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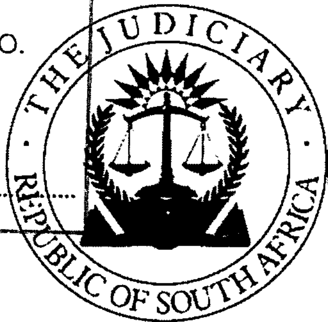

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 74/16

In the matter between:

VODACOM (PTY) LTD **APPLICANT**

and

GODFREY MOTSA **FIRST RESPONDENT**

MTN GROUP LTD **SECOND RESPONDENT**

Heard: 4 February 2016

Judgment delivered: 9 February 2016

Summary: Urgent application to enforce 'garden leave' clause and restraint undertakings in contract of employment. Discussion on nature of garden leave and relationship to restraint undertakings. On facts, employer found to have elected to enforce both garden leave and restraint undertakings; six month period of garden leave considered together with six month post-termination restraint when reasonableness of restraint assessed. Period of restraint so considered not unreasonable; application granted.

JUDGMENT

VAN NIEKERK J

Introduction

[1] The first respondent, Mr. Godfrey Motsa, was employed by the applicant (Vodacom) in January 2007. On 23 December 2015, Motsa resigned. In these proceedings, brought on an urgent basis, Vodacom seeks a final order to enforce the terms of Motsa's employment contract. In particular, Vodacom seeks to hold Motsa to a notice period of six months (in the form of what is known as 'garden leave') and a restraint undertaking for a further period of six months after the expiry of the notice period.

[2] The parties agree that the matter is urgent. They disagree on the circumstances surrounding Motsa's resignation and whether or not he is subject to both the period of contractual notice and the six month restraint. Vodacom contends that Motsa is required to serve his notice period (without him being required to work) and after the expiry of that period, the restraint becomes operative. Motsa contends that he was released from the obligation to serve the notice period because after he had submitted his resignation, Vodacom elected not to hold him to his notice period. He maintains that as a consequence, his employment terminated immediately. Although Motsa maintains that he is entitled to take up employment elsewhere from 1 January 2016, he acknowledges that he is bound by the restraint and confidentiality undertakings.

[3] In so far as those undertakings are concerned, the parties agree on the terms of a draft order attached to the answering affidavit in which Motsa makes certain undertakings in favour of Vodacom, valid until 30 June 2016. This is consistent with Motsa's contention that he is bound by the six month restraint but the notice period, and with the relief sought in prayers 4.1, 4.2 and 5 of the notice of motion. The only real dispute in relation to the restraint, obviously related to the dispute

about the notice period, concerns the date from which the restraint undertakings should operate. Vodacom, consistent with its view that Motsa is obliged to serve out the six month notice period before the restraint is triggered, contends that the restraint undertakings come into force only after the notice period expires and the contract terminates. Motsa maintains that the restraint undertakings became operative on 23 December 2015, the date on which he says that Vodacom made the election that he was not required to work out a notice period. In the alternative, Motsa contends that Vodacom is not entitled to restrain him for a six month period beyond the expiry of his notice because it is clear from the terms of the restraint that the useful life of any confidential information to which he had access is six months. In these circumstances, he submits that the enforcement of the restraint beyond the six month period would be unreasonable.

Material facts

[4] Motsa is a senior executive employee. He commenced employment with Vodacom on 8 January 2007. On 1 April 2015, he was appointed to the post of chief officer: consumer business unit (CBU). Motsa was also appointed a director of Vodacom and a member of its exco. During October 2015, Motsa advised Vodacom's CEO, Mr. Shameel Joosub, that he had received an offer of employment from the second respondent (MTN) and tendered his resignation from Vodacom's employ. After a number of discussions, Motsa was persuaded to withdraw his resignation, no doubt in part on account of an improved remuneration package (R4.3 million, plus additional shares).

