd v Motsa*.[15] The *Vodacom* judgement is the first South African judgment dealing with garden leave.[16] Although the *Vodacom* judgement is a welcomed decision, this paper aims to set out that the Labour Court merely considers the tip of the iceberg that is the principle of garden leave. Garden leave is a much more complex principle that requires further statutory and judicial guidance in South Africa.[17]

This paper aims to critically analyse the *Vodacom* judgment. In such analysis, this paper will first consider the principle of restraints in South Africa generally. Thereafter, this paper will consider the general principles of garden leave in the United Kingdom (UK) and New Zealand, and whether South Africa indeed also has such a principle. Garden leave originates from and has been extensively developed in the UK.[18] The Labour Court also referred to UK

---

[10] Bishara & Westermann-Behaylo op cit note 3 at 12. Stratton op cit note 7 at 111.
[11] Hepple op cit note 7; and Stratton op cit note 7.
[12] Ibid. See Norman D Bishara, Kenneth J Martin & Randall S Thomas 'An empirical analysis of noncompetition clauses and other restrictive postemployment covenants' (2015) 68(1) *Vanderbilt LR* 1 at 13 at fn 45.
[13] Shae McCrystal 'Unfair dismissal, reinstatement and garden leave: *Blackadder v Ramsey Butchering Services Pty Ltd*' (2005) 33(3) *Federal LR* 555 at 559.
[14] Aamina Danka, Darren Subramanien & Nicola Whitear 'Garden leave: A discussion in the context of *Vodacom (Pty) Ltd v Motsa & another* (2016) 37 *ILJ* 1241 (LC)' (2017) 38 *ILJ* 1511 at 1521.
[15] 2016 (3) SA 116 (LC) (the *Vodacom* judgment).
[16] Danka, Subramanien & Whitear op cit note 14 at 1511; and Y Mupangavanhu 'The relationship between restraints of trade and garden leave' (2017) 20 *PELJ* 1 at 2.
[17] Francis Scoon 'Using restrictive covenants wisely in contractual agreements' available at *https://www.moorepay.co.uk/blog/using-restrictive-covenants-wisely-in-contractual-agreements/*, accessed on 17 January 2018.
[18] Carnevale op cit note 1 at 24; and Charles A Sullivan 'Tending the garden: Restricting competition via "garden leave"' (2016) 37(2) *Berkeley Journal of Employment & Labor Law* 293 at 295.

precedents when coming to its decision.[19] For this reason, this paper will analyse the *Vodacom* judgment in relation to the UK. New Zealand has also adopted and further developed garden leave. The Labour Court relies on New Zealand's approach when coming to its decision.[20] For this reason, the laws of New Zealand relating to garden leave will also be examined when analysing the *Vodacom* judgment. Secondly, this paper will study the background circumstances to the *Vodacom* judgment, identify its vital facts, and highlight its ratio decedendi. Thirdly, this paper will critically analyse the *Vodacom* judgment in relation to established South African restraint principles, as well as established principles of garden leave from the UK and New Zealand respectively. Throughout this analysis, this paper will consider South African constitutional rights and values where relevant. Finally, this paper will propose a way forward for the issue of garden leave in South Africa.

II. BACKGROUND TO THE *VODACOM* JUDGMENT

In South Africa, a restraint is the primary mechanism to protect an employer's business interests in relation to human capital.[21] South African law on restraints is well-established.[22] In terms of the principles on restraints, a restraint is enforceable unless it is against public policy.[23] Reasonableness is the fundamental criteria for determining whether a restraint is against public policy.[24] In *Basson v Chilwan*,[25] the court developed a four-prong test to determine the reasonableness – and therefore validity – of a restraint. First, a court must determine whether the employer has a protectable interest.[26] Secondly, the court must establish whether the protectable interest is being

[19] *Vodacom* supra note 15 paras 23–24.
[20] Ibid paras 25–26.
[21] A van Niekerk et al *Law@work* 3ed (2015) at 90.
[22] *Vodacom* supra note 15 para 20. See cases summarising restraint principles – namely, *Massmart Holdings Ltd v Vieira* unreported case no J1945/15 (3 November 2015) paras 4–5; *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé* (2011) 32 *ILJ* 601 (LC) paras 14–15; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes* (2012) 33 *ILJ* 629 (LC) para 25; and *Eoh Mthombo (Pty) Ltd v Bheekie-Odha*v 2012 JDR 1588 (LC) para 17.
[23] *Magna Alloys & Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B–C.
[24] Van Niekerk et al op cit note 21 at 91.
[25] 1993 (3) SA 742 (A).
[26] Ibid at 749H.

prejudiced by the employee.[27] Thirdly, if there is such an interest, the court must determine how it weighs up qualitatively and quantitatively against the interest of the employee to be economically active and productive.[28] Fourthly, it must ascertain whether there are any other public policy considerations which require that the restraint be enforced.[29] If the interest of the employee outweighs the interest of the employer, the restraint is unreasonable and unenforceable.[30] The *Reddy* case introduced an additional leg to this test, which is that a restraint must not '[go] further than necessary to protect the interest [of an employer]'.[31]

Although garden leave is also a restrictive measure,[32] and thus the South African principles on restraints could assist with the application and interpretation of garden leave,[33] it is significantly different to restraints.[34] Unlike restraints, garden leave 'is a relatively new concept to South African jurisprudence'.[35] In *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd*,[36] an employee was placed on what the court termed garden leave. In casu, the court did not make a ruling on garden leave, but held that it was '[i]n essence … suspension with pay'.[37] Although garden leave 'usually [encompasses] suspension from duties', it is but one facet of garden leave.[38] It is also submitted that garden leave is not the same as suspension as an employer can place an individual on garden leave without the employee having

[27] Ibid at 744H.
[28] Ibid at 744J–745A.
[29] Ibid at 748I–749A.
[30] Ibid 743H.
[31] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 17.
[32] Stratton op cit note 7; and Katharine Kemp 'The significance of consideration paid for post-employment restraints in England and Germany' 2005 (2) *Stellenbosch LR* 257 at 261.
[33] Danka, Subramanien & Whitear op cit note 14 at 1513.
[34] Greg T Lembrich 'Garden leave: A possible solution to the uncertain enforceability of restrictive employment covenants' (2002) 102(8*) Columbia LR* 2291 at 2292.
[35] Toka Moiloa & Bankey Sono 'Botanical sabbatical: Labour court gives the green light to "garden leave" clauses in employment contracts' available at *http://www.werksmans.com/legal-briefs-view/botanical-sabbatical-labour-court-gives-the-green-light-to-garden-leave-clauses-in-employment-contracts/*, accessed on 17 July 2017.
[36] (2008) 29 *ILJ* 1564 (LC).
[37] Ibid para 18.
[38] Gallafent op cit note 8. See Employment New Zealand 'Garden leave' available at *https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/garden-leave/*, accessed on 24 November 2017.

committed any misconduct.[39] Furthermore, as opposed to suspension, an employee needs to expressly consent to being placed on garden leave.[40]

As garden leave is not a defined South African legal principle, it is helpful to refer to the well-established principle of garden leave found in the UK and New Zealand respectively.

In the UK, guidelines on garden leave can only be found in judicial precedents.[41] The *Evening Standard* case,[42] is the leading case that cemented garden leave into English law.[43] In casu, the employee was obliged in terms of his employment contract, to give one year's notice of termination.[44] He was also obliged to refrain from working for another employer without his employer's permission.[45] Despite this, the employee was offered employment with a competitor and gave the employer only two months' notice.[46] As a result, the employer sought an interdict to force him to work the twelve months' notice period, and offered to pay his salary and benefits during that period, irrespective of whether he would work or not.[47] The court granted the interdict, and this gave rise to the Evening Standard doctrine.[48]

In the UK, an employee can be placed on garden leave where he has expressly agreed to it in an employment contract, or where failing express agreement, it is necessary to protect the employer's legitimate interests.[49] It is 'generally accepted [that there are] three legitimate business interests that

---

[39] Suspension is usually enforced during a disciplinary investigation of an employee and has various procedural requirements. See Simon Fennel 'Garden leave clauses: The road to executive termination' available at *http://www.shoosmiths.co.uk/client-resources/legal-updates/garden-leave-clauses-executive-termination-12171.aspx*, accessed on 27 November 2017.
[40] Employment New Zealand op cit note 38.
[41] Dehne, Stief & Boerne op cit note 9.
[42] *Evening Standard Co Ltd v Henderson* (1987) IRLR 64.
[43] Sullivan op cit note 18 at 300.
[44] *Evening Standard* supra note 42.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Lembrich op cit note 34 at 2308.
[49] *Lloydd v Diagnostic Medlab Services Limited* (2009) ERNZ 42 para 14. See *Provident Financial* supra note 9; *GFI Group Inc v Eaglestone* (1994) IRLR 119; *Euro Brokers Ltd v Rabey* (1995) IRLR 206; *William Hill Organisation v Tucker* (1999) ICR 291; *Cantor Fitzgerald v George* (1996) CLY 2523; and *TFS Derivatives Ltd v Morgan* (2004) EWHC 3181.

