IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: 2025-122173

Not Reportable

In the matter between:

ZIMMER BIOMET SOUTH AFRICA (PTY) LTD	Applicant
and	
LARRY OOSTHUYZEN	First Respondent
STRYKER SOUTH AFRICA (PTY) LTD	Second Respondent

Heard: 11 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 12h00 on 19 September 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] On 24 July 2025 the applicant applied to court seeking to enforce a restraint of trade and confidentiality agreement against the first respondent, its erstwhile employee, the first respondent having taken up employment with the second respondent, its competitor. In so doing, the applicant sought to protect both customer connections and confidential information.

[2] The application was opposed by both the first and second respondents who challenged the issue of urgency as well as the merits, although the first respondent did make certain concessions regarding the issue of his relationships with a limited number of the applicant's customers.

Background

[3] The applicant's business entails the supply of specialised medical equipment and products, including implants, surgical tools, replacement systems, and smart robotics. The first respondent was employed by the applicant with effect from 1 April 2018 in his capacity as a Clinical Support Technician. During 2021 he was promoted to the position of a Sales Representative but was demoted back to the original position to which he had been appointed with effect from 1 April 2025.

[4] It was common cause between the parties that the first respondent's employment by the applicant was governed by a written contract of employment, and that such contract included a written covenant of restraint of trade, and an undertaking as to confidentiality.

[5] In accordance with the restraint of trade, the first respondent agreed as follows,

> '7.1 *The employee shall not while he is employed by the company and for 6 (six) months from the termination date, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant or otherwise, directly or indirectly, carry on or be interested or engaged in or concerned with or employed by any business,*

trade, firm, undertaking or concern carried on in the territory which sells prescribed goods or renders prescribed services, or in the course of the business of which prescribed goods are sold or prescribed services are rendered, provided that he shall not be deemed to have breached this undertaking by reason of him:

7.1.1 holding shares in the company; or

7.1.2 holding shares in any company, the shares of which are listed on a recognised stock exchange if the shares owned by:

…

7.2 The employee undertakes that neither he nor any business, trade, firm, undertaking or concern in or by which he is directly or indirectly interested or employed will within 6 (six) months after the termination date, directly or indirectly:

7.2.1 encourage or entice or incite or persuade or induce any employee of the company to terminate their employment by the company; or

7.2.2 furnish any information or advice to any employee then employed by the company or to any prospective employer of such employee or use any other means which are directly or indirectly designed, or in the ordinary course of events calculated, to result in any such employee terminating their employment by the company and/or becoming employed by or directly or indirectly in any way interested in or associated with any other business, trade, firm, undertaking or concern; or

7.2.3 furnish any information or advice (whether oral or written) to any prescribed client/customer that he intends to or will (whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative or otherwise) directly or indirectly, be interested in or engaged in or concerned with or employed by any business, trade, firm, undertaking or concern carried on in the territory which sells prescribed goods or renders prescribed services or in the course of the business of which prescribed goods are sold or prescribed services are rendered after the expiry of 6 (six) months after the termination date;

7.3 Without derogating from the obligations imposed by this clause 7 the employee undertakes that neither he nor any business, trade, firm, undertaking or concern in or by which he is directly or indirectly interested, engaged, concerned or employed will for a period of 6 (six) months after the termination date directly or indirectly, whether as proprietor, partner, director, *shareholder, employee, consultant, contractor, financier, agent, representative, assistant or otherwise in any part of the territory:*

7.3.1 *solicit orders from prescribed clients/customers for the prescribed goods and/or the prescribed services;*

7.3.2 *canvass business in respect of the prescribed goods and/or the prescribed services from prescribed clients/customers;*

7.3.3 *sell or otherwise supply any prescribed goods to any prescribed client/customer;*

7.3.4 *render any prescribed services to any prescribed client/customer.*

7.4 *Each of the undertakings set out in this clause 7 (including those appearing in a single clause) is severable inter alia as to:*

7.4.1 *nature of interest, act or activity;*

7.4.2 *categories of persons falling within the definition of prescribed client/customers;*

7.4.3 *the categories of goods falling within the definition of the prescribed goods;*

7.4.4 *the categories of services falling within the definition of the prescribed services; and*