[5] Clause 16 of Motsa's contract of employment regulates the termination of employment. The relevant clauses read as follows:

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

[6] Clause 18 of the contract contains a series of restraint of trade obligations that apply post termination of employment. Given the parties agreement on the terms of draft order dealing with the restraint component of the present dispute, I do not intend to burden this judgment with a repetition of the entire clause. It is sufficient to say for present purposes that for six months after the date on which Motsa's employment terminates, for any reason, he is restrained from being employed or otherwise engaged in the business of any competitor within a defined geographic area, which by and large comprises Southern and parts of East and West Africa.

[7] On 22 December 2015, Vodacom became aware that MTN had communicated to its senior employees that Motsa had been appointed as its vice-president for the SEA region, which includes Southern Africa, with effect from 1 January 2016. Joosub and Vodacom's chief HR officer, Mr. Mbungela, attempted to contact Motsa on several occasions to determine the accuracy of the MTN communication. On 23 December 2015 Joosub spoke to Motsa, who said that he was considering an offer of employment from MTN but that had not accepted the offer. Later on the same day, Motsa told Joosub that he would be resigning.

[8] On 23 December 2015, Motsa sent an email to Joosub and Mbungela. The email reads as follows:

> Hello Shameel, Hello Matimba,
>
> I hereby officially inform you of my decision to resign from Vodacom effective January 1. 2016.

> This is an extremely difficult decision to make but I confirm to have made it. I really thank you for everything you have done for me and Vodacom.
>
> Monsieur Joosub, Monsieur Mbungela, please accept my deepest regret.
>
> Regards
>
> Godfrey Motsa.

[9] It is not clear from the terms of Motsa's resignation whether he intended that his six-month contractual notice period commence running on 1 January 2016, or whether he was of the view that he would be released from any further obligation to Vodacom with effect from that date. In the answering affidavit, he says that he intended to work his notice period if that was what Vodacom required him to do. That is hard to square with the communication from MTN that Motsa had been appointed with effect from 1 January 2016 but given what transpired later, nothing turns on this.

[10] On 24 December 2015, Joosub circulated an internal email communication. It reads as follows:

> Godfrey Motsa, Chief Officer Consumer Business Unit in Vodacom will be leaving the company with immediate effect to pursue other opportunities.
>
> Godfrey joined Vodacom in 2005 and was appointed to his current role in April 2015.
>
> We would like to thank Godfrey for his contribution during his time at Vodacom and we wish him well in his future endeavours.
>
> We will announce his successor in due course.

[11] Mbugela (who was responsible for an initial draft of the communication) says that the words 'leaving the company with immediate effect' meant no more than that Motsa would not be required to come to work during the notice period, that it was never Vodacom's intention to waive the notice period by making this statement, nor did Vodacom waive the notice period or any part of it.

[12] Later on 24 December 2015, Mbungela says that he attempted unsuccessfully to contact Motsa. He sent a WhatsApp message stating

> GM... we r still colleagues for the next 6 months isn't it? [4 'smiley' emojis inserted]. Pls call me when u hv a moment.

Motsa replied:

> Ok. I will call. Why did you dismiss me with immediate effect. Did you really have to say that. People think I have been fired and I must have committed a serious transgression.

[13] More than two weeks later, on 11 January 2016, Motsa spoke to a Ms. Julie Arndt, Vodacom's executive head for human resources support, and informed her that in his view, he was no longer employed by Vodacom because Vodacom had dismissed him. Motsa undertook not to breach any of his restraint obligations and said that he would only commence work on the South African portfolio of his position at MTN after the expiry of his restraint.

[14] On the same day, 11 January 2016, Mbungela addressed a letter to Motsa. Amongst other things, he recorded that Motsa had in his email dated 23 December 2015 resigned to take up a position with MTN as vice-president of its Southern and East Africa region. The letter records Motsa's obligation to give six months' notice and that by virtue of his resignation and intention to join a competitor, 'it would be inappropriate for you to continue in your current position ... until the end of your 6 (six) months notice period'. The letter continues:

> 6. Although you will not be required to work or attend to your ordinary employment related duties and responsibilities during this period, it will be necessary for you to hold yourself available during this period to assist the company and to provide a seamless transition of your responsibilities at the request of the Company.
>
> 7. Your Guaranteed Cost of Employment remuneration will remain unchanged and will be paid to you until the termination of your employment on 30 June 2016.

