

**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**



18/6/2014

**CASE NUMBER: 38845/201**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
17/6/2014	
DATE	SIGNATURE

In the matter between:

**DIGITERRA (PTY) LTD**

**APPLICANT**

and

**JACOBA WILHELMINA MENTZ**

**1<sup>ST</sup> RESPONDENT**

**ZERTIVE CONSULTING SERVICES**

**2<sup>ND</sup> RESPONDENT**

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**CORAM: DE VRIES AJ**

**JUDGMENT**

1. This matter comes before Court as one of urgency brought in terms of the provisions of Rule 6(12).
2. In terms of the amended notice of motion the Applicant seeks the following relief against the two Respondents:

"That the employment agreement (attached as annexure "A" to the founding affidavit and hereafter referred to as the "employment agreement") be rectified as follows:

- 2.1 The reference to the clauses 68 – 73, in clause 63 of the employment agreement be rectified to read 61 – 66.2.
  - 2.2 The reference to clause 71 of the employment agreement in clause 65, be rectified to read 64; and
  - 2.3 The reference to clauses 68 – 73 in clause 66 of the employment agreement be rectified to read 61 – 66."
3. The 1<sup>st</sup> Respondent is interdicted in her personal capacity and as director of the 2<sup>nd</sup> Respondent, for the period of 1 year, from:
- 3.1 Contracting the Applicant's clients (as at the time of the 1<sup>st</sup> Respondent's employment with the Applicant) or interfering with the Applicant's relationships with its clients, in breach of the terms of the employment agreement (concluded between them and as attached to the founding affidavit [annexure "B"] with the specific reference and inclusion of clauses 61 and 62 thereof), specifically including but not limited to the following clients:
    - 3.1.1 Multichoice Operations (Pty) Ltd;
    - 3.1.2 Multichoice Africa Ltd;
    - 3.1.3 Multichioce Support Services (Pty) Ltd; and
    - 3.1.4 DSTV Digital Media Mobile (Pty) Ltd.

3.2 Breaching the conditions of the confidentiality agreement (attached as annexure "C" to the founding affidavit) which was concluded between the parties, and which shall include but not be limited to:

3.2.1 The 1<sup>st</sup> respondent be prohibited from communicating or discussing with any third party person, associated company or legal entity (including those listed supra) any information relating to the Applicant's business affairs, pricing list, client list or other confidential information, and in whatever form of by whatever means without the prior written consent of the Applicant's chairman; and

3.2.2 Use of such information for the 1<sup>st</sup> Respondent's private or for the 2<sup>nd</sup> Respondent's benefit in whatsoever manner.

3.3 Illegally and unlawfully using any confidential information obtained during the 1<sup>st</sup> Respondent's employment with the Applicant, to advance the Respondent's business interests at the Applicant's expense.

4. Leave is granted to the Applicant to supplement its founding affidavit, if so advised, relating to any new information which may come to hand relating to any further breach of the 1<sup>st</sup> Respondent or information which may be relevant to the final adjudication of this application.

5. Prayer 3 will function as an interim interdict, with immediate effect, pending the finalisation of this application.
6. That the Respondents are ordered to pay the costs of the 10<sup>th</sup> of June 2014.
7. That the Respondents be ordered, jointly and severally, the one paying the other to be absolved to pay the costs of this application.
8. The matter was set down for hearing initially on the 10<sup>th</sup> of June 2014 and at that stage the Respondents, having failed to comply with the time limits set out by the Applicant in the un-amended notice of motion, the matter was not ripe for hearing and stood down for hearing until the 13<sup>th</sup> instant on which date the matter was argued and was stood down for judgment to be delivered on the 17<sup>th</sup> of June 2014.
9. The Applicant relied on a written agreement entered into between the Applicant and the 1<sup>st</sup> Respondent with effect the 1<sup>st</sup> of May 2011. The document, being an employment agreement, had annexed to it two annexures, being annexure "A", a document headed "Job Profile & Job Description & Performance Agreement", a further annexure, being annexure "C", headed "Confidentiality Agreement". The documents were appended to the founding affidavit, and marked annexures "B, "C" and "D" respectively.
10. The clauses of the employment agreement are to be found on page 15 of annexure "A", numbered 61, 62, 63, 64, 65 and 66, and read as follows:  
  
"61. The parties (the employer and employee respectively) hereby irrevocably agree and guarantee each other that they shall not, directly or indirectly,

interfere with, circumvent or attempt to circumvent, avoid, bypass, or obviate each other's interest, or the interest or relationship between "the parties" with producers, sellers, buyers, suppliers, brokers, dealers, distributors, refiners, shippers, financial institutions, technology owners or manufacturers, to change, increase, or avoid directly or indirectly payment of established or to be established fees, commissions or continuance of pre-established relationships or intervene in uncontracted relationship with manufacturers or technology owners with the intermediaries, entrepreneurs, legal counsel or initiate buy/sell relationships or transnational relationships that bypass one of "the parties" with any corporation, producer, technology owner, partnership, or individual revealed or introduced by one of "the parties" to one another in connection with an ongoing or future "transaction" or "project", without the prior written consent of all parties"