can be protected by a period of garden leave.[50] These are confidential information,[51] customer connection,[52] and stability of the work force.[53]

The principle of garden leave in New Zealand is very similar to that of the UK.[54] Like in the UK, garden leave in New Zealand is not regulated by legislation but has been established and developed through jurisprudence.[55] The major difference is with regards to the relationship (if any) between garden leave and restraints, which is discussed in greater detail below.[56]

III. STATEMENT OF THE CASE

Motsa was a senior executive employee and exco member for Vodacom.[57] During October 2015, Motsa tendered his resignation to take up a position with MTN, which the Labour Court described as being 'Vodacom's largest competitor'.[58] Initially, Motsa withdrew his resignation,[59] however, Vodacom shortly became aware that MTN was to appoint Motsa from January 2016 as its vice-president for the south east African region, which included southern Africa.[60] After Vodacom questioned Motsa, he informed Vodacom that he was considering an employment offer from MTN, but that he had not yet accepted it.[61] Later that day, Motsa tendered his resignation.[62] Vodacom subsequently addressed a letter to Motsa notifying him that he was bound to a six-month notice period,[63] as well as a further six-month restraint period.[64] Vodacom informed Motsa that during the notice period he would not be required to

---

[50] Gaby Hardwicke 'Briefing note: Garden leave' available at *http://www.gabyhardwicke.co.uk /images/library/files/briefingnotes/Garden_Leave.pdf*, accessed on 31 March 2017.
[51] *Symbian Ltd v Christensen* (2001) IRLR 77.
[52] *Euro Brokers* supra note 49.
[53] *Crystal Palace FC (2000) Ltd v Bruce* (2002) SLR 81.
[54] Employment New Zealand op cit note 38.
[55] Ibid.
[56] *Air New Zealand v Grant Kerr* (2013) NZEmpC 153 paras 59–64 & 69–71.
[57] *Vodacom* supra note 15 para 4.
[58] Ibid paras 4 & 33.
[59] Ibid para 4.
[60] Ibid para 7.
[61] Ibid.
[62] Ibid.
[63] Ibid para 14.
[64] Ibid. According to clause 18 of Motsa's employment contract, he is restrained 'from being employed or otherwise engaged in the business of any competitor' (para 6).

attend work or his normal duties, but that he had to remain available 'to provide a seamless transition of [his] responsibilities' at Vodacom's request.[65] Vodacom further informed Motsa that he would continue to be remunerated, and that he was bound by all the contractual obligations, particularly that of confidentiality.[66] Vodacom also notified Motsa that he could not work for another employer until the expiry of the notice period.[67] Motsa contended that although he was subject to the restraint period, he was not bound by the notice period as he had been paid in lieu of notice.[68] Motsa thus argued that he was restrained from working with MTN up until June 2016, and not December 2016.[69] He also argued that he could not be restrained in excess of six months, as the information he had access to was useful for only up to a six-month period and that a restraint longer than that would be unreasonable.[70] Vodacom brought an urgent interdict to the Labour Court seeking a final order to hold Motsa to the accumulative restraint period, which included both the notice and restraint periods.[71]

The Labour Court considered the following legal issues:

- whether Motsa was obliged to serve the notice period or whether Vodacom had waived it;[72]
- whether Motsa was bound to both the notice period and the restraint period;[73]
- whether the enforcement of the restraint period was unreasonable, taking into Vodacom's proprietary interests it sought to protect;[74]
- whether a relationship existed between garden leave and a restraint;[75] and

[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid paras 2–3 & 17.
[69] Ibid para 16.
[70] Ibid para 3.
[71] Ibid para 1.
[72] Ibid paras 27–29.
[73] Ibid para 27.
[74] Ibid para 26.
[75] Ibid para 22.

- whether ‘any period of enforced commercial inactivity prior to the termination of employment’, such as a garden leave notice period, was relevant in determining the reasonableness of a restraint.[76]

The Labour Court held that in terms of Motsa’s employment contract, when he tendered his resignation, Vodacom had three options available to it with regards to the notice period.[77] First, Vodacom could let Motsa work out the notice period.[78] Secondly, Vodacom could place him on garden leave.[79] Or thirdly, Vodacom could waive the notice period and pay him in lieu of notice.[80] The Labour Court held that Vodacom had the discretion to choose which option to enforce.[81] The Labour Court further held that there was no evidence that Vodacom waived the notice period,[82] and that the relationship between the parties only terminated after Motsa served it.[83] More importantly, it interpreted the notice period to be a garden leave provision.[84] The Labour Court held that Vodacom clearly elected to place Motsa on garden leave with the purpose of sterilising him of his confidential information,[85] which would be achieved by ‘render[ing] Motsa commercially inactive for that period’.[86]

When dealing with the relationship between garden leave and a restraint, the Labour Court adopted the approach of New Zealand, where it held that:

> ‘[A] garden leave provision should be taken into account by the court when considering the reasonableness of the duration of any post-termination restraint covenant.’[87]

The Labour Court quintessentially scrutinised the total period of commercial

---

[76] Ibid.
[77] Ibid para 30.
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid para 37.
[82] Ibid para 35.
[83] Ibid.
[84] Ibid para 39.
[85] Ibid paras 36 & 39.
[86] Ibid para 36.
[87] Ibid paras 25–26.

inactivity when determining the reasonableness of the restraint period.[88] The Labour Court held that the accumulative restraint period of twelve months was reasonable after looking at Motsa's 'intimate knowledge of Vodacom's short- and longer-term strategic plans', the 'useful life of the information', as well as the benefits this information would be to a direct competitor.[89]

The Labour Court noted that:

> '[B]roader public interest … militates against having experienced and competent employees inactive and their skills atrophied during any unreasonably long exclusion from commercial activity.'[90]

However, the Labour Court held that this was not the case, as Motsa's 'eyewatering remuneration [package]' remedied the effects of a long period of commercial inactivity.[91] The Labour Court emphasised that the ultimate consideration when determining the reasonableness of a garden leave provision, restraint, or both, was 'having regard to the proprietary interests that the employer [sought] to protect'.[92] Ultimately, the Labour Court held that the accumulative restraint period was reasonable and ordered that Motsa be restrained for a period of twelve months from being involved in, and associated with, MTN or its subsidiaries.[93]

IV. ANALYSIS OF THE *VODACOM* JUDGMENT

a) The distinction between garden leave and restraints

In terms of Motsa's employment contract, Vodacom could request Motsa to refrain from attending work during his notice period.[94] The Labour Court identified this contractual provision to be a garden leave provision, which

[88] Ibid para 26.
[89] Ibid para 41.
[90] Ibid para 26.
[91] Ibid.
[92] Ibid.
[93] Ibid para 43.
[94] Ibid para 30.

provided Vodacom with a discretion to enforce an 'agreed period of garden leave' on Motsa.[95] It is argued that in doing so, the Labour Court implied the acceptance of garden leave in South African law. However, although the Labour Court explicitly referred to the provision as being a garden leave provision, it failed to shed light on the principles of garden leave (if any) in a South African legal context.[96] The Labour Court did not define garden leave, and despite not being referred to any authority, it accepted the just of garden leave to be where an employee is requested by an employer to refrain from attending work during a notice period.[97] The Labour Court's main concern was to examine garden leave in relation to restraints.[98] It is submitted, however, that the Labour Court first had to clarify and define the concept of garden leave in a South African legal context, before looking at the relationship between garden leave and restraints.

Although garden leave is similar to a restraint 'in that it is an additional means of restricting an employer's ability to join a competitor', it has important distinguishable features.[99] Garden leave is applicable during the course of employment, and is exercised during a notice period where the employee continues to receive remuneration.[100] Conversely, a restraint is applicable after termination without continued remuneration.[101] The Labour Court, however, did not expressly emphasise this distinction. This distinction is important due to an employee's fiduciary duties during the course of his employment.[102] Unlike with restraints, the employee remains employed during garden leave, and is bound by all the usual contractual obligations, including his common law duties.[103]

In South Africa, employees have a fiduciary duty of good faith, loyalty and fidelity towards the employer that ends with the termination of the employment

[95] Ibid para 37.
[96] Ibid paras 19–20.
[97] Ibid para 22.
[98] Ibid para 23.
[99] Carnevale op cit note 1 at 24; and Mupangavanhu op cit note 16 at 11–12.
[100] Sullivan op cit note 18 at 296 at fn 6.
[101] Ibid.
[102] Carnevale op cit note 1 at 24; and Danka, Subramanien & Whitear op cit note 14 at 1512.
[103] Ibid.

relationship.[104] Similarly, in the UK and New Zealand, employees also have such duties which cease to exist once the employment relationship is terminated.[105] Thus, during garden leave, Motsa would have to uphold all his fiduciary duties, unlike with the restraint. Therefore, Motsa was obliged to uphold Vodacom's interest and could not work for another employer.[106] Motsa taking up employment with MTN during the notice period was clearly a breach of his fiduciary duties, as it conflicted between his own interests and his duty to protect Vodacom's business interests. The *Vodacom* judgment, however, made no mention of Motsa's fiduciary duties or did not take them into account.