8. Since you will remain employed by the company until the end of your 6 month notice period on 30 June 2016, you will remain bound by all of your obligations to the Company in terms of your Executive Contract of Employment and, in particular, your obligation to maintain the confidentiality of the Company's proprietary information.

9. Accordingly and subject to such obligations above, you may not commence employment with, or in any other manner advise, assist or be associated with, any other entity prior to the end of your 6 month notice period on 30 June 2016. Furthermore, you may not commence employment with MTN or any other competitor of the Company prior to 31 December 2016 as this would be a breach of the Restraint of Trade undertaking you have given in favour of the Company.

[15] Motsa did not respond to the letter but it is clear from the papers that at that stage, Motsa was concluding an agreement in terms of which he would provide consultancy services to MTN Dubai. . On 14 January 2016, Vodacom's attorneys addressed a letter to Motsa in terms not dissimilar to Mbungela's letter but in addition demanding formal undertakings from Motsa, amongst others, that he would remain employed by Vodacom until the expiry of the notice period, that he would comply with his restraint of trade obligations.

[16] After a number of further exchanges between the parties and their representatives, on 22 January 2016, Motsa's attorneys addressed a letter to Vodacom's attorneys. In this letter, Motsa confirmed that he had tendered his resignation on 23 December 2015, and that his six month notice period would ordinarily have terminated on 30 June 2016. The letter continues:

3.1 Our client tendered his resignation in writing on 23 December 2015, to take effect from 1 January 2016. His six month notice period would have accordingly terminated on 30 June 2016.

3.2 On 24 December 2015 at 14h32, your client's CEO, Mr. Shameel Joosub, issued an internal communique to all employees of your client, including our client, in which he announced as follows:

> "Godfrey Motsa, Chief Officer Consumer Business Unit in Vodacom will be leaving the company with immediate effect to pursue other opportunities... We would like to thank Godfrey for his contribution during his time at Vodacom and we wish him well in his future endeavours...".

This is followed by references to the same communique, which had been picked up in a number of industry publications. Paragraph 3.7 of the letter continues:

> 3.7 Your client's communiques and conduct on 24 December 2015, which communiques have been confirmed as recently as this week in the industry press, make it evident that after our client tendered his resignation on 23 December 2015, to take effect on 1 January 2016 followed by a six month notice period, your client elected , on 24 December 2015, in terms of clause 16.7 of our client's executive contract of employment with you, to pay him in lieu of notice, in which event our client is not required to work his notice period. Our client has acted on such representation of your client and has entered into an agreement for the provision of consulting services with MTN (Dubai) Limited ("MTN Dubai") with effect from 1 January 2016 for a period of six months. Your client is estopped from contending that our client remains in its employ in light of the representations your client made on 24 December 2015 as set out above, and which representations have been repeated by your client in the publications mentioned above.

[17] The letter goes on to record, amongst other things, that Motsa's engagement as a consultant by MTN Dubai did not constitute a breach of his restraint undertakings, and that Vodacom was indebted to Motsa in a sum equivalent to six months' remuneration in consequence of its election to pay Motsa in lieu of notice.

[18] These proceedings were initiated soon afterward, on 26 January 2016.

The applicable legal principles

[19] The principles that regulate a resignation are well-established. Resignation is a unilateral act; see *Sihlali v South African Broadcasting Corporation* (J799/08; 14 January 2009)). When an employee gives the required notice, the contract terminates at the end of the notice period. When an employee leaves his or her employment without giving the required period of notice, the employee breaches

the contract. Ordinary contractual rules dictate that the employer may hold the employee to the contract and seek an order of specific performance requiring the employee to serve the period of notice. Alternatively, the employer may elect to accept the employee's repudiation, cancel the contract and claim damages. Of course, it is always open to the parties to terminate an employment contract on agreed terms and for either of them to waive whatever rights they might otherwise have enjoyed.