62. Furthermore, the parties irrevocably agree that they shall not disclose or otherwise reveal directly or indirectly to any third party, any confidential information provided by one party to the other or otherwise acquired particularly, contract terms, product information or manufacturing processes, prices, fees, financing arrangements, schedules and information concerning the identity of sellers, producers, buyers, lenders, borrowers, brokers, distributors, refiners, manufacturers, technology owners, or their representatives and specific individual names, addresses, principals, or telefax/telex/telephone numbers, references, product or technology information, and/or all other information, advised by one "party/parties" to another as being confidential or privileged, without the prior specific written consent of the "party/parties" providing such information.
63. This Agreement shall be valid from date of signature and upon termination of this agreement, clauses 61 to 66 will survive and remain applicable for a minimum of two (2) years from the termination date of this Agreement, and for two (2) years after completion of each transaction or exchange of information, whichever occurs later, with an additional two (2) years automatic roll over/renewals at the close of each transaction or exchange of information and thereafter at the end of any roll over period without the need of advisement, unless mutually agreed in writing to be terminated by all "the parties", which termination can occur

only at the end of any roll over period and must be acknowledged by notice through Certified Mail thereof, if notice is not given by all "the parties" within ten (10) days after the beginning of a new roll over period, it shall be construed that the Agreement is in full force and effect between "the parties" for another two (2) years.

64. The Employee agrees that they may under no circumstances approach or accept an offer of employment in any form from Digiterria clients to which they are or have been deployed. This applies to all forms of job offers including amongst other offers in the public domain and employment agents. If such a breach were to occur then the Employee will immediately be liable to pay the company a solicitation fee within seven calendar days of the acceptance of an offer by the Employee. The solicitation fee to be paid to the Company by the Employee is to be calculated as the full amount of revenue that would have been generated by the Employee for a twelve month period computed at the maximum Employee sale rate to the customer and where the Employee is utilised at 160hrs per month.
  65. The Employee expressly understands and agrees that they will personally be liable for the solicitation fee as set out in section 64 of this document.
  66. The Employee expressly understands and agrees that any legal costs on the scale as between attorney and own client incurred in the execution of the Companies rights under this section will be for the full account of the Employee. This section is defined as clauses 61 to 66."
11. That the parties agreed that this agreement contained the full agreement between the parties is evident from 67 which reads as follows:
- "67. This Agreement read together with the Company Codes and Policies and Procedures constitutes the whole agreement between the parties and supersedes all prior verbal or written agreements or understandings or representations by or between the parties regarding the subject matter of this Agreement, and the parties will not be entitled to rely, in any dispute regarding this Agreement, on any terms, conditions or representations not

expressly contained in this Agreement read together with the Company's codes as amended from time to time."

12. Clause 62 deals exclusively with confidential information and clause 64 caters for employment by an employee of the Applicant with a client of the Applicant which is clearly not applicable here.
13. The only basis for the restraint of trade on which the Applicant relies, must be found in clause 61.
14. From the facts of the matter it is clear that this agreement was drawn by the Applicant and that the *contra preferentem* rule will apply.
15. Tellingly the clause does not expressly prohibit the Respondent from competing with the Applicant in the market place or taking up employment with an entity that so competes. Of even greater significance is that the clause appears to envisage a reciprocal arrangement in terms of which the employer and the employee will not interfere with each other's interests as set out in the clause.
16. What the intention of the draftsman could have been in choosing this wording escapes the Court entirely. Even if a reliable construction in favour of the Applicant could be found, the wording, being in the main verbiage, referring to each and every business connection of the parties, extending even to a legal counsel, is so wide that it would be well-nigh impossible for any of the parties to be able to comply therewith, not only in regard to the classes of persons that it attempts to prescribe, but has no geographical limitation in regard to its operations.

17. I was invited by the Applicant's counsel, in the event of it being found that the matter be referred to trial. I cannot see that this will avail the Applicant at all.
18. Clauses 67 and 68 places this dispute foursquare within the ambit of *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 A, and any attempt to lead oral evidence in order to explain or amplify the terms of the agreement will for that reason fail.
19. To my mind the concession by the Respondents' counsel that the 1<sup>st</sup> Respondent was bound by the confidentiality clause does not avail the Applicant as the main complaint, and that which gives rise to the dispute between the parties is in essence one of a restraint of trade to which the Applicant is not entitled.
20. For these reasons the following order is made:
  - 20.1 The 1<sup>st</sup> Respondent is interdicted from breaching the provisions of the confidentiality agreement (attached as annexure "C" to the founding affidavit) which was concluded between the parties, and which shall include but not be limited to:
    - 20.1.1 The 1<sup>st</sup> Respondent be prohibited from communicating or discussing with any third party, person, firm, association, company or legal entity (including those listed supra) any information relating to the Applicant's business affairs, pricing list, client list or other confidential information and in whatever form of by whatever means, without the prior written consent of the Applicant's chairman;



- 20.1.2 Use of such information for the 1<sup>st</sup> Respondent's private or for the 2<sup>nd</sup> Respondent's benefit in whatsoever manner;
- 20.1.3 Illegally and unlawfully using any of the confidential information, obtained during the 1<sup>st</sup> Respondent's employment with the Applicant, to advance the Respondent's business interests at the Applicant's expense.
- 20.2 The balance of the prayers contained in the notice of motion, as amended, are dismissed.
- 20.3 The Applicant is ordered to pay the Respondents' costs of the application.
- 20.4 The Respondent is ordered to pay the Applicant's wasted costs of the 10<sup>th</sup> of June 2014.

  
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DE VRIES AJ