IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J4376/2018

In the matter between:

GRAFFITI DESIGN PROPRIETARY LIMITED **Applicant**

and

JEFNEY LERATO TEFFU **First Respondent**

PICAL PROPRIETARY LIMITED **Second Respondent**

Heard: **19 December 2018**

Delivered: **22 January 2019**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

[1] The applicant (Graffiti) seeks an order interdicting and restraining the first respondent (Teffu) until 17 October 2019 and in the Republic of South Africa, from being employed by the second respondent (Pical) or from being directly or indirectly engaged by any of its competitors. An order is further sought interdicting and restraining Teffu from breaching the terms of a confidentiality and restraint of trade agreement that was signed in favour of Graffiti on 7 October 2013, and from further disclosing its confidential information to any third party including Pical. Only Teffu opposed the application.

[2] In opposing the application, Teffu was initially assisted by her erstwhile attorneys, who had filed an answering affidavit. The attorneys withdrew from the matter on 13 December 2018. Teffu's contention was that the withdrawal was due to the reason that she could no longer afford to pay for legal services. She appeared in person in these proceedings.

[3] Graffiti is a specialist Fleet and Vehicle, Tarpaulins, Indoor and Outdoor branding company. Teffu was initially employed as its Retail Project Manager in October 2013 and was subsequently promoted to the position of Lead Projects Manager. Teffu nonetheless denied that there was a promotion, and contends that she was merely given a changed title which did not entail a change in her duties.

[4] It is not in dispute that upon her employment, Teffu had as part of her contract of employment, also signed the written Confidentiality and Restraint Agreement[1]. She resigned from Graffiti's employ with effect from 17 October 2018. Upon being asked who her prospective employer was in the light of the restraint undertakings, Teffu's response was merely that she was going to join an advertising agency, and had refused to divulge the details of her new employer or the nature of its business. Graffiti thought nothing much of this information as it had no conflict with advertising agencies.

[5] It subsequently came to Graffiti's attention that Teffu had commenced employment with Pical with effect from 18 October 2018. Pical according to Graffiti is a direct competitor, which operate in the same market, for the same or similar customers, and had in the past, poached its employees.

[6] Graffiti further contends that Pical has been in the business of Vehicle Branding for the last seven years, and it further conducts business in the transport, interior, exterior and retail branding industry. It had been attempting to enter the branded tarpaulins and Truck Top market business.

[7] Graffiti further contends that, whilst in its employ, Teffu was one of the most critical employees within its Fleet and Vehicle and tarpaulins branding

[1] Annexure 'RJW1' to the Founding Affidavit

division, and had reported to the Production Manager. It was contended that she had handled the job inflow and outflow, and was accordingly responsible for the planning, execution and monitoring of all projects from the customer inflow stage to the invoicing stage, and was therefore one of its main faces in the Fleet and Vehicle branding business, as she further interacted with major clients including City of Johannesburg, Avis and JMPD. To this end, it was further contended that she was privy to confidential information and trade secrets including customer portfolios, pricing structures, production IP, fleet list, full customer lists, turnover, revenue, strategies for growth, customer contacts, strategies, which confidential information and trade secrets were deemed to be proprietary to Graffiti.

[8] It was further contended that as Lead Project Manager, Teffu through her regular access to and contact with Graffiti's clients, she developed and maintained significant relationships with those clients, which relationships were similarly proprietary to Graffiti.

[9] Teffu opposed the application on a variety of grounds, including that the application was not urgent; that Pical was not a direct competitor of Graffiti as the two entities focussed on different businesses; that there was no basis for enforcing the restraint as her employment with Pical was not in breach of the restraint; that she was not during her employ by Graffiti, exposed to sales and business; was not privy to confidential information or customer connections; and essentially that the enforcement of the restraint would cause her prejudice.

Urgency:

[10] It is accepted that matters involving enforcement of restraint provisions are inherently urgent[2]. The duration of the restraint in this case is 12 months, and on the facts, I did not understand it to be placed in dispute that upon Graffiti having learnt that Teffu had taken employment with Pical, certain undertakings were sought from her and when these were not forthcoming, Graffiti had then approached the Court for relief. Even if it can be said that

[2] *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) 89A

there was a significant delay in approaching the court, I am satisfied that a reasonable explanation in that regard has been proffered, and the facts and circumstances of this case dictate that it be accorded urgency.