[20] The principles applicable to restraint agreements are equally well-established. In *Massmart Holdings v Vieira & another* (unreported, J1945-15) the court recently summarised them as follows:

> [4] Restraint agreements are enforceable unless they are unreasonable (see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). In general terms, a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint. In other words, a restraint cannot operate only to eliminate competition. The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see 2013 (1) SA 135; *Magna Alloys and Research (SA) (Pty) Ltd* supra; *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D)).
>
> [5] One of the most influential statements of the law in regard to the determination of the reasonableness or otherwise of a restraint of trade agreement is that in *Basson v Chilwan and others* 1993 SA 742 (A). In that judgment, the court established the following test:
>
> 1. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
> 2. Is such interest being prejudiced by the other party?
> 3. If so, does such interest weighs up qualitatively and quantitatively against the interests of the latter party that the latter should not be economically inactive and unproductive?

Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

[21] Precisely what constitutes a proprietary interest and a trade secret worthy of protection is not a matter that arises in the present instance, and I need say no more about it. The primary submission advanced on behalf of Motsa, as I have indicated above, is that the conflation of the garden leave and restraint provisions renders the restraint unenforceable or put another way, Vodacom bargained for a six month restraint period, and that is what the period of enforced garden leave effectively affords it. Mr. Redding SC, who appeared for Vodacom, submitted that both the period of garden leave and the post-termination restraint should be enforced – the period of garden leave as a term of the contract (Vodacom having elected to enforce that term), and the restraint agreement after the expiry of the notice period. Mr. Pretorius SC, who with Ms. Bosman appeared for Motsa, submitted that to enforce a six month restraint after the expiry of a six month period of garden leave would bind Motsa to a restraint longer than had been bargained for, and that any restraint that extended beyond six months was in any event unnecessary to protect Vodacom's legitimate interests.

[22] To the best of my knowledge, the concept of garden leave and its relationship, if any, with a restraint of trade agreement has not been the subject of consideration by the South African labour courts. I was not referred to any authority, but a garden leave clause is understood to typically provide that if an employee gives notice, the employer may require the employee to spend a whole or part of the notice period at home, thus allowing confidential information to which the employee had access to become stale and keeping the employee out of the clutches of a competitor. (See *Harvey on Industrial Relations and Employment Law* A11 -90 paragraph [251]. Whether the employee elects to do any gardening, it would seem, is a matter of personal inclination). The advantage for the employer, of course, is that the employee is rendered commercially inactive because he or she remains in employment, in circumstances where there is no risk to a reasonableness challenge that a restraint undertaking might otherwise attract. Of course, the

disadvantage for the employer is that the employee remains entitled to remuneration for the notice period. In the case of a restraint, of course, the employee is not rendered entirely inactive, at least not outside of the bounds of the restraint. Here, public policy and other considerations play a role and the court must necessarily take into account the employee's right to exercise his or her skills.

[23] There are a number of English and other authorities that deal with the relationship, if any, between garden leave and a restraint agreement. In *William Hill Organisation v Tucker* [1998] IRLR 313 (CA) Morritt LJ said the following, in the context of a case where there was no express garden leave clause in the contract:

> ... there appears to be a trend to increasing reliance on garden leave provisions in preference to conventional restrictive covenants, no doubt because hitherto the courts have treated the former with greater flexibility than the latter as explained by Neill LJ in *Credit Suisse v Armstrong* [1996] ICR 882, 892. But the reported cases dealing with the court's approach to the grant of injunctions in this field show that if injunctive relief is sought, then it has to be justified on similar grounds to those necessary to the validity of an employee's covenant in restraint of trade. It seems to me that the court should be careful not to any greater extent than would be covered by a justifiable covenant in restraint of trade previously entered into by an employee.