7.4.5 *the individual magisterial districts and areas in the territory;*

7.4.6 *and are acknowledged to be reasonably required for the protection of the company and are fair and reasonable.*

7.5 *For the avoidance of doubt the provisions of clause 7 and clause 8 shall survive the termination of this agreement.'*

[6] The issue of confidentiality was dealt with under the clause dealing with non-disclosure of information and return of documentation which respectively provided,

'8.1 *The employee acknowledges that the company has been or will be extensively involved in the orthopaedic and medical devices industry, and has therefore acquired certain secret and confidential information relating to same, which knowledge and secret and confidential information may, in the nature of the employee's employment with the company, be made available to him.*

8.2 *The employee shall not, during the employment period, or thereafter, use for his own benefit, or for the benefit of any other person or divulge or communicate to any person, except to those of the directors and employees of the company, whose province it is to know the same, any of the company's* *secrets and confidential information which he may receive or obtain in relation to the company's affairs and/or prescribed clients/customers, prescribed goods and/or prescribed services or to any design, artistic work, process or invention or to any marketing or business technique which is carried on or used by the company.*

8.3 The employee undertakes to refer all queries, requests for information, details sought, and any other information elicited, by any member of the press or media to the managing director or chairman of the company, and undertakes that no information of whatsoever nature pertaining to the affairs of the company shall be furnished by the employee to the press or media. The employee undertakes that any enquiries made or information sought by any member of the South African Police Services shall be referred to the managing director or chairman of the company, and undertakes further not to furnish any information of whatsoever nature pertaining to the affairs of the company to any member of the South African Police Services unless legally obliged to do so.'

'Upon termination of the employee's employment with the company for any reason whatsoever, the employee undertakes to:

10.1 promptly return to the company all programmes, documents and the like which may have been made available by the company to the employee at any time during the employment period;

10.2 surrender to the company all note books, records and copies thereof (including electronic copies of documents and resources), together with any other information that my be required by the company in connection therewith; and

10.3 continue to observe the obligation of secrecy and confidentiality imposed in relation to this agreement.'

[7] On 2 April 2025 the first respondent notified the applicant of his intention to resign from its employ, then commencing to work out his three month notice period, with his final working day being 30 June 2025. Within a week of the first respondent having tendered his resignation the applicant became aware of his intention to take up employment with the second respondent which led it to addressing correspondence to him in which he was reminded of his obligations in terms of the restraint of trade agreement and confidentiality undertakings and

was requested to sign an undertaking in respect of such obligations by not later than 11 April 2025. In response the first respondent declined to provide the undertaking requested, and expressed his reservations concerning the enforceability of the restraint throughout KwaZulu-Natal, in consideration of the geographical area in which the applicant operated within the province. He proposed, instead, that the parties meet to discuss the implications of the restraint.

[8] The first respondent received no response to his correspondence. Two months later, on 3 June 2025 the applicant again reiterated its request to him to provide an undertaking that he would comply with his restraint of trade obligations. Pursuant to certain discussions between the first respondent and the applicant's National Sales Manager, Mr Warren Lottering, the first respondent addressed further correspondence to the applicant on 10 June 2025 in which he reiterated his belief that the enforcement of the restraint of trade throughout the province of KwaZulu-Natal was unreasonable, having explained,

'The existing restraint clause refers to a 'fair' geographical limitation. Applying a blanket restriction across the entire KZN province is neither proportionate nor relevant, especially considering the reality of ZimmerBiomet's current market presence. There are multiple hospitals and regions within KZN where ZimmerBiomet has not operated for a significant period of time and where the company has voluntarily ceased operations. Imposing restrictions in areas where Zimmer has no ongoing business interest or presence appears unjustifiable. Furthermore, the position I have accepted at Stryker is not a sales representative role. My responsibilities will not involve direct sales to surgeons, which significantly reduces the potential for competitive conflict. This further supports the argument that the restraint should be more narrowly defined and relaxed accordingly.'

[9] In the response subsequently given to him by Mr Lottering, he was informed that a formal response would be given to him in due course, pursuant to the applicant having consulted with its legal advisors. By 30 June 2025 such further response was not forthcoming, and the first respondent's employment by the applicant came to an end.

