

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3511/2005

In the case between:

**BLOOMBERG ORTHOPAEDICS &
NEUROSCIENCES (PTY) LIMITED**

Applicant

and

MARIZE VERMAAK

1st Respondent

FLUOROVIZION (PTY) LTD

2nd Respondent

JUDGMENT:

EBRAHIM, J

HEARD ON:

28 SEPTEMBER 2006

DELIVERED ON:

12 OCTOBER 2006

[1] This is an application in which the applicant seeks to enforce the provisions of a restraint of trade agreement concluded between it and the first respondent. The second respondent was not a party to this agreement. The applicant seeks not only to interdict the second respondent from employing the first respondent but it also seeks to

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have the respondents pay the costs of the application jointly and severally.

[2] The terms of the agreement on which this application is founded provides that the first respondent is restrained for a period of 6 months after the termination of her employment with the applicant from being involved or engaged in any business or undertaking which carries on business in competition with the applicant.

[3] Consequently it follows that for the restraint to be valid and for the applicant to invoke any rights flowing from the restraint the applicant must first prove that the second respondent is a trade competitor of the applicant. The second respondent has denied that it carries on business in competition with the applicant.

[4] The first respondent has not opposed the application. It is common cause between the parties that she is not in the employ of the second respondent although it appears from the papers that second respondent had, prior to this application being launched, been engaged in discussions with first respondent with a view to entering into a contract of employment with her.

[5] An applicant who approaches this court for relief on the basis of a restraint clause prohibiting a respondent from employing an erstwhile employee of the applicant because the said respondent is engaged in business in competition with the applicant, must first place sufficient factual particularity of such competition before the court. An analysis of the applicant's case reveals the following:

5.1 The applicant has failed to disclose its product list or its price list or any other list from which it may be determined whether or not the applicant and the second respondent are in fact competitors.

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5.2 The applicant has made broad generalisations in stead of setting out facts referring to the competition which exists between itself and the second respondent. Such generalisations are the following:

“The applicant has been involved in the research and development of competitive products for many years.”

“The applicant carries on the business of the importation, manufacturing, distribution and sale of an extensive range of surgical orthopaedic and neuroscience products throughout South Africa.”

5.3 The applicant has in fact attached to his application in support of its allegations that the second respondent is in competition with it, a product list belonging to the second respondent detailing the list of products which second respondent trades in. In addition the applicant has annexed as a product list to its replying affidavit a list which refers to medical procedures rather than medical products. This list fails hopelessly to qualify as a product list of the applicant. The fact that this list surfaces for the very first time as an annexure to the applicant's case in reply also

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does not inspire much confidence in the strength of the applicant's case. It is a well-known principle that in application procedures an applicant must stand or fall by his founding affidavit and all facts alleged in it as those are the facts which the respondent is called upon to admit or deny.

See **POUNTAS' TRUSTEES v LAHANAS** 1924 WLD 67 at 68.

Nowhere in the founding papers does the applicant make reference to such a list. In fact, from a reading of the applicant's founding papers, it is apparent that the applicant's entire case is premised on the product list of the second respondent. Having regard to the nature of the product list furnished in reply, the inference appears to be inescapable that the applicant, on being informed of the second respondent's dealings with the first respondent, got the "bit between the teeth" and ran with it, so to

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 speak. In bringing this application the applicant appears to have ignored the pre-conditions of the restraint that first respondent is only prohibited from seeking employment with one who carries on business in competition with the applicant. No proper investigation to establish this was undertaken by the applicant prior to the application being launched. That being so, I think it would be grossly unfair to the second respondent were I to exercise my discretion in favour of allowing the so-called product list annexed in reply to be admitted in evidence. The list in any event, does not assist the applicant in its case.

- [6] In the circumstances I find that the applicant has failed to prove that the second respondent is in competition with it and the application must accordingly fail. I have been asked by both counsel to make a ruling in respect of costs occasioned by the several postponements which resulted from second respondent's failure to timeously file its answering papers. These papers were eventually filed on

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the 16th of February 2006 after an application to Compel Discovery of applicant's product list and business plan had been brought by the second respondent. That application was heard and argued before me on the 11th of May 2006 and I reserved the costs of that application for determination at the hearing of this main application. In light of my decision to dismiss the entire application, it is only proper that the costs should follow the result. Accordingly I order that the applicant is to bear the costs of the entire application, inclusive of the costs of each postponement and the costs of the application to compel.

[7] In the result the order I make therefor is that the application is dismissed with costs.

S. EBRAHIM, J

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

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BLOEMFONTEIN

On behalf of the Respondents: Adv. M. Welz
Instructed by:
 Lovius Block
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