It is submitted that the Labour Court should have considered the differences between garden leave and restraints. It is contended that as the Labour Court did not examine the principle of garden leave in isolation, it failed to appreciate these differences.[107] Instead, the Labour Court approached garden leave as an additional factor to determine the reasonableness of the duration of a restraint, as opposed to recognising it as a self-standing legal principle.[108] Thus, rather than primarily focusing on garden leave as a distinct legal principle, the Labour Court fast-forwarded to looking at 'the relationship, if any, between garden leave and a restraint'.[109]

In analysing this relationship, the Labour Court referred to several English and New Zealand authorities.[110]

In the UK, the courts have briefly looked at the relationship between garden leave and restraints, and have held that there is generally no relationship

---

[104] Van Niekerk et al op cit note 21 at 89–90.
[105] Sullivan op cit note 18 at 295; Jeffrey S Klein & Nichols J Pappas '"Garden Leave" clauses in lieu of non-competes' (2009) 241(24) *New York LJ* at 1; and Adrian Brooks 'The limits of competition: Restraint of trade in the context of employment contracts' (2001) 24(2) *University of New South Wales LJ* 346 at 346.
[106] Danka, Subramanien & Whitear op cit note 14 at 1512. See *Robinson v Randfontein Estates Gold Mining Co* 1921 AD 168 at 177.
[107] *Vodacom* supra note 15 para 26.
[108] Genevieve van Zyl 'Garden leave' (2016) 16(11) *Without Prejudice* 18 at 19.
[109] *Vodacom* supra note 15 para 23.
[110] Ibid paras 23–25. These cases included *Credit Suisse Asset Management Ltd v Armstrong* (1996) ICR 882*; Tullett* supra note 8; *William Hill* supra note 49*;* and *Air New Zealand* supra note 56.

between the two.[111] It is important to note that the UK courts have flagged the increased use of garden leave provisions by employers, due to more flexible enforcement thereof by their courts.[112] However, in the *Crédit Suisse* case, the court held that garden leave provisions should be 'justified on similar grounds' to those on restraints.[113] The court in the *JM Finn* case was of the same view, but held that a court has greater flexibility to limit a garden leave provision than a restraint.[114] Although the Labour Court made reference to the some of the UK cases flagging these concerns, it failed to go further than quoting from the *William Hill* case, that in turn quoted part of *Crédit Suisse* case that mentioned the issue on flexibility.[115] It is submitted, that the Labour Court should have made a ruling on whether South African courts should approach garden leave with greater flexibility and/or whether garden leave should be scrutinised in light of well-established restraint principles, or otherwise.

In New Zealand, the courts have looked at the relationship between garden leave and restraints more extensively, particularly in relation to the duration of an accumulated restraint period.[116] In the *Air New Zealand* case, the court considered the legal position in both the UK and New Zealand and confirmed that:

> '[T]he correct approach to be adopted is that a garden leave provision should be taken into account by the Court when considering the reasonableness of the duration of any post-employment restraint covenant.'[117]

Ultimately, the Labour Court adopted the approach followed by New Zealand.[118]

---

[111] *Credit Suisse* supra note 110 at 894 (see *Air New Zealand* supra note 56 paras 59–64).
[112] Ibid.
[113] Ibid at 892. See *Tullet* supra note 8 para 219.
[114] *JM Finn & Co Ltd v Holliday* (2013) EWHC 3450 para 61.
[115] *Vodacom* supra note 15 para 23.
[116] *Marshment v Sheppard Industries Ltd* 2010 NZEmpC 98 para 54; and *Transpacific Industries Group (NZ) Limited v Harris* (2013) NZEmpC 97 para 36.
[117] *Air New Zealand* supra note 56 para 71.
[118] *Vodacom* supra note 15 para 26, where the LC stated that it saw 'no reason to adopt a different approach'.

It is submitted that the Labour Court prematurely referred to the relationship between garden leave and restraints. The Labour Court should first have determined whether garden leave was a part of South African law, and in the event that it was, it should have confirmed whether it accepted the principles of garden leave as established by UK and/or New Zealand. Alternatively, it could have indicated whether South Africa should follow the principles of another jurisdiction, or whether it had distinct principles of garden leave of its own. The Labour Court should only after this evaluation have dealt with the relationship between garden leave and restraints. Although I do agree with the Labour Court's finding that a period of garden leave should be taken into account when determining the reasonableness of a restraint,[119] it is submitted that the Labour Court took it for granted that garden leave is still a new phenomenon in South Africa that needs to be properly adjudicated on, especially due to the lack of significant judicial precedents relating to it.[120] It is thus submitted that the Labour Court missed the opportunity to develop this area of South Africa law.

b) An employee's right against having his skills atrophy

When the Labour Court considered what garden leave was, it only generally recognised an employee's right to exercise his skills.[121] The Labour Court, however, did not specifically examine this right with reference to Motsa. This was despite the fact that the Labour Court recognised that Motsa would be commercially inactive during the notice period,[122] and that the purpose of placing Motsa on garden leave was to sterilise his corporate knowledge.[123] In terms of the garden leave provision, Motsa's only working obligations whist on garden leave would be to assist Vodacom, where necessary, with the 'seamless transition of his responsibilities'.[124] However, the Labour Court did not scrutinise the negative impact this would have had on Motsa's skills.

[119] Ibid.
[120] Ibid para 22.
[121] Ibid.
[122] Ibid para 36.
[123] Ibid para 39.
[124] Ibid.

This is indicative from the words the Labour Court used when interpreting this provision – namely, '[whatever that means]'.[125]

With regards to an employee's skills, it is submitted that section 22 of the Constitution (section 22)[126] finds relevance, as an employee's constitutional right to freedom of trade includes the right to practise this trade through exercising his skills, otherwise this right would be meaningless.[127] Thus, Motsa's right to exercise his skills tied in with his constitutional right to freedom of trade.

In addition, an employee's skills acquired whilst developing his trade, even if specialised, does not form part of an employer's protectable interests.[128] Thus, Motsa's skills amounted to a proprietary interest that belonged to him, even if it were acquired at Vodacom, and gave Vodacom a competitive advantage.[129] Motsa's skills therefore amounted to his property. Section 25 of the Constitution protects the acquisition, use, enjoyment and exploitation of property. Thus, Motsa's skills were subject to such protection.[130]

As to which types of skills – namely, general, specialised or technical – should be prevented from being atrophied, it is suggested that the nature of the type of skill should not be the determining factor. It is submitted that regardless of the nature of Motsa's skills, the Labour Court should have made a factual enquiry considering the circumstances to determine whether the enforcement of the garden leave provision, that sought to protect Vodacom's proprietary interests, unreasonably limited Motsa's right to freedom of trade, and/or whether it amounted to an arbitrary deprivation of his skills.[131]

---

[125] Ibid.
[126] The Constitution of the Republic of South Africa, 1996 (the Constitution).
[127] Karin Calitz 'Restraint of trade agreements in employment contracts: Time for pacta sunt servanda to bow out?' (2011) 1 *Stellenbosch LR* 50 at 54.
[128] *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) para 20.
[129] *Labournet (Pty) Ltd v Jankielsohn* (2017) 38 *ILJ* 1302 (LAC) para 61. See *Aquatan (Pty) Ltd v Janse van Vuuren* (2017) 38 *ILJ* 2730 (LC) para 22.
[130] *Laser Junction (Pty) Ltd v Fick* 2017 JDR 1631 (KZD) para 39; and *Basson* supra note 25 at 327C.
[131] *Eoh Mthombo* supra note 22 para 19. See *Provident Financial* supra note 9 at 305 (duration of garden leave determined whether skills would atrophy); and *William Hill* supra note 49 paras 21–22 (particular skills require frequent and continued use, and an employment policy can oblige an employer to maintain skills if it provides for such).