[10] On 8 July 2025, by which time the first respondent had taken up employment with the second respondent, the applicant's attorneys of record addressed a letter to both, in which the following demands were made,

> *'(a) You immediately cease and desist with your appointment / employment with Stryker for the remaining period of the restraint of trade, within the Republic of South Africa.*
>
> *(b) You immediately abide by your restraint of trade obligations owed to our client for the remainder of the applicable six (6) month period; and*
>
> *(c) Stryker ceases and desists from employing you in contravention of your restraint of trade obligations for the remainder of the applicable six month period.'*

The respondents were given until 11 July 2025 to comply with such demands.

[11] In response, the first respondent restated the concerns he had previously expressed relating to the enforcement of the restraint to the extent required by the applicant. Contemporaneously, the second respondent addressed correspondence to the applicant's attorneys in which it indicated that it would be amenable to restricting the first respondent's scope of work and thereby ensure that he would have no dealings with the Healthcare Practitioners and / or organizations with whom he had dealt whilst employed with the applicant for a period of six months.

[12] The applicant was not prepared to accept the second respondent's proposal and duly initiated the present application on 25 July 2025.

<u>Urgency</u>

[13] In consideration of the time taken by the applicant to have initiated its application, the respondents took issue with its claim to urgency. The respondents' contentions are not without merit.

[14] The applicant had become aware of the first respondent's intention to take up employment with a competitor by 8 April 2025, on which date it notified him of

its intention to approach this court in the event that the undertakings it then sought were not forthcoming. Despite the first respondent having expressly refused to provide the undertakings sought, the applicant did not do so. It allowed a period of two months to elapse until it sent further correspondence to him, again advising him of its intention to approach this court in the event that he did not agree to abide the terms of the restraint of trade agreement. This letter likewise failed to elicit a positive response from the first respondent, who reiterated his belief that in the circumstances, the enforcement of the restraint as required by the applicant would be unreasonable. Again, the applicant did not then approach this court. Throughout the first respondent's entire three month notice period the applicant was well aware of the first respondent's intention to take up employment with the second respondent, and yet it failed to take the steps it had threatened to take since the outset.

[15] A week after the termination of the first respondent's employment the applicant caused a further letter of demand to be addressed to the respondents and, having received no positive response by 11 July 2025 (being the date on which the demand was to have been complied with) the applicant took a further two weeks to initiate the present application.

[16] Mr Swiggers for the applicant argued that it would have been inappropriate for the applicant to have approached this court at any time prior to the first respondent actually having breached the restraint agreement. Whilst notionally there may be situations in which an actual breach of a contract is required, our law recognises the appropriateness of interdictory relief in circumstances of anticipatory breach giving rise to a reasonable apprehension of irreparable harm. Given that the first respondent persistently refused to comply with the applicant's demands that he undertake not to breach the restraint, there is no reason to conclude that the applicant would have been entitled to have approached this court, as it indicated it intended to do, prior to the conclusion of the first respondent's notice period.

[17] It cannot be said the that the applicant set about enforcing its rights at the earliest available opportunity it had to do so. The fact that the applicant

delayed in the initiation of its application, however, does not alter the other conclusions relevant to the issue of urgency which arise in relation to the facts of this matter. The first is that it is self-evident that without the urgent intervention of this court, the applicant would be unable to obtain substantial redress in due course in light of the fact that the period of the restraint is six months. Secondly, the applicant's delay in the initiation of its application did in and of itself not create a situation of self-created urgency. Irrespective of the time take by the applicant to have initiated its application, for it to be heard prior to the effluxion of the restraint, the determination of the application in the ordinary course could never have served the purpose sought to be served by its initiation.

[18] In view of the aforementioned considerations, and the fact that a full set of affidavits were exchanged with the issues having been fully ventilated, both parties' representatives having delivered comprehensive heads of argument, this court will exercise its discretion in favour of dealing with the application as one of urgency.

<u>Analysis</u>

[19] The existence of the restraint is not in dispute. That the first respondent has taken up employment with a competitor of the applicant is also not in dispute. The question of the enforceability of the restraint accordingly rests upon the reasonableness of doing so.

