IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1633/23

In the matter between:

MPU COMMUNICATIONS (PTY) LTD	**Applicant**
and	
GRIFFITHS DARLY GRAHAME	**First Respondent**
JANTJIES CHARLES ISAAC	**Second Respondent**
COOMBE-HEATH CAROLINE	**Third Respondent**
RYLE LUKE RICHARD	**Fourth Respondent**
OCTOPI SMART SOLUTIONS (PTY)	**Fifth Respondent**

Heard: **25 January 2024**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 7 February 2024.**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant approached this Court seeking the enforcement of the restraint of trade agreement and confidentiality undertakings against the first – fourth respondents. The applicant further sought to interdict and restrain the fifth respondent from unlawfully competing with it and moreover, for the first respondent to return to the applicant all proprietary information, documents, records, client lists, price lists, and suppliers' information.

[2] The application is opposed by the second respondent, who did not seriously challenge the urgency of the application. The Court will exercise its discretion and accordingly treat the matter as urgent. At the commencement of the proceedings, the parties handed in copies of settlement agreements in respect of the dispute between the applicant, the first, fourth and fifth respondents. These settlement agreements are made orders of the Court in accordance with the parties' request.

[3] The third respondent did not file any answering affidavit nor did she make an appearance in these proceedings. The applicant accordingly sought an order in her absence.

Background:

[4] The applicant as its name suggest is in the business of communications. Its business constitutes the provision of products and services comprising of the supply of IOT (Internet of Things) and technology solutions, *inter alia*; internet connectivity, cloud solutions, managed IT services, network security and surveillance.

[5] The applicant and the second respondent entered into contract of employment on 16 September 2021. The second respondent commenced his employment with effect from 1 October 2021 as a National Channel Manager at the applicant's Gauteng Branch. It is not in dispute that the second respondent bound himself to restraint of trade and other undertakings as per his contract of employment.

[6] In accordance with the restraint provisions, which are typical of such provisions as pertaining to proprietary interests (Customer and potential customer connections and secret and confidential information), the second respondent had *inter alia* agreed and acknowledged that during his employment, he would become 'privileged' to the applicant's confidential information which shall not be divulged to any unauthorised persons or bodies relating to any aspect of his work or to any operations or processes of the applicant and not to be employed directly or indirectly by any company, persons or entity involved in the marketing of the applicant's specific or related

products. He had further acknowledged that by his association with the applicant he will have access to the applicant's trade secrets, proprietary and confidential information.

[7] The restrained provisions were to endure for a period of 12 months from the date of termination of the employment contract, and within a radius of 100 kilometre from the branch at which he was employed. They were further to remain binding irrespective of how the termination of the employment came about. In acknowledgement of these restraint provisions and undertakings, and for his willingness to be bound by them, an extra amount of R1000.00 was added to his total monthly costs to the company.

[8] It is further not in dispute that the first – fourth respondents were informed on 15 August 2023 of possible retrenchment in terms of section 189 of the Labour Relations Act[1] (LRA), and notices in this regard were issued on 31 August 2023. On 19 September 2023 they were formally informed of the retrenchments and offered packages, which they had accepted. The second respondent's last date of service was on 29 September 2023, despite serving his notice in October 2023.

[9] On 19 October 2023, the applicant's attorneys of record sent correspondence to the second and third respondents requesting certain undertakings including adhering to the terms and conditions of the Restraint of Trade and Non-Disclosure Agreements. They were essentially requested to make undertakings that they shall not contact, solicit, or engage with any of the applicant's customers or suppliers; not divulge its private, confidential, and proprietary information for their own gain of that or third parties; and that they should return all proprietary information in whatever form in their possession. No such undertakings were given hence the application before the Court.

Condonation for the late filing of the answering affidavit:

[10] The applicant's contention was that the second respondent's answering affidavit was not properly before the Court as it was filed and served outside of

[1] Act 66 of 1995, as amended.

the set time limits. This application was served on the second respondent on 23 November 2023. The applicant enrolled the matter for 25 January 2024. The second respondent was required to file the answering affidavit on no later than 29 November 2023. He had only filed his notice of intention to oppose on 14 December 2023, followed by his answering affidavit on 10 January 2023.

