Garden Leave and Restraint of Trade provisions

Garden leave is where the employee gives notice of his intention to resign, and the employer requires the employee not to do any work for this period. The employee is effectively forced to remain commercially inactive during the period of his garden leave. The purpose of this is to ensure that any confidential information which the employee has access to becomes stale and useless while at the same time the employee is kept from engaging with competitors. It achieves the same purpose as a restraint of trade provision but the employer does not run the risk of the restraint of trade being declared unenforceable for unreasonableness.

The relationship between garden leave clauses and restraint of trade agreements was considered by the court for the first time in South Africa in the case of *Vodacom Pty Ltd v Motsa* 2016 (37) *ILJ* 1241 (LC). In this case the court held that in determining the reasonableness of the duration of a restraint, ‘the full period that an employee is out of the market should be taken into account’ and that any period of enforced commercial inactivity (ie: garden leave) prior to the termination of employment is relevant in determining the reasonableness of any restraint of trade agreement. The court went on further to state that this position is consistent with the broader public interest which is against experienced and competent employees being inactive and their skills being wasted during an unreasonably long absence from commercial activity.

The court stressed that when employers include garden leave provisions into employment contracts, consideration must be given to the length of the provision, and that the broader public policy requires that skilled and experienced employees not be commercially inactive for a lengthy period of time as the consequence could be that their trade abilities will be of no benefit to themselves or their employers.

The finding of the court serves as a warning to employers who wish to enforce both garden leave and restraint clauses, in that if both clauses put together results in the employee being on the sidelines for longer than is reasonably necessary to protect the employer’s proprietary interests, the restraint may be found to unreasonable and unenforceable.

Restraint of trade clauses were also considered in a number of other cases recently.

In one case the court considered the distinction between a supplier restraint and a competitor restraint, and found that a supplier restraint is as enforceable as an employee restraint against soliciting customers or employees or joining a competitor.

As regards the protection of client connections, the court found that all the employer has to show to justify a restraint clause is that an employee could 'easily induce' a customer to follow him to a competitor when he leaves. The employer does not have to go so far as to prove that the employee is able 'automatically' to carry the customer away with him when he leaves.

Similarly, where there is a complex web of personal relationships between an employee and his customers, that trade connection is open to exploitation by the employee when he takes up employment with a competitor and is deserving of protection by way of a restraint clause.

Where a former employee and the competitor for whom she worked were found to have wilfully and in bad faith breached a restraint of trade order, the court found that incarceration of the employee and the imposition of a fine on the competitor were appropriate sanctions. It suspended the orders for the period of the restraint, finding that this would be a sufficient deterrent against further breach and would ensure strict compliance with the restraint order.