Motsa's duties would have most likely been limited to an administrative tying-up of ends, which would not have allowed him to exercise the skill-set of a key senior employee.[132] However, the Labour Court did not specifically take into account Motsa's specific and unique post, and how being prevented from regularly exercising these skills would result in them to atrophy.[133] The Labour Court merely accepted that the effect of the garden leave provision on Motsa would have been that he would not have had access to confidential information and trade connections, which may have had some value to MTN.[134] It is therefore submitted that the Labour Court placed sole emphasis on the proprietary interests that Vodacom sought to protect, whereas it should have regarded both parties' interest, and not only that of Vodacom's.[135] The potential atrophy of Motsa's skills was a vital factor that the Labour Court should have considered.[136]

i) A closer examination of the applicant's 'confidential information' in the Vodacom judgment

The *Vodacom* judgment premised on Vodacom protecting itself against the risk of disclosure of its confidential information.[137] Confidential information is regarded as a justifiable protectable interest.[138] In terms of South African law, Vodacom was required to prove that it possessed such a protectable interest in order for the Labour Court to enforce the restraint.[139] In making its decision, the Labour Court regarded the information Motsa possessed as confidential.[140] The Labour Court held that the confidential information alone, together with the useful life thereof, rendered the duration of the accumulative

---

[132] *Basson* supra note 25 at 762E.
[133] *William Hill* supra note 49 para 21; and *SG&R Valuation Service Co v Boudrais* (2008) EWHC 1340 para 21.
[134] *Vodacom* supra note 15 para 39.
[135] *Basson* supra note 25 at 744J–745A.
[136] Ibid.
[137] *Vodacom* supra note 15 para 43.
[138] *Continuous Oxygen* supra note 22 para 34; and *Pinnacle Technology Shared Management Services (Pty) Limited v Venter* unreported case no J1095/1 (14 July 2015) para 25.
[139] *The Waste Group (Pty) Ltd v Brereton* 2017 JDR 1019 (GP) para 33; and *Laser Junction* supra note 130 paras 42 & 44.
[140] *Vodacom* supra note 15 paras 40–41.

restraint period reasonable.[141] However, it is submitted that the question regarding the confidentiality of the information Motsa possessed, was not appropriately ventilated, as the Labour Court accepted the information as confidential on mere face value.[142] The courts have examined the conflicting interests of the parties by considering the various types of information that could be considered confidential.[143] Although the courts have determined what type of information amounts to confidential information, 'the type of information alone does not necessarily establish its confidentiality'.[144] Whether information is confidential is a factual enquiry.[145] It is submitted that the Labour Court made no such enquiry as it did not distinguish between what information was confidential, and what information was a result of Motsa's own skill, knowledge and experience.[146] Even though this distinction is a difficult one to make, it must be done in order to ensure that an employee is not prevented from using what is in his head.[147] In the *Meter Systems* case, the court held that:

> 'Some knowledge … will inevitably remain in the employee's memory; and it leaves the employee free to use and disclose such recollected knowledge, in his own interests, or in the interests of anyone else, including a new employer who competes with the old one.'[148]

Thus, instead of amounting to confidential information, certain information in Motsa's possession could have been knowledge that formed part of his skills, knowledge and experience, which belonged to him, and which he should not have been prevented from using. It is therefore submitted that Vodacom failed to prove that it indeed possessed a protectable interest in the form of confidential information.

---

[141] Ibid.
[142] *Aquatan* supra note 129 para 15.
[143] *Eagleburgmann Seals SA (Pty) Ltd v Naidoo* 2015 JDR 1307 (KZD) para 7.
[144] *Meter Systems Holdings Ltd v Venter* 1993 (1) SA 409 (W) at 411D; and *Dickinson Holdings (Group) (Pty) Ltd v Du Plessis* 2008 (4) SA 214 (N) paras 33–35 (categories of protectable information).
[145] *Laser Junction* supra note 130 para 37; and *Experian SA (Pty) Ltd v Hayne* 2013 (1) SA 135 (GSJ) para 19.
[146] *Laser Junction* supra note 130 para 39.
[147] *Automotive Tooling Systems* supra note 128 para 10; *Labournet* supra note 129 para 43; *Aquatan* supra note 129 para 44; and The *Waste Group* supra note 139 paras 31,34 & 38.
[148] *Meter Systems* supra note 144 at 428E–F.

ii) The role of public policy when determining the reasonableness of a restraint

The Labour Court stated that public policy plays a role when determining the reasonableness of a garden leave provision, especially since the employee is rendered commercially inactive during garden leave.[149] In *Brisley v Drotsky*, the Supreme Court of Appeal held that public policy is a doctrine rooted in the Constitution that enshrines values such as human dignity.[150]

Although the Labour Court stated that it should consider an employee's right to exercise his skills as a matter of public policy,[151] it later stated that the ultimate question is not whether an employee's skills would potentially atrophy, but whether a period of commercial inactivity was reasonable in relation to the 'proprietary interests' that an employer sought to protect.[152] It is contended that the Labour Court regarded Vodacom's proprietary interests as the decisive factor when it determined the reasonableness of the restraint, instead of public policy. In the *Laser Junction* case, the court held that '[u]ltimately, reasonableness will be determined with reference to public policy'.[153] According to this judgment, public policy should be the primary consideration when determining reasonableness of a restraint. Brooks argues that the correct approach to determine the reasonableness of a garden leave provision is to weigh 'the employee's temporary loss of the opportunity of exercising their particular skills against 'the employer's loss in those skills being exercised for a competitor'.[154] The Labour Court made no such balancing exercise. It merely mentioned that:

> '[P]ublic interest … militates against having experienced and competent employees inactive and their skills atrophied during any unreasonably long exclusion from commercial activity.'[155]

[149] *Vodacom* supra note 15 para 22.
[150] 2002 (4) SA 1 (SCA) para 91.
[151] *Vodacom* supra note 15 para 22.
[152] Ibid para 26.
[153] *Laser Junction* supra note 130 para 24.
[154] Brooks op cit note 105 at 380.
[155] *Vodacom* supra note 15 para 26.

Ultimately, the Labour Court concluded that as Motsa did not contend that the garden leave provision '[was] against public policy or unenforceable', it would not consider public policy when determining the reasonableness thereof.[156] Although it is generally accepted that an employee bears the onus to prove the unreasonableness of a restraint,[157] the Labour Court should not have engrossed itself with the issue of onus and should rather have made a value judgment balancing two principal policy considerations.[158] The first being that of sanctity of contract, and the second being that employees 'should in the interests of society be productive and be permitted to engage in trade'.[159]

iii) Balancing high remuneration packages against an employee's right to not have his skills atrophy

The Labour Court highlighted that an employee's right against having his skills atrophied should not be a definitive factor in determining the reasonableness of a restraint.[160] The Labour Court placed significant emphasis on the fact that 'highly paid executive employees' such as Motsa, receive 'eye-watering remuneration packages' that sufficiently compensate against contractual restrictions, such as limitations on exercising particular skills.[161] It is contended that regardless of high remuneration packages, or continued remuneration during garden leave, such remuneration should not be regarded as a primary factor to determine whether a garden leave provision is reasonable. Courts should consider that employees are often 'interested not only in remuneration, but also in the opportunity to use, maintain or enhance their skills, and to enjoy the status associated with their employment'.[162] There are legal precedents from both the UK and New Zealand where the courts have taken this into account.[163]

---

[156] Ibid para 36.
[157] *Benchmark Signs Incorporated v Muller* unreported case no J1153/16 (30 September 2016) para 25.
[158] *Reddy* supra note 31 paras 14–15.
[159] Ibid. See *Aquatan* supra note 129 para 41.
[160] *Vodacom* supra note 15 para 26.
[161] Ibid.
[162] *Ogilvy & Mather (NZ) Ltd v Turner* (1995) 2 ERNZ 398.
[163] *Provident Financial* supra note 9 at 304; and *Marshment* supra note 116.