[11] The applicant in the answering affidavit to the main application had sought condonation and explained that the delay was because of belonging to Legalwise, which had to go through its own internal processes in deciding whether to assist him. He further attributed the delay to the fact that when the application was served, it was at the time that Legalwise's panel of attorneys were winding up for the year end, and it took time before his current attorneys of record could assist him.

[12] The applicant contends that the second respondent's explanation is insufficient and does not demonstrate good cause. The principles applicable to condonation applications need no introduction and are as set out in *Melane v Santam Insurance Co. Ltd*[2]*.* Thus, it is required of an applicant to demonstrate *good cause* why condonation should be granted. The court in the exercise of its discretion in this regard will consider all the relevant facts including, the degree of lateness, the explanation therefor, prospects of success and the importance of the case. These factors are interrelated but not individually decisive and must be weighed against each other. Of crucial importance when considering the relevant factors, is whether in the end, the interests of justice requires that condonation be granted or refused[3].

[13] Inasmuch as the applicant's explanation is scant on details and clearly fails to account for each period of the delays, the Court accepts that in view of the timing of the service of the application, and the enrolment of the matter on 25 January 2024, clearly a delay of about ten days inclusive of the holidays during the festive season is not excessive. Furthermore, the applicant cannot speak of any prejudice given the timelines it had set.

[2] 1962 (4) SA 531 (A) at 532B – E.

[3] See *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at paras 22-3 and 51.

[14] It is trite that a restraint of trade provision invariably entails a curtailment of an individual's rights under section 22[4] of the Constitution of the Republic[5], whilst at the same time it seeks to protect the proprietary interests of an employer. These are however matters that clearly requires that individuals whose rights are affected be afforded a say as to whether this Court should countenance such curtailment. The applicant notwithstanding the inadequate explanation, was without employment at the time that the application was served, and had to rely on Legalwise. This was at the time that attorneys like all industries were winding up for the festive season hence only a notice of intention to oppose was filed at the time. Given the circumstances of this case, the length of the delay and explanation proffered in that regard, and the second respondent's constitutional rights which are central to this application, clearly the interests of justice in these circumstances dictate that condonation be granted.

The merits and the legal framework in restraint of trade disputes:

[15] The applicant seeks a final interdict. The requirements[6] to be met are first, there must be a clear right on the part of the applicant. This means that the applicant must prove on a balance of probabilities the right which it seeks to protect. To the extent that there may be any factual disputes arising from the papers, these must be resolved in terms of the *Plascon-Evans*[7] rule. The second requirement to be met is that there is an injury actually committed or reasonably apprehended. The third is that there must be no other satisfactory remedy available to the applicant.

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[4] The Constitution of the Republic of South Africa, 1996.

[5] See also *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 40 – 4; *Yovanka Torrente & others v Grant Monaghan and Associates Incorporated* (Reportable Case No: JA 45/23 & JA 25/23, delivered on 23 January 2024) at para 21 where it was held;

> 'In general, a Court which is required to evaluate a restraint of trade agreement has also to engage with the reasonableness of the restraint. It is now trite law to note that this enquiry is a value judgment which involves a consideration of a public interest which requires that parties to a contract should comply with their contractual obligations (*pacta sunt servanda*) and the principle reinforced in s 22 of the Constitution of the Republic of South Africa, 1996, namely that every citizen has a right to choose their trade, occupation or profession freely. As stated by this Court in *Ball v Bambalela Bolts (Pty) Ltd and another*, a Court seeks to achieve a balance between the respective gravitational pull of *pacta sunt servanda* and s 22 of the Constitution by carefully examining the nature of the activity prevented by the relevant clause, the area of operation of the restraint, and the overall balance of the competing interest between the parties.'

[6] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) at 634E-G.