[24] In the *Crédit Suisse* case to which Morritt LJ referred, the Court of Appeal held that there was ordinarily no relationship between a garden leave clause and a restrictive covenant, and that if the covenant was valid, the employer was entitled to have it enforced. The court acknowledged the prospect of an exceptional case, where the period of garden leave was long 'perhaps substantially in excess of a year' in which the court might decline any further protection based on a restrictive covenant. In that case, the court upheld a post-termination restraint in circumstances where the employee had already served a period of six months on garden leave. *Crédit Suisse* has been applied in a number of subsequent decisions. Later judgments indicate a different trend. In the more recent decision in *Tullett Prebon plc v BGC Brokers LP* [2010] EWHC 484 (QB), the court stated:

> [224] Where the court considers that the period for which the employer is entitled to protection ends during the time for which the employee may be on garden leave, it will enforce the garden leave provision for that period, and will decline to enforce any post termination restriction. It will decline the latter because the employer will already have got all the protection he is entitled to, and the Court has the discretion not to enforce an enforceable post termination restriction or covenant where the circumstances are such that it should not.
>
> [225] The court may consider that the period for which the employer is entitled to protection extends beyond the period which is available for garden leave and into the period covered by an enforceable post termination restriction or covenant. The court will then exercise its discretion as to the enforcement of the restriction and will enforce the restriction for the whole or such part of the period provided by the terms of the restriction as is appropriate...

[25] In *Air New Zealand v Grant Kerr* ([2013] NZEmpC 153 ARC 38/13), the New Zealand Employment Court recently held, after a consideration of the above and other authorities, that the 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-termination restraint covenant (se paragraph [71] of the judgment).

[26] I see no reason to adopt a different approach. 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. This position would be consistent with the broader public interest, which militates against having experienced and competent employees inactive and their skills atrophy during any unreasonably long exclusion from commercial activity. Not that these considerations are definitive, of course – the courts must also take into account the fact that highly-

paid executive employees command the eye-watering remuneration packages they do at least partly on account of restraint and other 'golden handcuff' clauses in their contracts. But ultimately, the question that remains to be answered is whether any period of enforced commercial inactivity, whether by way of a garden leave clause or a more conventional restraint or both, is unreasonable having regard to the proprietary interests that the employer seeks to protect.

Analysis

[27] It makes sense first to deal with Motsa's obligation, if any, to serve a notice period. Here, the central issue is whether or not Vodacom waived its right to have Motsa work out his notice period or, put another way, it elected to terminate Motsa's employment with immediate effect and pay him lieu of notice. As I have indicated above, Motsa contends that Vodacom elected to pay him in lieu of notice and that his contract of employment terminated immediately. Vodacom denies any agreement to this option and contends that by failing to give the required notice, Motsa breached the contract of employment. Vodacom seeks to hold Motsa to both the 'garden leave' option and the post-termination restraint period.

[28] The rule ordinary applicable is that motion proceedings are not designed to resolve factual disputes and that where factual disputes are fully explored in the evidence, they must be resolved in favour of the respondent (see *Plascon Evans Paints Ltd v Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)). In other words, the court is bound by the facts in Vodacom's affidavits that Mots admits and the facts deposed to by Motsa, unless they are so far-fetched or clearly untenable that the court is justified in rejecting them on the papers (see *Plascon Evans* (supra) at 634-5).

[29] In my view, any dispute of fact is more apparent than real and as will appear below, the court is in a position to make a decision on Motsa's version. The *Plascon Evans* rule does not bind a court to a respondent's expressions of opinion or say-so. The court must have regard to the facts as they are presented. In the present instance, what Motsa thought that the communique meant is neither here nor there – the court must assess the wording of the communique objectively and determine

it can be said that the communique discloses an election by Vodacom not to hold Motsa to his notice period and to pay him in lieu of notice.

[30] Clause 16 of Motsa's contract of employment afforded Vodacom three options in respect of the notice period. Motsa could be required to work a notice period, during which he would continue to work normally and be paid; the 'garden leave' option, during which Motsa would be paid to remain at home but remain available to 'assist' Vodacom and provide 'a seamless transition of his responsibilities'; and thirdly, payment in lieu of notice, in which event the contract would terminate with immediate effect and Vodacom would pay Motsa the remuneration he would have earned during the notice period.