The legal framework and evaluation:

[11] The principles applicable to the enforcement of restraint undertakings are fairly well established. In this regard, an applicant seeking to enforce the restraint provisions need only invoke the contract and prove a breach of its terms. It is thereafter for the respondent to demonstrate on a balance of probabilities, that the restraint provisions are unenforceable on account of being unreasonable[3].

[12] The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations, and the right to freely choose and practice a trade, occupation or profession. It is also generally accepted that a restraint will be considered to be unreasonable (and thus contrary to public policy and unenforceable), if it does not protect some legally recognisable interest of the ex-employer, but merely seeks to exclude or eliminate competition[4].

[13] Central to an enquiry into the reasonableness of the restraint are four interrelated questions as identified in *Basson v Chilwan and others*. These are:

i. Does the one party have an interest that deserves protection at the termination of the employment?

ii. If so, is that interest threatened/prejudiced by the other party?

iii. Does such interest weight qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

[3] See *Basson V Chilwan* 1993 (3) SA 742 (A); *Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)
[4] See *Labournet (Pty) Ltd v Jankielsohn and Another* [2017] 5 BLLR 466 (LAC) at paragraphs 39 to 45; *Sunshine Records (Pty) Ltd v Frohling and others* 1990 (4) SA 782 (A) at 794C-E

iv. Is there an aspect of public policy having nothing to do with the relationship between the parties, which requires that the restraint be maintained or rejected? Thus, where the interest of the party sought to be restrained outweighs the interest to be protected, the restraint is unreasonable and consequently unenforceable[5].

[14] A further consideration should be added, namely whether the restraint is wider than what is necessary to protect the protectable interest[6].

Was there a Breach of the Restraint undertakings?

[15] In regards to the alleged breach, and since it was common cause that Teffu had joined Pical, the issue is whether the latter is a competitor of Graffiti for the purposes of determining whether Teffu's employment with Pical constitutes a breach of the restraint provisions.

[16] Teffu's contention was that there could not have been a breach since the two entities are not competitors, and secondly since Graffiti's main business entailed vehicle and tarpaulin branding, whilst Pical was involved in creative marketing and shopfitting with minimum branding. Teffu further averred that Pical offered more products and services than Graffiti, and that vehicle branding was only a small part Pical's business.

[17] As it was correctly pointed out on behalf of Graffiti, once Teffu had conceded that there was a competitive interface between the businesses of the two entities, it follows that her denials that the two are not competitors should be considered as being without merit. The overall conspectus of the evidence clearly demonstrates that Pical is in the business of exterior and interior branding, transport and retail branding[7], thus offering the same or similar services as Graffiti, which it clearly competes with.

[18] Pical's business *motto* is '*Branding Made Easy'*, and it cannot be correct to suggest that its involved in branding is on a limited scale. To the extent that

[5] At 767C-H
[6] See *Kwik Kopy (SA) (Pty) Ltd v van Haarlem & Another* 1999 (1) SA 472 (W) at 484E; *Shoprite Checkers (Pty) Ltd v Jordaan & another* (2013) 34 ILJ 2105 (LC)
[7] Annexure 'RJW7' to the Founding Affidavit

Teffu conceded that the two entities operate in the same, small and highly competitive industry, but had in the same vein taken employment with Pical, she had indeed acted in breach of her restraint undertakings[8]. On the whole, I am satisfied that Graffiti has discharged its onus in this regard.

[19] Teffu had further contended that as Lead Project Manager, she could hardly be deemed to be a critical employee of Graffiti as she was not involved in its tarpaulin division or in sales, and that she was merely involved in the execution and management of orders. Obviously these contentions are aimed at creating the impression that she would not be able to assist Pical to compete against Graffiti. The contentions are however unsustainable where a clear competitive interface between the two entities has been established.