[16] The principles applicable to restraint of trade agreements are fairly trite. Such agreements are generally enforceable unless they are unreasonable or unlawful. It is therefore for the applicant in this case to not only establish the existence of the contract sought to be invoked, but to also prove the breach of thereof. Once the existence of a contract and its breach is proven, it will then be upon the second respondent to demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable, unlawful and against public policy.[8]

[17] The purpose of enforcing restraint provisions as re-stated in *Sibex*[9] is to protect an employer's protectable proprietary interests. It follows from the authorities that in deciding whether a restraint of trade agreement ought to be enforced, the Court must strike a balance between the sanctity of a contract, and the freedom of the ex-employee's ability and right to trade his or her labour, occupation, and professional skills as protected under section 22 of the Constitution. In line with the principles set out in *Basson v Chilwan and Others*[10], the Court must therefore determine whether the party seeking to enforce the restraint provisions has some protectable interest and whether such interest if it exists, is being prejudiced by the other party. If so, the Court must then determine whether the interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be

[8]See *Experian South Africa (Pty) Ltd v Haynes and another* 2013 (1) SA 135 (GSJ); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502 J – 503 B*;* See Headnote in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984(4) SA 874 (A)* where the following is stated:

> "The approach, followed in many South African judgments, that a covenant in restraint of trade is *prima facie* invalid or unenforceable stems from English law and not our common law, which contains no rule to that effect. The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.
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> Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the *onus* of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable."

[9] *Supra* f(n) 3.

[10] 1993 [3] SA 742 (A) at 767 C-H.

economically inactive and unproductive. Furthermore, the Court must determine if there are public policy considerations that support the enforcement of the restraint. Of equal relevance is the duration of the restraint, the reasons for the restraint, the geographical area to which the restraint applies, and whether the restraint goes further than is necessary to protect the interests claimed[11].

The submissions and evaluation:

[18] The starting point in determining whether the applicant is entitled to the relief it seeks is that in its prayer 2.1 of the Notice of Motion, an order was sought for the second respondent to be restrained from being employed by any entity in the same or similar industry within a radius of 100 kilometres from all of its offices, inclusive of Gauteng, Mbombela and Middleburg.

[19] What the applicant sought with the above prayer is not in sync with the restraint provisions as applicable to the second respondent[12]. In this regard, Clause 18.2 of the restraint provisions reads as follows;

> 'It is an agreed condition of employment that the clientele serviced by the company or its associated companies or divisions is a direct result of the efforts of the company. It would therefore be considered not unreasonable and binding upon you to undertake that, in the event of you leaving the employ of the company for whatsoever reason, not to be employed directly or indirectly by any company, close corporation, or organization, or entity, or persons involved in the marketing of our specific or related products for a period of 12 months from the date of your departure from the company. This restriction applies to a 100(hundred) kilometer radius from the branch at which you are employed at the time of your resignation or at the time of the termination of your employment with the company for any reason whatsoever. The above restriction applies no matter how the termination of your employment might come about (Sic).'

[20] Clearly the geographical area which the applicant sought to have the restraint provisions applied goes further than the terms of the contract. The second respondent was employed in the Centurion branch of the applicant at the date

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[11] See also *Kwik Kopy (SA) (Pty) Ltd v van Haarlem and Another* 1999 (1) SA 472 (W) at 484E.
[12] At page 115 of the Applicant's bundle of pleadings.

of retrenchment, and the restriction applied to 100 kilometres from a branch at which he was employed. To therefore seek to have the geographical area or radius extended to Mbombela and Middleburg in the Mpumalanga Province is not only unreasonable but unlawful.

[21] The applicant correctly conceded to this anomaly in its prayer 2.1 of the Notice of Motion, and pointed out that the scope ought to be limited to 100 kilometres radius from Centurion in Gauteng. Nonetheless, it was pointed out on behalf of the second respondent that the applicant cannot simply make such a concession without first having sought an amendment to the Notice of Motion.

Is there a breach of the restraint provisions?

[22] The validity and enforceability of the restraint provisions was not in dispute. The only issue in this case is whether there was a breach of the restraint provisions by the second respondent. At the onset, there is no allegation or evidence that the second respondent is or was ever employed by the fifth respondent, whom the applicant avers is a competitor. The applicant as summarised below, contends that the second respondent obtained, divulged and shared its confidential information with the fifth respondent, and also solicited or contacted its clients or prospective customers.