[31] In support of his contention that Vodacom elected to terminate his employment and pay him in lieu of notice, Motsa relies only on the email communication to the effect that he was leaving Vodacom 'with immediate effect'. The email does not refer to Vodacom having elected to pay Motsa in lieu of notice.

[32] Motsa does not dispute that in his telephone conversation with Joosub on 23 December 2015, Joosub referred to the options that Vodacom had available to it in relation to his contract of employment. He states only that Joosub did not state which option Vodacom would be pursuing. Nyoka provides a detailed exposition on the telephone conversation between him and Motsa on the same date, and specifically avers that he informed Motsa that if he were to resign and take up employment with a competitor, Vodacom would enforce both the notice and restraint undertakings contained in his contract. Motsa denies Nyoka's averments, except to the extent to which they conflict with the version that he proceeds to set out. He admits the telephone conversation, and a discussion on the various options open to Vodacom. Similarly, in relation to the averment that Mbungela advised Motsa on 23 December 2015 that he would not be required to work during his notice period and that he would be bound by a post-termination restraint, Motsa denies that he was advised that he would be subject to a notice period during which he would not be required to come to work.

[33] What Motsa does not say at this point is that Vodacom had elected to waive any right to elect that he serve his notice period. That is a version that emerged only much later. Motsa's resignation and his response to the communique must be assessed against the uncontested facts that he was reminded, before he submitted his letter of resignation, by no less than Joosub, Nyoka and Mbungela, that the termination of his employment was subject to a six month notice clause and a six month restraint, and that it was for Vodacom to elect whether or not to enforce these provisions. Despite this, Motsa resigned, intending at that stage to join MTN, Vodacom's largest competitor.

[34] On Motsa's own version, at the time when the communique was issued on 24 December 2105, he did not understand this as any form of election or waiver – his only concern was for his reputation and in particular, that the wording might be construed to the effect that he had been dismissed for misconduct. This is simply inconsistent with a belief that he had been the beneficiary of a waiver entitling him to leave Vodacom's employ immediately with six months' remuneration.

[35] Further, until the much later exchange of correspondence by the parties' legal representatives, there is no evidence to indicate that Motsa ever expressly entertained the thought that the communique constituted a waiver of his notice period and an election to pay him in lieu of notice. What is particularly significant is that Motsa is not able to point to a single meeting, telephone conversation or item of correspondence, after he had received advice on the options open to the Vodacom should he resign, that indicates even remotely that Vodacom had decided to release him from his notice period, even less to pay him in lieu of notice. The communique issued to Vodacom's employees on 24 December 2015 and the general notice that Motsa would be leaving Vodacom 'with immediate effect to pursue other opportunities' does not unequivocally state that Motsa would be leaving Vodacom's employ with immediate effect, nor does it say that he is released from his notice period, or that he would be paid in lieu of notice. The communique is nothing more than the standard mealy-mouthed public relations response by any corporation to the resignation of a senior executive; it is quite

capable of sustaining the conclusion that Motsa would no longer be physically present at work, with immediate effect, for the duration of the employment relationship.

[36] In so far as Mr. Pretorius contended that what Vodacom seeks is an order for specific performance and that the court ought to be disinclined to grant such an order, the traditional reason for refusing specific performance is the personal nature of the employment relationship. That is not a relevant consideration in the present instance. In any event, the court has a discretion to make an order for specific performance. The six month notice clause was clearly intended to render Motsa commercially inactive for that period; the wording of the clause says as much. I do not understand him to contend that such a provision is against public policy or unenforceable on some or other basis. Motsa knew what he was signing when he entered into his employment contract and I see no reason why he should not be held to it.