[20] A further significant factor is that Teffu conceded that she was employed by Pical as Head of Projects, and would have the same or similar responsibilities to that of the Lead Project Manager. She however contended that even though the responsibilities would be similar in terms of project management functions, her role at Pical was different in terms of *job spec* and products offered. On a conspectus of the evidence however, Teffu clearly seeks to downplay her role whilst employed at Graffiti. She was definitely not a very junior employee with a marginal involvement in the business. The evidence further reflects that in her position, she was nonetheless fully immersed in Graffiti's business.

Protectable Proprietary interests?

[21] There are two kinds of proprietary interests that can be protected by a restraint agreement. The first relates to all confidential information (Trade Secrets) which is or might be useful to a competitor, if disclosed to it, to gain a relative advantage. The second relates to the relationships with customers,

[8] Clause 3.2 **Non- Solicitation undertakings** provides that;

"In order to protect the proprietary interests of the company, the employee irrevocably undertakes in favour of the company that he shall not, in any capacity whatsoever, for the duration of the employee's employment with the company and for a period of twelve (12) months from the termination date-

3.2.2.2 become employed by, associated with and/or form part of any business or concern, in any capacity whatsoever, which conducts business in competition with the company"

potential customers, suppliers and others that have been referred to as the 'trade connections' of the business.

[22] Whether information constitutes a trade secret is a question of fact. For information to be regarded as confidential and thus worthy of protection, it must be capable of application in the trade or industry (*i.e*. it must be useful and not be public knowledge); must only be known to a restricted number of people or a closed circle; and must be of economic value to the person seeking to protect it[9].

[23] In this case, the onus is upon Teffu to demonstrate that she had no access to that information or that she had never acquired any significant personal knowledge of it whilst in the employ of Graffiti. The latter on the other hand however, only needs to demonstrate that indeed Teffu had access to such information, which could be transmitted to and utilized by Pical. Graffiti need not demonstrate that the confidential information had in fact been utilized, and all that it needs to show is that Pical could do so.[10]

[24] It cannot be doubted that information such as customer lists including the names and contact details of key customers and their requirements; sales, business and marketing strategies; pricing of products of clients; the terms of contractual relationships with suppliers and the terms of supply; business financial information including revenue generated; and information and contact details of suppliers, is confidential. Such information in a competitive market is clearly capable of application in the trade or industry , and is of economic value to the person seeking to protect it, unless the person seeking to escape from the restraint provisions can demonstrate that such information is either useless to other persons, or alternatively, that it cannot be deemed to be confidential as it was in the public domain. Graffiti contends that Teffu was privy to this type of information during her employment, and that it remains useful in the hands of competitors.

[9] See *Profibre Products (Pty) Ltd v Govindsami* (J1448/18) [2018] ZALCJHB 240 (5 June 2018) at para [13]
[10] *BHT Water treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) at 57J-58D:

[25] Teffu's contention on the other hand was that she was not privy to any of Graffiti's confidential information, as she was not involved in any of its strategies, sales and pricing structures. She further contended that she was not given full access to confidential information, and that the limited information she had access to was public knowledge.

[26] Whether Teffu was privy to and had access to confidential information for the purposes of determining whether those interests are worthy of protection has to be assessed within the context of the functions she had performed whilst in the employ of Graffiti. As already indicated, Teffu in her capacity as Lead Projects Manager was according to Graffiti, responsible for planning, executing and monitoring of projects carried out from time to time that customers had appointed Graffiti to perform the work, up to the invoicing stage.

[27] Annexures 'RA7' and 'RA8' to the Replying Affidavit further indicates that despite her denials, Teffu was involved in the tarpaulin business of Graffiti, whilst annexure 'RA6' to the Replying Affidavit indicates that she was involved in the bringing in of new business between 9 January 2017 and October 2018. Similarly, she conceded to having had limited information or knowledge of sales figures, and had contended further that the limited knowledge she had such as material sold to clients was already in the public knowledge as it was communicated to clients through enquiries and quotes.

[28] I did not understand it to be Teffu's case that in her position as Lead Projects Manager, she was not responsible for the management of projects carried out for Graffitti's clients, and further that she was not responsible for overseeing the process of each project. It would therefore have been impractical for her to have carried out these functions without being privy to any confidential information.