[23] In *White River Marketing (Pty) Ltd and Another v Rothwell and Another*[13] , it was held that;

> "As for the merits, in the case of a former employer seeking to enforce a restraint against a former employee, the onus is first proving the existence of a restraint obligation that applies to the former employee. Second, and if a restraint obligation is shown to exist, the employer must prove that the former employee acted in breach of the restraint obligation imposed by the restraint. Once the breach is shown to exist, the determination turns to whether the facts, considered as a whole, show that the enforcement of the restraint would be reasonable in the circumstances."

[24] From the above authority, if the applicant cannot surmount the second leg of the enquiry, i.e., demonstrate a breach of the restraint obligations, it follows

[13] 2022 JDR 1186 (GJ) at para 7.

that ordinarily, it would not be entitled to any relief. Furthermore, and to the extent that the restraint obligations exist, if there is no breach proven, it would not even be necessary for the court to determine the reasonableness of those provisions, unless of course as in this case, the applicant sought prohibitions that went beyond those provisions.

[25] The alleged breach according to the applicant, occurred or was discovered after the termination of the services of the first - third respondents. This was after they had returned their work- issued laptops. The applicant's Mr Putter had reviewed and examined the laptops, and had discovered that between 6 September 2023 and 8 October 2023, there was an exchange of emails between the first, second, third, fifth respondents, and the applicant prospective client (Go Touch Down Resorts-Seasons CC ('GTD')). The applicant contends that the fifth respondent as its competitor in the same business, has every intention of soliciting its current and prospective customers, and in the process, obtain its proprietary confidential information.

[26] The exchange of emails by the second and third respondent was either through the work email or through their private Gmail addresses. The exchange involved requests by the second respondent to GTD to provide various documentation of a confidential nature including credit application forms; monthly bank statements, bank confirmation letters, quotations, applicant's breakdown of internal price list, resolutions, ID copies and other related information, to which GTD had responded to and provided such information. A further examination of the emails from the returned laptops had revealed that on 8 October 2023, the second respondent sent an email from his private Gmail address to the first respondent's private email containing confidential information of another of the applicant's prospective clients, 'Aristocraft', including an order form on the applicant's letter head and a quote dated 16 February 2023.

[27] In the light of the above revelations, the applicant had on 19 and 20 October 2023, addressed correspondence to the second – third respondents seeking undertakings that they would abide by the terms and conditions of the restraint provisions, and in that regard, not contact, solicit or engage with any of its

customers or suppliers; not divulge its private, confidential and proprietary information; and to return all forms of proprietary information in their possession. As already indicated, the individual respondents concerned refused to give such undertaking.

[28] The second respondent in his answering affidavit in disputing the allegations and the relief sought against him averred that;

28.1 Upon being notified of the retrenchment, his last day of employment was on 29 September 2023, and he was no required to render his services whilst serving the notice period in October 2023. During the section 189 of the LRA consultations, he and others were informed that they could conclude or finalise any outstanding transactions during October whilst serving their notice period, and further that they would be entitled to a commission earned on the deals that were concluded during the notice period. On 29 September 2023, he had returned the work-issued laptop and had thereafter no access to the applicant's network.

28.2 He averred that when his services were terminated, he had provided the applicant with his private email for the purposes of forwarding any of his personal communication. He contended that his private email was password protected, but that after he had returned the laptop, the applicant had 'hacked' his private emails from its laptop without his password, and had retrieved his personal emails that were sent to his own personal laptop. The second respondent viewed the applicant's conduct as having breached his constitutional right to privacy and thus having acted unlawfully in breach of the provisions of the Electronic Communications and Transactions Act[14].

28.3 To the extent that the applicant sought that he be interdicted and restrained from being employed or conduct any business similar to that of it, the second respondent contended that clause 18.1 or 18.2 of the contract did not make any such provisions. Clause 18.2 only referred to prohibition of employment directly or indirectly by any entity or person

[14] Act 25 of 2002.

involved in the marketing of the applicant's specific or related products. In any event, he denied that he was currently engaged in any business similar to that of the applicant with any person or entity which is an existing client of the applicant. He further disputed that the applicant had demonstrated that it had intellectual property rights to any specific product or related product that it offers to its customers, and that the solutions and products it offered to customers were based on freely available technology products developed by other information technology and software companies.