In the UK, 'consideration is rarely the central factor' to determine reasonability.[164] In the *Provident Financial* case, the court considered more than the fact that an employee received remuneration during garden leave, and that he is not 'starving', to justify the enforcement of a restraint.[165] In casu, the court also considered the issue of idleness, wherein an employee's skills could atrophy as a result of non-use.[166] However, in the UK, if an employee refuses to work, he cannot force a court to consider idleness as a factor.[167]

Furthermore, in terms of South African law, employees have a constitutional right to dignity.[168] It is submitted that an employee's skills, and his desire to hone them, forms part of this right.[169] Thus, requesting an employee to surrender his skills for a price, arguably amounts to requesting him to surrender his dignity for that same price. According to Riley, in a garden leave scenario, an employee's skills become like a property-like right in the hands of an employer, where the employer is free to negotiate the employee's surrender of this right in exchange for remuneration.[170] Riley is against this negotiation tactic as she argues that:

> '[Employees] ... are subjected to a limitation on their freedom to choose their own stories. People are not property. They are not like "apples and pears"'.[171]

This view is shared by the Constitutional Court which held that:

> 'Human beings are not commodities to which a price can be attached … they

[164] Kemp op cit note 32 at 262.
[165] *Provident Financial* supra note 9 at 304–305.
[166] Ibid.
[167] In *Elsevier v Munro* (2014) EWHC 2648, the employee, a CFO, was placed on garden leave. The employer agreed to continue remunerating the employee, regardless of whether he continued to work. The employee refused to work and argued that since he did not wish to work for the employer, and that he could not be forced to do so, if the garden leave provision was enforced he would be compelled to idleness for the remainder of the notice period. This argument was rejected by the court as it held that it was the employee who chose to be idle and was not as a result of the employer's doing (see para 81).
[168] Section 10 of the Constitution.
[169] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 59.
[170] Joellen Riley 'Sterilising talent: A critical assessment of injunctions enforcing negative covenants' (2012) 34(4) *Sydney LR* 617 at 626 (see Bishara, Martin & Thomas op cit note 12 at 9).
[171] Ibid at 633.

ought to be treated as ends in themselves, never merely as means to an end.'[172]

It is contended that the Labour Court was satisfied that it did not need to inquire into the potential atrophy of Motsa's skills, as he received a high remuneration package in exchange for limiting his right to not have his skills atrophy.[173] It is thus submitted that the Labour Court should have considered the maintenance and development of Motsa's skills, as his skills formed 'a part of himself', and essentially his dignity.[174]

c) An employee's right to work

After analysing the garden leave provision, the Labour Court confirmed that the provision afforded Vodacom the discretion to withhold work from Motsa, and that Vodacom could have required him to refrain from attending work.[175] The Labour Court, however, did not deliberate on whether Motsa had a right to work, even though Motsa would have been completely removed from 'the relevant industry and his workplace for the garden leave period'.[176] It is therefore submitted that the Labour Court thus neglected to consider the negative impact on Motsa of being commercially inactive and absent from his relevant field of specialisation.[177]

In South Africa, there is no express right to work, and an employer has no obligation to provide an employee with actual work.[178] In this regard, an employer's only obligation is to ensure that an employee is remunerated.[179] However, despite the absence of a right to work in South African law, the Labour Court could have referred to either section 22, the principle of sanctity of contract, or the principle that everyone should be 'productive and be

---

[172] *S v Dodo* 2001 (1) SACR 594 (CC) para 38.
[173] *Vodacom* supra note 15 para 26.
[174] *Basson* supra note 25 at 778D; and *Aranda Textile Mills (Pty) Ltd v LD Hurn* 2000 BIP 154 (E) para 33.
[175] *Vodacom* supra note 15 paras 35–37.
[176] Taryn Doherty 'Garden leave intertwines with post-termination restraint of trade' available at *https://www.heskethhenry.co.nz/Articles/x_post/garden-leave-intertwines-with-post-termination-restraint-of-trade*, accessed on 24 November 2017.
[177] Mupangavanhu op cit note 16 at 6–7.
[178] *Smit v Worksmen's Compensation Commissioner* 1979 (1) *SA* 51 (A) at 61C.
[179] Ibid. See Van Niekerk et al op cit note 21 at 86.

permitted to engage in trade and commerce or the professions' (the principle of productivity).[180]

It is submitted that the right to work is a component of section 22.[181] Freedom to work is an important right, as it is 'a means to maintain dignity and self-respect'.[182] In the *Affordable Medicines* case the Constitutional Court stated that:

> '[W]hat is at stake is more than one's right to earn a living … [f]reedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity … there is a relationship between work and the human personality as a whole … it is the foundation of a person's existence.'[183]

However, there are conflicting judgments on whether priority must be given to section 22 or sanctity of contract.[184] Riley argues that favouring sanctity of contract 'should be resisted with great force' as:

> 'There is very little "sanctity" in contracts that are regularly offered on a 'take it or leave it' basis, and are rarely negotiated, let alone properly understood by the parties themselves.'[185]

Nevertheless, the Labour Court was readily prepared to enforce the garden leave provision as Motsa did not challenge it to be against public policy, and that he 'knew what he was signing when he entered into his employment

---

[180] *Reddy* supra note 31 para 15. *South African Recycling Equipment (Pty) Ltd v Leleux* unreported case no D519/13 (13 November 2013) para 40.

[181] PJ Sutherland *The restraint of trade doctrine in England, Scotland and South Africa* (PhD thesis Edinburgh,1997) at 31 as cited in Calitz op cit note 127 at 54.

[182] Calitz op cit note 127 at 64. See *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 27.

[183] *Affordable Medicines* supra note 169.

[184] *Magna Alloys* supra note 23 (established primacy of sanctity of contracts); *North Safety Products (Africa) (Pty) Ltd v Nicolay* (2007) 28 *ILJ* 350 (C) at 353J; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) para 28; *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) *SA* 229 (D) para 33 (conflicting views of *Magna Alloys* case); and *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) at 1757A–B (criticism of *Den Braven* case). See Calitz op cit note 127 at 56.

[185] Riley op cit 170 at 629.

contract'.[186] However, a court should weigh section 22 against sanctity of contract when determining the reasonableness of a restraint.[187] Thus, it is submitted that the Labour Court indirectly championed sanctity of contract, but should have considered and given primacy to section 22 due to the importance ascribed to dignity of work.

With regards to public policy, it is against public policy to enforce a restraint that 'unreasonably restricts the [employee's] freedom to trade or to work'.[188] Similar with section 22, when relying on public policy, a court should refer to the principle of productivity as well as sanctity of contract when weighing up an employer's proprietary interest against an employee's interest to remain economically active.[189]

Furthermore, a court should balance the competing interests of the parties when deciding to enforce a restraint.[190] It is submitted that the Labour Court failed to balance these interests. Had the Labour Court done so, it may have concluded that Motsa had more to lose than Vodacom, as it was highly probable that Motsa could lose employment with MTN, who would have to wait twelve months before being able to use Motsa's services. Losing a job 'in the present depressed economic climate is not something lightly to be contemplated', and does not seem justified considering this paper's submission that Vodacom failed to prove that it had a protectable interest.[191] In addition, the Labour Court failed to take into account that employers often exaggerate how the exposure of their confidential information will negatively affect their businesses.[192] The Labour Court also did not consider that confidential information is often very detailed and complex, and without Motsa

---

[186] *Vodacom* supra note 15 para 36. See Bishara op cit note 9 at 769 (discussion of employee's unequal bargaining position); and Mupangavanhu op cit note 16 at 10–11 (argument for sanctity of contract).
[187] *Aquatan* supra note 129 para 41.
[188] *Esquire* supra note 22 para 36.
[189] *Reddy* supra note 31 para 15.
[190] *Aquatan* supra note 129 para 30.
[191] Ibid.
[192] *Air New Zealand* supra note 56 paras 77–79; *Provident Financial* supra note 9 at 304; and *Credit Suisse* supra note 110 at 894.

duplicating it, it will 'be quite impossible to recall'.[193] The Labour Court did not inquire into whether Motsa attempted to duplicate the information,[194] or alternatively that the information had been destroyed by Vodacom.[195] Thus, there is no evidence led in the *Vodacom* judgment that proved that Motsa could have retained any useful memory of the information for longer than six months.

Currently, in both the UK and New Zealand, employers have a general duty to provide an employee with work, provided that there is work available.[196] Previously in the UK, there was no duty to provide an employee with work, unless agreed to in the employment contract.[197] Where an employment contract was silent on this duty, the court would analyse the type of employment performed by an employee, as particular types of employment would obligate an employer to provide an employee with work.[198] At first, the types of employment was limited to actors and television personalities who needed to be provided work to maintain their public images.[199]

Despite section 22, the right to dignity, the principle of productivity, and guidance found in the foreign jurisdictions as cited in the *Vodacom* judgment, the Labour Court made no mention of Motsa's right to work. The Labour Court thus indirectly ignored Motsa's rights to freedom of trade and dignity when it decided to enforce the garden leave provision without considering this right. This arguably led to an 'incomplete, unbalanced and disproportionate

---

[193] *Air New Zealand* supra note 56 para 80.
[194] Ibid.
[195] *AIFA v Jonker* unreported case no C741/17 and C742/17 (17 November 2017) paras 8, 35 & 41.
[196] In *Langston v Amalgamated Union of Engineering Workers* (1974) 1 All ER 980, the court held that an employer of a skilled worker is bound to provide him with work. In *Radio Horowhenua Limited v Bradley* (1993) NZEmpC 204 at 10, the court held that New Zealand law 'jealously guards' employees' freedom of occupation. In *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* (1995) 1 ERNZ 672, the court held that employees have the right to work, as it is an intrinsic value on its own, and that employers are obliged to provide employees with work if there is work available. In *Ogilvy* supra note 162, the court held that where an employer instructs an employee not to work, the employer would be in breach of his duty to provide work. The court emphasised that this obligation varied from case to case. See Gordon Anderson *Labour Law in New Zealand* (2011) Kluwer Law International BV at 100.
[197] *Marbe v George Edwards (Daly's Theatre) Ltd* (1928) 1 KB 269.
[198] Ibid.
[199] Ibid at 288.

result'.[200] It is further submitted that as the garden leave provision limited Motsa's rights to freedom of trade and dignity, Vodacom should have had to prove that the limitation was reasonable and justifiable in terms of section 36 of the Constitution.[201] Alternatively, the Labour Court should have regarded Motsa's interest to remain economically active from a public policy point of view. It should, however, be noted that an employee should be refrained from abusing his constitutional rights and crying Constitution every time a restraint goes to court to be enforced, lest the purpose of restraints become redundant.[202]

i) An implied right to work in employment contracts

The Labour Court stated that Motsa's employment contract afforded Vodacom the express right to place Motsa on garden leave without providing him with work.[203] The Labour Court, however, did not consider whether Motsa's employment contract conferred an express, or alternatively, an implied duty to provide Motsa with work.

