



## Garden Leave in South Africa

Employment lawyers and HR professionals used to working in the UK and other Commonwealth countries have always taken “garden leave” clauses for granted. We often include them in non-competition agreements without thinking twice. And we normally provide that a period of non-competition is reduced by any period of garden leave the employee takes beforehand (so that, overall, the employee is not kept out of the market for too long).

But would you believe that the South African courts have never ruled on the legal validity of a “garden leave” clause in that country? Until, that is, earlier this year.

In the case of *Vodacom (Pty) Ltd v Motsa and Another* (February 2016) the Johannesburg Labour Court was asked to look at how garden leave clauses should work in South African non-competition restrictions. The specific issue was whether a court should ignore any garden leave period, or take it into account, in considering whether the length of a non-competition period is reasonable.

In the UK (and elsewhere in the Commonwealth, such as New Zealand) it is well established that you should essentially add any period of garden leave to any period of non-competition, to determine if the non-competition period is reasonable. So, if an employee was on garden leave for 6 months and had a non-competition period of 6 months, then this should be treated in the same way as if the employee had no garden leave and a non-competition period of 12 months. The rationale is that what is important is the total period the employee is out of the market, not how he or she got there.

After considering how garden leave works elsewhere, the South African court decided to follow suit and apply the same principles in South Africa.

In his decision, the judge said this:

“While I appreciate that in South Africa the onus is on the party resisting a restraint to establish that it is unreasonable in one or more respects, it seems to me that any consideration of reasonableness, especially in relation to the duration of a restraint, ought necessarily to take account of the full period that an employee is out of the market. Put another way, 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.”

So, it would seem that the garden leave rules we are all used to will apply in South Africa as well.

And what a better place to be put on garden leave, than in the country famous for the garden route.