28.4 He contended that as a Microsoft Certified Professional Systems Engineer, he was a solutions architect that created a safe and secured local area network where every user and equipment could talk to each other without interruptions. He averred that there was therefore no specific product that was developed by the applicant for him to be barred from making a living.

28.5 He denied having breached any confidentiality or restraint obligations by colluding with the first applicant, and/or having furnished any customer information pertaining to GDT to the fifth respondent. He conceded that he had contact with GTD prior to the termination of his services. This was as a result of GTD having initially approached him in 2022 in order to purchase a product from the applicant. GTD at the time did not accept a quotation that was given to it.

28.6 GTD then approached him again in September 2023 to consider whether it would qualify to obtain a product from the applicant, but had indicated that it was not in a position to consider financing from the bank. It instead sought financing from the applicant. He then had engagements with the first respondent about GTD, as he was his supervisor during their employment, who had informed him that the applicant would not provide GTD with financing it sought.

28.7 When GTD approached him in September 2023, it was aware of his impending departure and was concerned that its deal would not be finalised before then, hence it constantly contacted him. After he had left the applicant's services and whilst still serving notice, he had continued to follow up on the GTD deal with the applicant's Du Plessis and Putter because having worked hard on the deal, he wanted to ensure its finalisation since as per the agreement with the applicant during the consultation process, he would have been entitled to earn a commission on the deal concluded during the notice period for the month of October 2023.

28.8 He averred that since the applicant was not assisting GTD with financing, the first respondent had then suggested that such financing could be sourced from another company, and he (first respondent) had engaged with the fifth respondent to establish if it could not assist GTD, and had therefore sent all documentation pertaining to GTD to it (fifth respondent). The deal however did not fall through as neither the applicant nor the fifth respondent could provide GTD with financing.

28.9 In respect of another prospective client, 'Aristocraft', the second respondent averred that this entity was previously provided with a quotation by the applicant in 2022 in respect of a product which it did not accept at the time. The first respondent had then contacted him in September 2023 and advised him that Aristocraft had contacted him with the same enquiry and had requested him to furnish him with the documents that Aristocraft had originally sent. This was in October during the notice period and there was nothing that prevented him from concluding any deals and earning commission. The second respondent however did not know the outcome of the engagement between the first respondent and Aristocraft.

[29] In the light of the above, the second respondent denied that he had divulged any confidential information to any person or entity. He conceded that he had only exchanged information with the first respondent in respect of GTD and Aristocraft at the time as his supervisor and with whom he worked closely in providing solutions to clients. He further denied that he had approached any of

the applicant's customers or clients, or conducted any business or provided quotations to them.

[30] In the light of the parties' averments, what can be discerned is that other than reliance by the applicant on the emails it had retrieved after the termination of the second respondent had taken effect;

30.1 There is no evidence to suggest that the second respondent has acted in any manner and in competition with the applicant; or that he is since engaged in any business similar to that of the applicant, let alone is he involved in the marketing of the applicant's specific or related products with any person or entity.

30.2 The difficulty with the applicant's case is that it sought to shift the onus of proving that the second respondent had breached the restraint provisions to the extent that it submitted that he should have in his answering affidavit, disclosed who his current employer was, and the nature of his job description currently.

30.3 The reality is that it is not for the second respondent to prove the applicant's case. It is for the applicant to provide proof of any breach. Conjecture and mere blanket allegations of a breach are not sufficient. It is not for the second respondent in any event, to remove any uncertainty about whether he is in breach or not as the applicant seems to suggest.

30.4 To the extent that reliance of the alleged breach is placed on the email exchanges between the first, second, fifth respondents and the prospective clients being GDT and Aristocraft, I did not understand the applicant's case to be that it denied that these exchanges took place at least into October 2023 when the second respondent was serving his notice period. I further did not understand it to be denied that the second respondent was permitted to finalise any deals during the notice period in order to gain a commission. Equally so, it is not in dispute that the second respondent reported to the first respondent, who had suggested that the fifth respondent be approached with the GTD deal, to enquire if it may assist since the applicant could not do so.