The courts in the UK have become 'increasingly willing to imply an employee's "right to work" in employment contracts'.[204] The leading case on an employee's implied right to work, is the *William Hill* case. In casu, the court considered the unique nature of the employee's role, the skills involved in his job, and whether they needed frequent and continued use to the enhance and preserve them.[205] The court recognised that due to the changing social conditions, UK courts 'have increasingly recognised the importance to the employee of the work, not just the pay'.[206] In essence, the court in the *William Hill* case argued that unless the employment contract expressly excluded this, a contract of employment had to be construed as

---

[200] *Laser Junction* supra note 130 para 30.
[201] Ibid para 29, the court held that the principle of sanctity of contract must be scrutinised that in light of the Constitution. See *Ball v Bambalela Bolts (Pty) Ltd* (2013) 34 *ILJ* 2821 (LAC) para 13.
[202] *Leleux* supra note 180 para 40.
[203] *Vodacom* supra note 15 paras 35–37.
[204] Robert Dixon 'What is garden leave? (or should that be gardening leave?)' available at *http://www.turbervilles.co.uk/blog/what-is-garden-leave-or-should-that-be-gardening-leave/,* accessed on 25 January 2018.
[205] *William Hill* supra note 49 para 21.
[206] Ibid para 18.

obliging the employer to provide the employee with work if the employee's post was a 'specific and unique post', that the terms of the contract expressly required him to work at specific times in order to get paid, or if it was an employment policy to maintain the skills of an employee.[207] Similarly, in terms of the *SG&R Valuation* case, an employee has the right to work if the employee's work is specialised, he has significant skills, or occupies a high position within the employer which role should not be belittled. [208]

It is not suggested that the Labour Court should have implied a general obligation on Vodacom to provide Motsa with work. However, before the Labour Court enforced a garden leave notice period that denied Motsa the right to work, it should have at least considered that Motsa was a senior executive employee with a reputation, previous privileges and powers, as well as a skill-set that needed maintenance and development through being able to work.[209] In the *JM Finn* case, the court held that placing an employee on garden leave did not cause reputational damage, as garden leave is common and 'there is [a] general acceptance and understanding' of the reasons for being placed on garden leave, none of which reflects negatively on the employee.[210] Conversely, in South Africa, garden leave is still a relatively unknown legal principle. This suggests that it is not guaranteed that a South African employee, who is placed on garden leave, will not face reputational damage.[211]

ii) Unwillingness of an employee to perform work during garden leave

The Labour Court failed to consider whether Motsa's conduct indicated a willingness to perform work for Vodacom during the notice period. In South Africa, an employee's principle obligation is to make his 'personal services available to the employer'.[212] Thus, an employee will be remunerated as long

[207] Ibid paras 21–22.
[208] *SG&R Valuation* supra note 133.
[209] *Vodacom* supra note 15 para 39.
[210] *JM Finn* supra note 114 para 76
[211] In *McAulay v Sonoco NZ Ltd* (1998) 2 ERNZ 225, the court considered that in light of the facts, an employee's reputation was critical to his employment.
[212] Van Niekerk et al op cit note 21 at 85.

as he makes his services available to the employer.[213] In the UK, an employee's right to remuneration depends on his willingness to do the work that he is employed for.[214] If he is unwillingly to do that work, there is no onus on the employer to pay him.[215] Similarly, where an employee is placed on garden leave and he is unwilling to work, or makes it unreasonably impracticable for the employer to provide him with work, the employer is not obliged to provide him with work during his notice period.[216] The position in New Zealand is identical to that of the UK.[217]

Motsa undertook 'not to breach any of his restraint obligations' and would only work on MTN's South African portfolios after the restraint period expired.[218] He further indicated that he would have worked the notice period if it were applicable.[219] However, the Labour Court held that that was improbable and relied on the communication from MTN, which stated that Motsa would commence employment with MTN from January 2016, to substantiate its finding.[220] Even though Motsa alleged that the notice period was not applicable, he admitted that he was bound by the restraint.[221] The restraint was applicable for six months and would thus expire in June 2016.[222] However, Motsa entered into an agreement with MTN to provide consulting services to MTN (Dubai) from January 2016.[223]

---

213 Ibid.

214 Wages are generally mutual obligations (see *Miles v Wakefield Metropolitan District Council* (1987) 1 AC 539 paras 58–59).

215 Ibid.

216 *SG&R Valuation* supra note 133 para 24. This approach was subsequently approved in *Standard Life Health Care Ltd v Gorman* (2009) EWCA Civ 1292, where commission-only insurance agents were found to be in breach of their contractual duty of good faith when they resigned to join a competitor without giving the required period of notice. The employer sought an interdict restraining them from working for anyone else during the notice period. The court granted the interdict, and the employer was released from any obligation to provide them with work, despite the fact that the agents could resultantly not earn any remuneration. See *Sunrise Brokers LLP v Rodgers* (2014) EWCA Civ 1373.

217 Anderson op cit note 196 at 101.

218 Ibid para 13.

219 *Vodacom* supra note 15 para 9.

220 Ibid.

221 Ibid para 2.

222 Ibid para 16.

223 Ibid.

In terms of South African law, an employer does not have to wait for an employee to actually breach a restraint to preserve it, there only needs to be a possibility.[224] It is submitted that Motsa's vague assurance, and the fact that he took up consultancy work with MTN Dubai during the term of his restraint period, does not inspire confidence in Motsa's undertakings.[225] Vodacom was therefore entitled to protect itself against the risk of its confidential information being disclosed.[226] Thus, it is argued that by commencing employment with MTN from January, albeit for MTN Dubai, there was a possibility that Motsa could have breached the restraint by doing work for MTN South Africa.

Therefore, it is submitted that due to Motsa's conduct, he had made it impractical for Vodacom to provide him with work during his notice period. In conclusion, it is argued that had the Labour Court examined whether Motsa had a right to work with reference to the legal principles form the UK and/or New Zealand, the Labour Court would have concluded that Motsa's conduct was indicative of an unwillingness to perform work for Vodacom during the notice period. Therefore, Vodacom would not have been obliged to provide him with work during this period. It is submitted that had the Labour Court inquired whether Motsa's had a right to not have his skills atrophy, this factor should have been considered, as Motsa's idleness would have been self-created.[227]

V. GARDEN LEAVE IN SOUTH AFRICA – THE WAY FORWARD

Garden leave is featuring more frequently in employment contracts.[228] In South Africa, some authors believe that the *Vodacom* judgment 'is a big win for employers' who will start to include garden leave provisions in their employment contracts with senior employees to 'strengthen the effectiveness

---

[224] *Interwaste Holdings Limited v Mahoney* unreported case no J1619/15 (8 September 2015) para 21. See *Experian* supra note 145 para 22; and *Medtronic (Africa) (Pty) Ltd v Van Wyk* (2016) 37 *ILJ* 1165 (LC) para 34; *Ball* supra note 200 para 22.
[225] *Vocacom* supra note 15 para 22.
[226] *Pinnacle Technology* supra note 138 para 25.
[227] Notes 167 and 215.
[228] Brooks op cit note 105 at 380.

of restrictive covenants'.[229] For this reason, it is even more concerning that the *Vodacom* judgment offers little direction with regards to garden leave as a South African legal principle.

