

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No. : A253/06

In the application between:

BLOOMBERG ORTHOPEADICS &
NEUROSCIENCES (PTY) LIMITED

Applicant

and

MARIZE VERMAAK

1st Respondent

FLUOROVIZION (PTY) LTD 2nd Respondent

JUGDMENT:

EBRAHIM, J

HEARD ON:

21 SEPTEMBER 2007

DELIVERED ON:

27 SEPTEMBER 2007

[1] This is an application for leave to appeal against the whole of the judgment of this Court dated 12 October 2006 dismissing with costs the applicant's application to enforce the provisions of a covenant in restraint of trade concluded between it and the first respondent. Judgment was given in favour of the 2nd respondent in those proceedings. The

second respondent, to whom I shall refer herein as “the respondent”, opposes the present application for leave to appeal on the basis that the period of the restraint having lapsed, any order or judgment sought on appeal would be of academic value and of no practical effect. Whilst this is conceded by the applicant, this Court’s indulgence is sought in order to allow the applicant the opportunity to reverse the costs order granted against it in the main application.

[2] In a nutshell the applicant challenges the correctness of my finding in the main application that the applicant had proved no protectable interest as a basis for alleging that it and the respondent were trade competitors. It is further contended for by the applicant that this Court erred in excluding the product list produced by the applicant consequent upon the court order compelling it to do so for the following reasons:

(a) that it could not on the evidence be said that such a list had only surfaced for the first time as part of the applicant’s case in reply; and

(b) that the finding that the said list referred to medical procedures rather than medical products, was incorrect.

[3] The applicant's principal submissions in support of its quest for leave are twofold:

- a) The applicant argues that on a proper reading of the list produced it is clear that a number of medical products marketed and sold by the applicant as part of its business of importing, manufacturing, distributing and selling an extensive range of surgical orthopaedic and neuroscience products in the Republic, appears on the list;
- b) Secondly, the applicant contends that in view of the fact that the respondent had, notwithstanding its demand for that list in order to prepare its answering affidavit, filed the latter prior to receiving the applicant's list of products, the applicant had no option but to deal with its list in its replying affidavit which would not have happened had the respondent not pre-empted the applicant by producing its answering papers prior to the

applicant having had an opportunity to prepare and submit the product list to the respondent as it was called upon to do by the order of court dated 15 June 2006. The applicant argues that if this proper procedure had been followed, the product list would then have been very much a part of the applicant's founding papers fully setting out the applicant's case. Instead the convoluted procedure followed by the respondent had the effect of creating the impression that the applicant had chose to make out a proper case only in reply.

- [4] On the basis of these two principal submissions the applicant contends that there is a reasonable possibility that another court could find in favour of the applicant on the merits. I am inclined to agree and accordingly leave is granted to the applicant to appeal to the Full Bench of this Division. The costs of this application are to be costs in the appeal.

S. EBRAHIM, J

On behalf of applicant: Adv. P.U. Fischer
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of respondents: Adv. M. Welz
Instructed by:
Lovius Block
BLOEMFONTEIN

/sp