[29] Further based on the annexures to the Replying Affidavit referred to above, again Teffu seeks to downplay the amount of confidential information she had access to. As already indicated, given Teffu's relatively senior position, it is impossible that she could have performed her duties without access to any such confidential information. It is therefore not sufficient for her to simply

allege that the information in question was limited, or was in the public domain, or was not confidential. The fact of the matter is that confidentiality is relative, and she had acquired that information in the course of her employment relationship with Graffitti. The fact that such information might have been in the public domain does not make it less confidential[11]. It remains protectable.

[30] In regards to customer connections, the need for Graffiti to protect its trade connections arises where it has been demonstrated that Teffu had whilst in its employ, gained access to its customers, that such connections exists, and she was in a position to build up a particular relationship with those customer so that when she left its employ, she could easily induce those customer to follow her to Pical. It is then for Teffu to demonstrate that she never acquired any significant knowledge of or influence over Graffiti's customers whilst in its employ.

[31] Teffu had denied that she was the primary and critical liaison between Graffiti and some of its major clients. She in fact denied that there was a need for her to meet clients, and contended that she was not required to meet with clients on a regular basis, unless post application on extreme cases where the client was aggrieved by services rendered. She denied having established strong relationships with clients, and contended that was not in a position to influence them in any way.

[32] It has already been concluded that given the nature of her functions and responsibilities, on the facts, it would not have been possible for Teffu to fulfil those functions unless she had access to clients, their details, requirements and needs. Equally so, and despite her denials, the facts point that Teffu had indeed dealt with various clients of Graffiti, and in particular, the City of Johannesburg, Avis, and JMPD. As pointed out by Graffiti in the replying

[11] See *Experian South Africa (Pty) Ltd v Heyns and Another* [2013] (1) SA 135 (GSJ) at para 44, where it was held that;

> 'All of the above, in my view, constitute confidential information which is proprietary to the applicant and which it is entitled to protect. It follows that first respondent's contention that this information to which he had access whilst employed by the applicant is not confidential cannot be sustained. In any event, the contention is legally untenable in that it is clear from several reported judgments on this issue, that irrespective of whether or not information is in the public domain, the fact that the first respondent has obtained such information within the context of a confidential relationship means that it in fact is protectable….'

affidavit, Teffu may not have at times interacted with these clients on her own as she had accompanied its Operations Director (Richard Wood), when consulting with those clients. However, annexures 'RA2' and 'RA3' to the Replying Affidavit demonstrate Teffu's direct communication with the contact persons of those clients, particularly Avis and City of Johannesburg. She was clearly the contact person of Graffiti when its clients sent through order forms.

[33] It is worth repeating that Teffu's position as Lead Project Manager was at a reasonably senior level. Despite her denials, which at most times were bare, it is inescapable that she must have had access to and must have developed relationships with Graffiti's clients. It suffices as in this case, that Graffiti has established that trade connections through customer contact existed between her and its clients, and further that these could be exploited for the benefit of Pical. I am persuaded that this risk is real[12].

[34] A further consideration in this case relates to how Graffiti's interests weighs qualitatively and quantitatively against those of Teffu to be economically active and productive. In *Sunshine Records (Pty) Ltd v Frohling and Others*[13], it was held that;

> 'In determining whether a restriction on the freedom to trade and to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons in the interests of society, be permitted as far as possible to engage in commerce or professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations, a court will obviously have regard to the circumstances of the case before it.'

[35] Central to Teffu's submissions was that she would suffer extreme prejudice in the current economic climate should the restraint be enforced and her

[12] See *Experian* at para 20
[13] [1990] 1 ALL SA 8 (A) at 41 and 42.

employment with Pical be terminated. This was even more particularly so as the period of the restraint was 12 months and throughout the Republic. She had contended that her current trade was the only one she had studied and knew, and that the restraint would further cause her and her dependent son prejudice.

[36] It is accepted that questions of enforcement of restraint of trade undertakings will always raise the conundrum between the sanctity of contracts and the constitutionally entrenched freedom of trade, occupation and profession[14]. Central to this debate however is the fact that such undertakings are freely and willingly made, and employers expect employees to be bound by those undertakings. Whether it can in each case be said that such undertakings were freely and willingly made is a subject of another debate in view of the constant counter-argument that an unemployed person will sign anything to secure employment in these hard economic times, and further that prospective employees always bargain from a position of weakness.