As garden leave in South Africa is currently unregulated, employees subjected to garden leave provisions run the risk of being abused. Employers could use garden leave as a means to exploit employees by stipulating unreasonably long periods of garden leave that would ensure that 'an ambitious and able executive [would] not give notice if he [was] going to be unable to work at all for anyone for a long period of time.'[230] McCrystal aptly summarises the potential pitfalls of garden leave when she states that:

> 'While the idea of full pay without duties may initially appeal, the reality of this situation continuing for more than a few weeks for the average employee is a loss of skills, professional development, personal satisfaction, the sense of community available to those who engage in paid work and, potentially, the opportunity to obtain alternative future employment.'[231]

Regulation of garden leave is arguably also in the best interest of employers, who would be in a better position to enforce a reasonable garden leave provision in instances where an opportunistic employee would attempt to avoid it.[232] It is thus submitted, that the principle of garden leave should be formally establish in South Africa as soon as possible, due to the potential abuses.[233]

In the UK and New Zealand, garden leave is not regulated by statute, however, both these jurisdictions have garden leave principles that have been well-developed by the judiciary. South Africa could refer to these jurisdictions' judicial precedents for guidance. However, it must be noted that garden leave in these foreign jurisdictions is by no means a settled legal principle and is

---

[229] Van Zyl op cit note 108.
[230] *Provident Financial* supra note 9 at 302.
[231] McCrystal op cit note 13.
[232] *JM Finn* supra note 114 para 42.
[233] Ibid.

'still in a state of evolution and subject to future scrutiny by the courts'.[234] It is contended that a step in the right direction would be to have a South African court expressly confirm whether South African law has adopted the principle of garden leave**,** and whether it accepts and adopts the legal principles of garden leave as established by a foreign jurisdiction such as the UK or New Zealand.

The UK has a variety of cases dealing with garden leave provisions.[235] It is submitted that:

> '[T]he [c]ourts [in the UK] have narrowed the circumstances under which they will grant [interdicts] to enforce garden leave provisions to the point where employers have considerable guidance in drafting [garden leave provisions in] employment [contracts].'[236]

It is submitted that legal precedents of the UK offer guidance on what terms should be used by the South African judiciary, legislature and/or included in employment contracts.[237] It is therefore suggested that the following terms be structured into South African garden leave provisions:

- that an employee may be placed on garden leave for the full term of his notice period;
- that the employee will continue to remain employed and received full remuneration and benefits;
- that the employer is not required to provide him with work during the notice period, whilst considering an employee's right to work, dignity and skills;
- that the employee is bound to all his contractual and common law obligations;
- that the employer must specify the acts an employee may perform during garden leave without the employer's consent;
- that the employer must indicate that the garden leave will be implemented

[234] Stratton op cit note 7 at 114.
[235] Lembrich op cit note 34 at 2313.
[236] Ibid.
[237] Ibid.

only in so far as to protect the employer's interests;

- that the employee needs to remain available to work if required;
- that an employer is not obligated to pay an employee who refuses to work during the notice period;
- that the employer should make provision for instances where an employee can take up non-competitive work with another employer; and
- that the employer should state whether the employee, as an alternative to garden leave, could 'perform alternate duties of a lesser status and responsibility during his notice period'.[238]

It is proposed that the Basic Conditions of Employment Act 75 of 1997 be amended to incorporate the above terms.[239] In the absence of the suggested amendment, it is proposed that parties include these terms in employment contracts to establish well-structured and fair garden leave provisions.[240]

In the interim, it is suggested that when faced with interpreting garden leave provisions, South African courts use the well-established rules on restraints to determine the reasonableness of garden leave provisions.[241] However, garden leave should be regarded as a self-standing legal principle, not merely a factor to determine the reasonableness of the duration of a restraint, and should not be enforced by the courts with greater leniency than restraints.[242] With regards to the relationship between garden leave and restraints, this paper endorses the Labour Court's approach of considering this relationship when determining the reasonableness of an accumulative restraint period.[243]

---

[238] Danka, Subramanien & Whitear op cit note 14 at 1522; Scoon op cit note 17; Doherty op cit note 176; Ariane Adam '*Sunrise Brokers LLP v Rodgers* (2014). Keeping the contract of employment alive without pay' available at *https://invictuschambers.org/blogs/sunrise-brokers-llp-v-rodgers-2014-keeping-contract-employment-alive-without-pay*, accessed on 14 January 2018; and Kennedys Law LLP 'Garden leave and the right to work' available at *http://www.kennedyslaw.com/articleemploymentgardenleave/*, accessed on 31 March 2017.

[239] Danka, Subramanien & Whitear op cit note 14 at 1521.

[240] Kennedys Law LLP op cit note 238.

[241] *William Hill* supra note 49 para 25; and *Credit Suisse* supra note 110 at 892.

[242] Ibid.

[243] *Vodacom* supra note 15 para 26.

VI. CONCLUSION

The *Vodacom* judgment is an important judgement that will 'serve as a useful guide to employers who wish to enforce both garden leave and restraint [provisions]'.[244] However, the Labour Court arguably relinquished the opportunity to expressly confirm the adoption of garden leave in South Africa. In doing so, it also overlooked the prospect of developing the underlying principles of garden leave in a South African legal context. It could have easily done so with the assistance of the foreign authorities which it referred to in its judgment. Unfortunately, the Labour Court's focus centred on the enforceability of a restraint in relation to its duration, with garden leave being reduced to a factor in determining the reasonableness of this duration. The Labour Court failed to look at garden leave as an isolated legal principle, and as a result, it did not consider essential issues relating to garden leave such as an employee's right to not have his skills atrophy, and his right to work. In coming to its decision, the Labour Court unduly focused on Vodacom's right to have its proprietary interests protected. This inadvertently resulted in Motsa's constitutional rights to freedom of trade, property and dignity being overlooked.

It is evident that the use of garden leave provisions in employment contracts are by no means disappearing but growing in prevalence. This reinforces why the issue of garden leave in South Africa needs to be clarified either judicially or legislatively. In doing so, South Africa does not need to re-invent the wheel and can assimilate the principles of garden leave as developed by the UK and New Zealand. It must, however, be borne in mind that the principle of garden leave is by no means a settled legal principle, and that even in these jurisdictions garden leave is in a state of flux.

The *Vodacom* judgment was a good starting point for garden leave in South Africa, however, I eagerly anticipate further direction from South African courts in future garden leave disputes.

---

[244] Danka, Subramanien & Whitear op cit note 14 at 1521; and Mupangavanhu op cit note 16 at 2.

VII. BIBLIOGRAPHY

a) South African legislation

Basic Conditions of Employment Act 75 of 1997.
The Constitution of the Republic of South Africa, 1996.

b) South African case law

Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn 2008 (2) SA 375 (C).
Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC).
AIFA v Jonker unreported case no C741/17 and C742/17 (17 November 2017).
Aquatan (Pty) Ltd v Janse van Vuuren (2017) 38 *ILJ* 2730 (LC).
Aranda Textile Mills (Pty) Ltd v LD Hurn 2000 BIP 154 (E).
Automotive Tooling Systems (Pty) Ltd v Wilkens 2007 (2) SA 271 (SCA).
Ball v Bambalela Bolts (Pty) Ltd (2013) 34 *ILJ* 2821 (LAC).
Basson v Chilwan 1993 (3) SA 742 (A).
Benchmark Signs Incorporated v Muller unreported case no J1153/16 (30 September 2016).
Brisley v Drotsky 2002 (4) SA 1 (SCA).
Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes (2012) 33 *ILJ* 629 (LC).
Den Braven SA (Pty) Ltd v Pillay 2008 (6) SA 229 (D).
Dickinson Holdings (Group) (Pty) Ltd v Du Plessis 2008 (4) SA 214 (N).
Eagleburgmann Seals SA (Pty) Ltd v Naidoo 2015 JDR 1307 (KZD).
*Eoh Mthombo (Pty) Ltd v Bheekie-Odha*v 2012 JDR 1588 (LC).
Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another (2011) 32 *ILJ* 601 (LC).
Experian SA (Pty) Ltd v Haynes 2013 (1) SA 135 (GSJ).
Interwaste Holdings Limited v Mahoney unreported case no J1619/15 (8 September 2015).