[37] In short: On his own version, Motsa has failed to establish that Vodacom waived its rights to enforce the notice period. There is no reason why Motsa should not be held to the terms of his contract. Motsa's contract expressly affords Vodacom the discretion to enforce the agreed period of garden leave. Motsa is therefore bound by Vodacom's election to enforce clause 16.6 of his contract, which terminates on 30 June 2016.

[38] I turn next to Motsa's restraint undertakings. As I have concluded, these stand to be scrutinised in accordance with the ordinarily applicable principles, subject to a reading of the restraint so as to include the period of garden leave.

[39] Although a garden leave clause might make no express reference to any intention to 'sterilise' an employee, that is the effect. So while clause 16 of Motsa's contract refers to obligations to 'assist' Vodacom and 'provide a seamless transition of his responsibilities' (whatever that means), the fact of the matter is that for the period of garden leave Motsa will not have access to any of Vodacom's trade secrets, whether in the form of confidential information or otherwise, and any trade connections which may have some value to MTN. Indeed, that is what the wording

of clause 16.6 contemplates, to the extent that it expressly prohibits Motsa, during the period of garden leave, from having contact with Vodacom's customers and clients.

[40] It is not disputed that Motsa was a senior executive, a director of Vodacom and a member of its exco. It is also not disputed that Motsa is responsible for significant aspects of Vodacom's commercial business, including sales, marketing, data collection and the management of consumer sales, product strategy, wholesale products and services, community services, customer relationship management, and dealer relationship and supply chain management.

[41] In this capacity, Motsa is privy to strategic business decisions on a micro-level. He is also privy to strategic decisions taken and instructions issued by the exco of Vodaphone Plc, at least in respect Vodacom's South African business. Motsa does not dispute that he attended a strategy planning meeting for the Vodacom group held in Cape Town in December 2015, where matters of macro-strategic importance were discussed. He does not deny that at the meeting, the group presented its strategic plan for the forthcoming three years, a plan that covered every aspect of Vodacom's business. It would not be an understatement to say that Motsa has intimate knowledge of Vodacom's short and longer term strategic plans, and it is obvious that this information would be of benefit to a direct competitor. On this basis alone, and given the useful life of the information to which Motsa has been exposed, in my view, a period of restraint that spans effectively the 12 month period following Motsa's resignation, is not unreasonable.

[42] In summary: I am satisfied that Vodacom is entitled to the enforcement of the post termination restraint agreement, on the terms reflected in the draft order.

Costs

[43] The court has a broad discretion to make orders for costs according to the requirements of the law and fairness. None of the conventional factors which militate against a costs order are present in this case. There is no reason why costs ought not to follow the result.

I make the following order:

1. It is declared that the first respondent's contract of employment terminates on 30 June 2016.
2. The first respondent is interdicted and restrained from 1 July 2016 until 31 December 2016:
   - 2.1. from being interested in, engaged in, concerned or associated with or employed by the second respondent or any of its subsidiaries or affiliate companies, where such engagement, association or employment constitutes a breach of the restraint agreement contained in his contract of employment with the applicant.
   - 2.2. from becoming involved in any capacity of whatsoever nature with the second respondent and its subsidiaries or affiliate companies, where such involvement would constitute a breach of the restraint provisions in the contract of employment, which include, but are not limited to, the first respondent being a member of and/or participating in, in any manner whatsoever, whether as a consultant or otherwise, any committee or other forum having purview of and/or directly or indirectly exercising influence and control over the second respondent or the businesses conducted by the second respondent in South Africa, Tanzania, DRC, Mozambique, or Lesotho.
3. The first respondent is interdicted and restrained from disclosing any confidential information of the applicant, such information being any information to which the first respondent became privy by virtue of his employment with the applicant, and which would be of assistance to a competitor to enable such competitor to compete against the applicant and would ordinarily be known to such competitor.
4. The first respondent is to pay the applicant's costs, such costs to include the costs of senior counsel.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Adv AIS Redding SC, instructed by ENS Africa

For the first respondent: Adv P Pretorius SC, with him Adv P Bosman, instructed by Webber Wentzel