[37] The issue however as in this case is that once it is established that such restraint provisions exists; that there was in fact a breach; and further that a case has been made out for a protection of proprietary interests, the issue is whether there is any facet of public policy that militates against the enforcement of the restraint.

[38] On Graffiti's undisputed version, Teffu upon having resigned, was requested to re-consider her decision. She had nonetheless refused to do so. Upon being asked where she was going to be employed, her response without divulging much, was that she was going to join an advertising agency. Since Graffiti had no reason to believe that there was conflict with the business Teffu intended to join, her word was trusted. It had however turned out that she had joined a competitor.

[39] The Court will always take a dim view of ex-employees under a restraint who seeks to escape such provisions when they had caused the very unfortunate circumstances they find themselves in. Teffu in this case knew that she was bound by the restraint and confidentiality undertakings. Had she come out

[14] Section 22 of the Constitution of the Republic of South Africa, Act 108 of 1996

clean and informed Graffitti about where she was going to be employed, she would then have been told at that stage that her move to Pical would have been in conflict with her undertakings. She nonetheless refused to reveal who her prospective employer was, told untruths, and took a risk. She cannot now argue that the restraint provisions are unreasonable when her deliberate choices come back to haunt her.

[40] For what it is worth, it is not correct as Teffu had alleged, that the industry she is currently in is the only one where she can be employed. To the extent that she had conceded that she had informed Graffiti when she left that she was going to join an advertising agency, which Graffiti had accepted as not being a threat, she remains able, for the period of the restraint, to seek employment in the advertising industry, or alternatively in the marketing industry, and with parties that are not in direct competition with Graffiti.

[41] Further concerns raised by Teffu about security of employment and financial prejudice as a consequence of the duration and area of the restraint are as already indicated, factors that she brought upon herself. In any event these concerns do not in themselves, raise issues of public policy that serve to outweigh the basic principle that parties ought to be bound by agreements which they freely and voluntarily enter into.

Conclusions:

[42] Where a final order is sought, three essential requisites must be met. Thus, there must be a clear or alternatively a *prima facie* right, secondly an injury actually committed or reasonably apprehended, and lastly, the absence of any other satisfactory remedy[15].

[43] In this case, I am satisfied that Graffiti has established a clear right in the light of the interests it seeks to protect, and that Teffu by virtue of her employment with Pical, is in a position to threaten those interests. Those interests which Graffiti seeks to protect outweighed those of Teffu not to be economically inactive and unproductive. In any event, and as already illustrated, it is not as if the enforcement of the restraint would leave Teffu without choices or

[15] See *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431(CC) at para 39.

alternatives, and it cannot be said that she would be rendered economically inactive.

[44] I am also satisfied that the enforcement of the restraint provisions is not meant to stifle competition but to protect Graffiti's proprietary interest against any harm posed by Teffu's association with Pical. Graffiti's alternative remedies in the circumstances are limited if not non-existent if the restraint is not enforced, given its limited duration and the harm posed by Teffu's employment with Pical. In the circumstances, it is concluded that Graffiti has made out a case for the relief that it seeks, and in particular, the enforcement of the restraint and confidentiality undertakings. I have further had regard to the requirements of law and fairness, and deem it not appropriate to make any cost order.

[45] Accordingly, the following order is made;

Order:

1. The forms and service provided for in the Rules of this Court are dispensed with, and the matter is dealt with as an urgent application.

2. The First Respondent is interdicted and restrained;

   2.1 until 17 October 2019 and in the Republic of South Africa, from taking up employment with the Second Respondent or directly or indirectly, being employed by, concerned, engaged and/or associated with, interested in and/or form part of any business or concern, in any capacity whatsoever, which conducts business in competition with the Applicant;

   2.2 Until 17 October 2019, from breaching the provisions of the Confidentiality and Restraint Agreement as annexed to her contract of employment with the Applicant marked 'B'.

   2.3 From disclosing the confidential information of the Applicant to any third party including the Second Respondent.

3. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant:	P. Bosman
Instructed by:	Mervyn Taback Incorporated
For the First Respondent:	In Person