Labournet (Pty) Ltd v Jankielsohn (2017) 38 *ILJ* 1302 (LAC).
Laser Junction (Pty) Ltd v Fick 2017 JDR 1631 (KZD).
Magna Alloys & Research SA (Pty) Ltd v Ellis 1984 (4) SA 874 (A).
Massmart Holdings Ltd v Vieira unreported case no J1945/15 (3 November 2015).
Medtronic (Africa) (Pty) Ltd v Van Wyk (2016) 37 *ILJ* 1165 (LC).
Meter Systems Holdings Ltd v Venter 1993 (1) SA 409 (W).
Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA).
Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff 2009 (3) SA 78 (C).
North Safety Products (Africa) (Pty) Ltd v Nicolay (2007) 28 *ILJ* 350 (C).
Pinnacle Technology Shared Management Services (Pty) Limited v Venter unreported case no J1095/15 (14 July 2015).
Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA).
Robinson v Randfontein Estates Gold Mining Co 1921 AD 168.
S v Dodo 2001 (1) SACR 594 (CC).
Smit v Worksmen's Compensation Commissioner 1979 (1) SA 51 (A).
South African Recycling Equipment (Pty) Ltd v Leleux unreported case no D519/13 (13 November 2013).
The Waste Group (Pty) Ltd v Brereton 2017 JDR 1019 (GP).
Viney v Barnard Jacobs Mellet Securities (Pty) Ltd (2008) 29 *ILJ* 1564 (LC).
Vodacom (Pty) Ltd v Motsa 2016 (3) SA 116 (LC).

c) Foreign case law

Air New Zealand v Grant Kerr (2013) NZEmpC 153.
Cantor Fitzgerald v George (1996) CLY 2523.
Credit Suisse Asset Management Ltd v Armstrong (1996) ICR 882.
Crystal Palace FC (2000) Ltd v Bruce (2002) SLR 81.
Elsevier v Munro (2014) EWHC 2648.
Euro Brokers Ltd v Rabey (1995) IRLR 206.
Evening Standard Co Ltd v Henderson (1987) IRLR 64.
GFI Group Inc v Eaglestone (1994) IRLR 119.
Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee (1995) 1 ERNZ 672.

JM Finn & Co Ltd v Holliday (2013) EWHC 3450.
Langston v AUEW (1974) ICR 510.
Lloydd v Diagnostic Medlab Services Limited (2009) ERNZ 42.
Marbe v George Edwards (Daly's Theatre) Ltd (1928) 1 KB 269.
Marshment v Sheppard Industries Ltd (2010) NZEmpC 98.
McAulay v Sonoco NZ Ltd (1998) 2 ERNZ 225.
Miles v Wakefield Metropolitan District Council (1987) 1 AC 539.
Ogilvy & Mather (NZ) Ltd v Turner (1995) 2 ERNZ 398.
Provident Financial Group v Hayward (1989) 3 All ER 298.
Radio Horowhenua Limited v Bradley (1993) NZEmpC 204.
SG&R Valuation Service Co v Boudrais (2008) EWHC 1340.
Standard Life Health Care Ltd v Gorman (2009) EWCA Civ 1292.
Sunrise Brokers LLP v Rodgers (2014) EWCA Civ 1373.
Symbian Ltd v Christensen (2001) IRLR 77.
TFS Derivatives Ltd v Morgan (2004) EWHC 3181.
Transpacific Industries Group (NZ) Limited v Harris (2013) NZEmpC 97.
Tullett Prebon Plc v BGC Brokers LP (2010) EWHC 484.
William Hill Organisation v Tucker (1999) ICR 291.

d) Journal articles

Aamina Danka, Darren Subramanien & Nicola Whitear ‘Garden leave: A discussion in the context of *Vodacom (Pty) Ltd v Motsa & another* (2016) 37 *ILJ* 1241 (LC)’ (2017) 38 *ILJ* 1511–1522.

Adrian Brooks ‘The limits of competition: Restraint of trade in the context of employment contracts’ (2001) 24(2) *University of New South Wales LJ* 346–381.

Bob Hepple ‘The duty of employee loyalty in English law’ (1999) 20 *Comparative Labor LJ & Policy Journal* 205–224.

Charles A Sullivan ‘Tending the garden: Restricting competition via “garden leave”’ (2016) 37(2) *Berkeley Journal of Employment & Labor Law* 293–325.

Genevieve van Zyl '"Garden leave"' (2016) 16(11) *Without Prejudice* 18–19.

Greg T Lembrich 'Garden leave: A possible solution to the uncertain enforceability of restrictive employment covenants' (2002) 102(8) *Columbia LR* 2291–2323.

IGC Stratton 'Restraint of trade during and on the termination of a contract of employment' (1997) 12(1) *Denning LJ* 107–128.

Jeffrey S Klein & Nichols J Pappas '"Garden leave" clauses in lieu of non-competes' (2009) 241(24) *New York LJ* 1–2.

Joellen Riley 'Sterilising talent: A critical assessment of injunctions enforcing negative covenants' (2012) 34(4) *Sydney LR* 617–635.

Karin Calitz 'Restraint of trade agreements in employment contracts: Time for pacta sunt servanda to bow out?' (2011) 1 *Stellenbosch LR* 50–70.

Katharine Kemp 'The significance of consideration paid for post-employment restraints in England and Germany' (2005) 2 *Stellenbosch LR* 257–271.

Norman D Bishara & Michelle Westermann-Behaylo 'The law and ethics of restrictions on an employee's post-employment mobility' (2012) 49(1) *American Business LJ* 1–21.

Norman D Bishara 'Covenants not to compete in a knowledge economy: Balancing innovation from employee mobility against legal protection for human capital investment' (2006) 27(2) *Berkeley Journal of Employment & Labor Law* 287–322.

Norman D Bishara 'Fifty ways to leave your employer: Relative enforcement of covenants not to compete, trends, and implications for employee mobility

policy' (2011) 13(3) *University of Pennsylvania Journal of Business Law* 751–795.

Norman D Bishara, Kenneth J Martin & Randall S Thomas 'An empirical analysis of noncompetition clauses and other restrictive postemployment covenants' (2015) 68(1) *Vanderbilt LR* 1–51.

Shae McCrystal 'Unfair dismissal, reinstatement and garden leave: *Blackadder v Ramsey Butchering Services Pty Ltd*' (2005) 33(3) *Federal LR* 555–585.

Y Mupangavanhu 'The relationship between restraints of trade and garden leave' (2017) 20 *PELJ* 1–22.

e) Internet sources

Ariane Adam '*Sunrise Brokers LLP v Rodgers* (2014). Keeping the contract of employment alive without pay' available at *https://invictuschambers.org/blogs/sunrise-brokers-llp-v-rodgers-2014-keeping-contract-employment-alive-without-pay*, accessed on 14 January 2018.

Employment New Zealand 'Garden leave' available at *https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/garden-leave/*, accessed on 24 November 2017.

Francis Scoon 'Using restrictive covenants wisely in contractual agreements' available at *https://www.moorepay.co.uk/blog/using-restrictive-covenants-wisely-in-contractual-agreements/*, accessed on 17 January 2018.

Gaby Hardwicke 'Briefing note: Garden leave' available at *http://www.gabyhardwicke.co.uk/images/library/files/briefingnotes/Garden_Leave.pdf*, accessed on 31 March 2017.

Kate Gallafent ‘Garden Leave’ available at *https://www.blackstonechambers.com/documents/136/Garden_Leave*, accessed on 6 December 2017.

Kennedys Law LLP ‘Garden leave and the right to work’ available at *http://www.kennedyslaw.com/articleemploymentgardenleave/*, accessed on 31 March 2017.

Lawrence F Carnevale ‘Contractual restraint on employee conduct’ available at *http://www.clm.com/docs/6603465_3.pdf,* accessed on 17 July 2017.

Robert Dixon ‘What is garden leave? (or should that be gardening leave?)’ available at *http://www.turbervilles.co.uk/blog/what-is-garden-leave-or-should-that-be-gardening-leave/,* accessed on 25 January 2018.

Simon Fennel ‘Garden leave clauses: The road to executive termination’ available at *http://www.shoosmiths.co.uk/client-resources/legal-updates/garden-leave-clauses-executive-termination-12171.aspx*, accessed on 27 November 2017.

Tanuja M Dehne, Christopher P Stief & Risa B Boerner ‘Restrictive covenants for multi-national employers: Strategies for effective drafting and implementation’ available at *https://www.acc.com/chapters/del/upload/2016-04-19_FisherPhillips_RestrictiveCovenants-PPTX*, accessed on 17 July 2017.

Taryn Doherty ‘Garden leave intertwines with post-termination restraint of trade’ available at *https://www.heskethhenry.co.nz/Articles/x_post/garden-leave-intertwines-with-post-termination-restraint-of-trade*, accessed on 24 November 2017.

Toka Moiloa & Bankey Sono ‘Botanical sabbatical: Labour court gives the green light to “garden leave” clauses in employment contracts’ available at *http://www.werksmans.com/legal-briefs-view/botanical-sabbatical-labour-court-gives-the-green-light-to-garden-leave-clauses-in-employment-contracts/*, accessed on 17 July 2017.

f) Textbooks

A van Niekerk et al *Law@work* 3 ed (2015) LexisNexis, South Africa.

Gordon Anderson *Labour Law in New Zealand* (2011) Kluwer Law International BV, Netherlands.