[20] In this regard, the applicant seeks to enforce the restraint (contractually agreed to have become operative throughout the whole of South Africa) within the province of KwaZulu-Natal. Insofar as confidentiality is concerned, where the applicant sought in its Notice of Motion the return of a plethora of what was claimed to have been confidential information in the first respondent's possession together with an interdict preventing him from utilising such information, in argument Mr Swiggers curtailed the applicant's confidentiality claim to its customer lists and financial information.

[21] As regards the restraint, it is the case of the respondents that, beyond the relationships that the first respondent developed with a limited number of Health Care Practitioners whilst in the employ of the applicant, the applicant has no interest worthy of protection through the mechanism of a restraint. The first respondent also denies that he is in possession of any information which the applicant can legitimately claim to be confidential to it.

[22] The reasonableness of enforcement of a restraint is determined by reference to the four questions posed in Basson v Chilwan & Others 1993 (3) SA 742 (A),[1] together with the further question posited in Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA),[2]

- Is there an interest of the one party (the applicant) which is deserving of protection at the termination of the agreement?
- Is such interest being prejudiced by the other party?
- If so, does such interest weigh up qualitatively and quantitatively against the interest of the other party that such other party should not be economically inactive and unproductive?
- Is there another facet of public policy, having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?
- If the applicant does have an interest worthy of protection, does the restraint go further than necessary to protect that interest?

[23] As indicated above, the applicant asserted proprietary interests in both its customer connections and its confidential information.

(i) Customer connections

[24] Insofar as the protection of its customer connections is concerned, the applicant alleged that its clients were both hospitals and surgeons. In his capacity as a theatre technician, it was alleged that the first respondent spent the majority of his time whilst at work with these surgeons, thereby having

[1] At paragraphs 767C-H
[2] At paragraph 17

acquired in depth knowledge of its clients' needs. As a theatre technician he would assist and advise clients, and would be responsible to co-ordinate the supply of products for particular procedures. Ancillary to this the first respondent was responsible for training clients and their staff on the various medical products supplied by the applicant, thereby having become aware of such products' specifications, pricing and usage protocols. In light of his involvement with the applicant's clients, the first respondent was able to develop relationships with them and, in his employment with the second respondent, will be able to leverage those relationships to its benefit.

[25] The first respondent disputed neither the nature of his employment functions with the applicant, nor the nature of the relationships he formed with clients of the applicant in the course of his employment by it. He contended, however, that such relationships did not extend beyond the limited number of surgeons with whom he had been assigned by the applicant to work, being approximately 12 in number. He asserted that, whatever connection he may have developed with those surgeons, such connection did not translate to other doctors with whom he had no involvement.

[26] Albeit that the applicant sought to address this issue in reply with reference to the confidentiality of its client base, known to the first respondent, such response did not expressly address the first respondent's objection to the applicant having sought to protect customer connections which did not exist insofar as the doctors with whom he had no involvement were concerned. The applicant merely asserted that the first respondent's relationship with its customers extended to the hospitals themselves. This was not, however, the basis upon which the protection of its customer connections was sought to have been established at the outset, and its assertions made in reply were, in any event, wholly unsubstantiated.

[27] Accordingly, on the facts before this court it must accept that the first respondent's relationships with the applicant's clients, and hence its potentially protectable customer connections, were limited to those surgeons with whom the applicant worked closely.

[28] For such customer connections to warrant the protection of the restraint, the relationships between the first respondent and the surgeons must meet the threshold established in Rawlins v Caravan Truck (Pty) Ltd 1993 (1) SA 537 (A),

'… it was said that the need of an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers and could easily induce the customers to follow him or her to a new business. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee would take up employment becomes apparent.'[3]

[29] The issue is then whether the applicant established that the admitted relationships were such that, on the strength thereof, the surgeons with whom the first respondent had interacted could be induced by him to move their businesses to the second respondent, given that the mere existence of a close relationship with customers is insufficient to warrant the enforcement of a restraint.

[30] The applicant did not gainsay the first respondent's assertion that no doctor uses one or other of the products supplied by the applicant and / or the second respondent exclusively. Absent dispute, there is no reason for this court not to accept the correctness of such proposition. It is also reasonable to presume that surgeons, responsible for the well-being of the patients under their care, with professional reputations to uphold, and who are bound by codes of professional conduct, would premise their choice of products on the efficacy and reliability of the products, rather than any personal affinity they may have for a particular individual.