30.5 The second respondent had conceded that any information regarding Aristocraft was provided to the first respondent upon the latter's request. The second respondent played no further part in the matter thereafter.

30.6 All that is being said with the above email exchange, is that there is nothing that can be read into it that suggest anything untoward on the part of the second respondent, particularly since the second respondent and others were allowed to at least until the end of October 2023 when the notice period ended, finalise any outstanding deals so that they can earn a commission.

30.7 The second respondent insisted that the information obtained from his private email was 'hacked' and thus illegally obtained. Significant with these allegations is that if the applicant was up to something nefarious, he would not have voluntarily informed the applicant of his private email when he left its services. Furthermore, Putter, who had allegedly accessed these emails after the laptops were returned, did not depose to an affidavit to explain how he had obtained access to the second respondent's own private email when it was password protected. I will refrain from making any determination as to the legality and admissibility of the retrieved emails from the second respondent's private email address, in view of the conclusions already made insofar as a breach of the restraint provisions was alleged based on those emails.

30.8 Bearing the above in mind, it however needs to be stated that beyond the information obtained from the second respondent's private emails and after he had served his notice period at the end of October 2023, there is nothing further that suggests that he had took possession from the applicant or used to its prejudice, its trade secrets, confidential information, or connections.

30.9 At paragraphs 32-34 of the answering affidavit, the second respondent averred *inter alia* that the solutions and products that are offered to the applicant's customers were based on freely available technology products developed by other information technology and software companies. He had averred that there was no specific product that was developed by the applicant, and thus there was no basis for the order sought to bar him from making a living.

30.10 One would have expected the applicant to have in its reply, rebutted the second respondent's contentions to demonstrate the basis upon which it lay claim to any know-how, processes or techniques. This was not done as can be gleaned from paragraphs 11 – 14 of the replying affidavit.

30.11 Against the lack of any meaningful response in the replying affidavit in this regard, it ought to be concluded that the applicant has in effect, not demonstrated in reasonably clear terms that the information, know-how, technology or methods over which it alleged ownership, or allegedly in the second respondent's possession, or even seeks to protect, is something which is unique and peculiar to it, and is not public property or public knowledge[15].

30.12 Further given the nature of the industry the applicant operates in and the second respondent's own qualifications and skills, there is nothing that suggests that the second respondent is in possession of any trade secrets and confidential information justifying protection by the restraint.

30.13 Worst still however for the purposes of its relief in this case, the applicant has not demonstrated that the second respondent in effect breached the restraint of trade provisions as alleged, and this therefore ought to bring an end to the matter without the necessity to determine further the reasonableness or otherwise of the restraint provisions.

[15] See *Hirt & Carter (Pty) Ltd v Mansfield & another* 2008(3) SA 512 (D); (2008) 29 ILJ 1075 (D); [2007] 4 All SA 1423 (D) at para 57.

[31] Other than the conclusions made in regards to the allegations of breach, it appears that based on the emails exchange as already dealt with in this judgment, the applicant sought an undertaking from the second respondent, and when this was not forthcoming, it launched this application. Inasmuch as it is appreciated that the applicant was entitled to approach the Court for relief, it is however not for this Court to merely interdict and restrain employees who refused to make any further undertakings beyond what the contract provides, and in circumstances where there is no discernible evidence that they have acted in breach of their restraint obligations. In my view if a restraint provision as in this case remains extant, an employer cannot simply approach the Court because an employee refuses to give an undertaking, unless of course in addition, it has demonstrated that there is a breach.

[32] It is trite that employees are entitled to use their skill and training to practice their trade, as long as they are not in breach of their restraint obligations, or where it is found that such provisions are unreasonable. It has been said that employees cannot be prevented from using their stock of general knowledge, skill, and experience to earn a living[16]. It is against all of the above that it is reiterated that granting the relief that the applicant seeks based on its pleaded case would be untenable. In the end, the applicant has not in the absence of establishing a breach of the restraint provisions, satisfied the requirements of the final relief it seeks. It follows that the application ought to be dismissed.

[33] Costs in this Court are ordinarily considered having had regard to the requirements of law and fairness. The application and the dispute before the Court being contractual, the provisions of section 162 of the LRA find no application, and ordinarily, costs should follow the results. Having however had regard to the facts and circumstances of this case, it is my view that each party must be burdened with its own costs.

[34] In the premises, the following order is made kin conjunction with the settlement agreements already referred to in paragraph 2 of this judgment:

<u>Order:</u>

[16] *Bonnet & another v Schofield* 1989 (2) SA 156 (D))

1. In the matter between the Applicant and the First Respondent, the settlement agreement handed in Court, marked as **annexure "A",** is made an order of the Court.

2. In the matter between the Applicant and the Second Respondent, the following order is made:

   2.1 This matter is heard as one of urgency as provided for in terms of Labour Court Rule 8 and the Applicant's failure to comply with the normal time periods, forms and service as provided for in Labour Court Rule 7, is condoned.

   2.2 The late filing of the second respondent's answering affidavit is condoned.

   2.3 The applicant's application is dismissed.

   2.4 Each party is to pay its own costs.

3. In the matter between the Applicant and the Third Respondent, and in the absence of opposition to the relief sought, the following order is made:

   3.1 The matter is heard as one of urgency as provided for in terms of Labour Court Rule 8 and the Applicant's failure to comply with the normal time periods, forms and service as provided for in Labour Court Rule 7, is condoned.

   3.2 The Third Respondent is interdicted and restrained for a period of one year from date of this order from: -

      3.2.1 Within a radius of 100-kilometre from the Applicant's Gauteng office, to be employed by an entity in the same or similar industry as the Applicant,

      3.2.2 Within a radius of 100-kilometre from the Applicant's Gauteng office, to do any business similar to that of the

Applicant, with a person or entity which is an existing client of the Applicant'

3.3 The Third Respondent is ordered to comply with every provision in respect of the confidentiality and restraint obligations agreed to between her and the Applicant.

3.4 The Third Respondent is prohibited from divulging to any other person or entity, the Applicant's confidential information, including, but not limited to know – how, processes and techniques utilised by the Applicant in the provision of its services, involving, *inter alia*:

i. The Applicant's customer information, contact details and requirements. In this regard, the names of existing customers and their requirements, who require additional services which are offered by the Applicant and in respect of which, such existing customers, are therefore also potential customers;

ii. The names of other prospective customers and their requirements;

iii. The Applicant's Agreements with Customer's;

iv. Details of the Applicant's financial structure and operating results;

v. The Applicant's pricing and discount structures which includes the financial details of the customers, including credit and discount terms, which the Applicant provides to its customers.

vi. The Applicant's customer transaction histories;

vii. The Applicant's risk analysis;

viii. The Applicant's profit margins;

ix. The Contractual arrangements between the Applicant and its suppliers and/or business associates;

x. The Financial details of the Applicant's relationship with its suppliers and/or business associates;

xi. Details of the Applicant's product development;

xii. Details of the Applicant's current and prospective products;

xiii. Knowledge of the Applicant's strategic plans;

xiv. Details of the Applicant's current and prospective products;

xv. Details of the remuneration paid by the Applicant to its employees as well as their duties;

xvi. Other matters which relate to the business of the Applicant and in respect of which, information is not readily available in the ordinary course of business to a competitor of the Applicant; and

xvii. Any other information which could be damaging to the Applicant's operations, or which could benefit other parties to the detriment of the Applicant.

3.5 Insofar as the Third Respondent has already approached any of the Applicant's customers, and/or clients and conducted any business or provided any quotations to them, she is interdicted and restrained from conducting any further business with them.

3.6 There is no order as to costs.

4. In the matter between the Applicant, the Fourth and Fifth Respondents, the settlement agreements respectively marked as **annexures "B" and "C"**, are made orders of the Court.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	P.S.A.J. Jacobsz, van Der Nest Incorporated.
For the Second Respondent	B.Z. Bobson-Opoku, instructed by A.J. Venter and Associates Incorporated.
For the Fourth to Fifth Respondents:	S. Munro-Flint, of Munro-Flint Attorneys.