[31] Absent any evidence that the first respondent has the ability to cause the departure of the surgeons with whom he worked from the applicant's business

to that of the second respondent, this court cannot find that the enforcement of the restraint would reasonably serve to protect the applicant's interest in its customer connections.

(ii) <u>Confidential information</u>

[32] For information to be classified as confidential it must be:

- capable of application in trade or industry, that is, it must be useful and not be public knowledge or property;
- known only to a restricted number of people or a closed circle; and
- of economic value to the person seeking to protect it.[4]

[33] The applicant asserted,

'The First Respondent in his position as a theatre technician had access to the Applicant's confidential information which included client lists, supplier lists, pricing information, trade secrets, trade connections and other confidential information that would place a competitor in a position to unfairly compete with the Applicant should the competitor have access to such confidential information.'

[34] Except to have listed the aforementioned categories of information which the first respondent was said to possess, the applicant provided this court with no details relating to the information itself, let alone did it provide this court with an explanation concerning its usefulness, its restricted access, or its economic worth so as to enable this court to assess whether the threshold at which the information sought to be protected could be categorised as confidential.

[35] The first respondent, on the other hand, denied that he had been privy to the applicant's confidential information whilst in its employ. In amplification of his general denial, he disputed that he had been provided with any strategies relating to sales by the applicant, and nor that had he received any formal

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[3] At paragraphs 541C-D

[4] <u>Townsend Productions (Pty) Ltd v Leech and Others</u> 2001 (4) SA 33 (C) at paragraphs 53J-54B

training to this end. On the contrary, he alleged that he was required to develop his own strategies. He asserted that the applicant's information of which he had acquired knowledge was limited to the details of patients, and the applicant's pricing information (excluding its margins). As regards the issue of pricing, the first respondent alleged that such information was commonly known in the marketplace. Moreover, such pricing was regulated either by way of a tender process (where the supply was for public hospitals) or the medical insurance industry (where the supply was for private hospitals), processes with which he had no involvement, and which negated any possible commercial advantage which could be obtained by the second respondent from his being aware thereof.

[36] Although the applicant disputed the correctness of the first respondent's assertions in reply, it again failed to provide any particularity concerning the information in question, or to substantiate its position with any objective evidence evincing its existence, having only expressed the view that the first respondent's undertaking given not to disclose any confidential information to the second respondent *ipso facto* established the existence thereof. Such undertaking was embodied in the first respondent's answering affidavit, in which the first respondent set forth the basis upon which he and the second respondent believed the matter could be resolved,

'I will not disclose to any third party, including and in particular, Stryker, any of Zimmer's confidential information that I had access to or knowledge of during and as a result of my employment with Zimmer.'

[37] Whether the aforementioned statement could be construed as an admission, as alleged by the applicant, or otherwise, as alleged by the first respondent, is immaterial. Whilst the question of the existence of information would be a factual issue in respect of which an admission would be dispositive, the same is not true in regard to the classification thereof. Whether information may be classified as confidential is an issue in respect of which this court is required to make a determination on the basis of the established facts and the subjective opinions of the parties are irrelevant to that determination.

[38] In view of that which was required to have been established in accordance with Townsend, this court is unable to conclude that the first respondent is in possession of any information which may be considered to be confidential to the applicant.

[39] As stated, the enforcement of a restraint which has been breached rests upon reasonableness. Reasonableness requires that some purpose be served by limiting a former employee's ability to utilise his or her skills and expertise freely in the market place. For the reasons explained, this court is unable to find that the enforcement of the restraint would be reasonable, and the application will accordingly be dismissed.

Costs

[40] The parties were in agreement that costs ought to follow the result and, in the circumstances, the applicant will be ordered to pay the respondents' costs.

Order

1. The application is dismissed.

2. The applicant is ordered to pay the respondents' costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr S Swiggers, instructed by Cox Yeats Attorneys

Respondents:

Mr L Frahm-Arp, of Fasken (Incorporated in South Africa as Bell Dewar Inc)