THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

30 JULY 2026
DATE: SIGNATURE

Case Number: 2026-159648

In the matter between:

ORTHO-XACT (PTY) LTD
(REGISTRATION NO.: 2009/016275/07) Applicant

and

Werner Le Roux
(IDENTITY NO.: 9[…]) First Respondent

REVIVE ORTHO (PTY) LTD
(REGISTRATION NO.: 2026/074363/07) Second Respondent

This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines and to Saflii. The date for hand-down is deemed to be 30 July 2026.

Summary: Contract - Legality - Restraint of trade - Enforceability — Protectable interest — Confidential information and trade connections- Unreasonableness. Application dismissed.

JUDGMENT

MUDAU, J

Introduction

[1] This is an urgent application in which the applicant seeks to enforce restraint of trade, confidentiality and non-solicitation obligations against the first respondent, a former employee, and against the second respondent, a company through which the first respondent rendered services to the applicant pursuant to a Services Agreement.

[2] The applicant, Ortho-Xact (Pty) Ltd, operates in the specialised orthopaedic medical device industry, supplying sports-medicine, orthopaedic trauma and limb reconstruction products. Over more than nine years, it has developed substantial goodwill and commercial relationships with surgeons, private hospitals, government healthcare institutions and other stakeholders.

[3] The first respondent, Werner Le Roux, was employed by the applicant from 1 September 2024 until 1 March 2026 in a senior sales capacity. His employment contract contained a 12-month restraint of trade, confidentiality and non-solicitation provisions. On or about 3 March 2026, the second respondent, Revive Ortho (Pty) Ltd, concluded a written Services Agreement with the applicant (annexure "FP2"). The agreement also contains restraint, confidentiality and non-solicitation obligations.

[4] The applicant alleges that the respondents have breached their contractual obligations by:

a. engaging with medical practitioners outside the allocated portfolio;

b. soliciting customers to redirect business away from the applicant;

c. arranging other representatives to attend to cases without approval;

d. approaching employees with financial inducements;

e. utilising customer relationships, goodwill and confidential information for purposes adverse to the applicant;

f. continuing to book surgical procedures and hold themselves out as authorised to represent the applicant following the termination of the Services Agreement.

[5] The respondents deny the applicant's allegations and raise several preliminary points. They contend that the application is not urgent, that the applicant lacks authority to institute proceedings, that the applicant relies on inadmissible hearsay, and that the relief sought is defective in its structure.

[6] The matter was argued before me on 21 July 2026. I reserved judgment and now deliver my reasons. The respondents have filed a detailed chronology of events (the "Respondents' Chronology"), which I have found, in parts, useful in placing the disputes in their proper temporal context. The key dates are as follows. On 26 August 2024, the first respondent signs the Employment Agreement together with the separate Confidentiality, Restraint and Non-Solicitation Agreement (Annexure B) dealing with non-solicitation for 6 months and non-competition for 12 months from termination.

[7] Thereafter, on 1 September 2024, the first respondent commences employment with the applicant as sales manager, sports med. In January 2026, the first respondent discloses to Mr Pretorius his intention to resign and thereafter to render services through an agency arrangement. The applicant is aware of the intended structure from this point.

[8] On 28 January 2026, Revive Ortho (Pty) Ltd is incorporated with registration number 2026/074363/07. This is followed by the Enovis agency agreement signed by all parties on 15 February 2026. On 16 February 2026, Revive renders its first invoice to Enovis. 28 February 2026 was the first respondent's last working day, with resignation effective from 1 March 2026. From 1 March 2026, the first respondent commenced as an independent agent. In April 2026, Revive commenced performance as agent under the Services Agreement. In May 2026, services were rendered by Revive. The May sales report generated by the applicant; fee of R177,292.66 earned thereon (including on practitioners outside Annexure A- marked WLR 5, which is doctors / medical practises and area).

[9] On 11 Jun 2026, the applicant delivered what it termed a "Notice of Acceptance of Repudiation and immediate termination of Agency Agreement" (FP4). The respondents rejected the repudiation construction in writing the same day and elected to hold the applicant to the agreement on 16 Jun 2026, inter alia on the basis that the notice was defective. On 24 Jun 2026, the applicant's attorneys of record, Brand Potgieter Inc, per a letter (FP10), demanded arbitration under clause 11; written undertakings; without prejudice 60-day notice under clause 10.1 (termination no later than 25 August 2026); crucially records that a damages claim is an adequate remedy for the respondents. Applicant pays Revive's May fee of R177,292.66, some 18 days after the purported cancellation.

[10] This chronology establishes several important points. First, the applicant was aware of the first respondent's intended agency structure from January 2026 and negotiated and signed the Services Agreement thereafter. Second, the applicant continued to trade and pay fees under the Services Agreement even after its purported cancellation. Third, on its own alternative case, the agreement terminates by 25 August 2026 in any event. Fourth, the restraint periods are finite and will expire within months. These facts bear directly on urgency, the nature of the relief, and the balance of convenience.

Points in limine

<u>Urgency</u>

[11] The respondents contend that the application is not urgent and should be struck from the roll. They argue that the applicant has known since January 2026 of the first respondent's intention to resign and continue in the industry through an agency arrangement. They further contend that the applicant took almost four weeks after its purported cancellation on 11 June 2026 to launch the application on 7 July 2026.

[12] The applicant responds that the urgency did not arise when the first respondent resigned or when the Services Agreement was concluded. It arose in June 2026, when the applicant discovered conduct inconsistent with the respondents' contractual obligations. The applicant further contends that it first

sought undertakings and attempted to resolve the matter before resorting to litigation.

[13] In *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others*[1], the court held that the law on the procedure following rule 6 (12) (a) and (b) is well established. An applicant must set out explicitly the circumstances rendering the matter urgent and why substantial redress cannot be obtained in due course. The court retains a discretion to determine the degree of relaxation justified by the facts.

[14] Restraint disputes are inherently urgent because the restraint period is finite. The threatened harm; disclosure or use of confidential information, erosion of customer connections and loss of goodwill may occur before ordinary process can protect the applicant.[2]

[15] In this matter, the urgency is not founded on the first respondent's resignation or the conclusion of the Services Agreement. It is founded on the June 2026 breaches, the termination of the Services Agreement, the refusal to furnish undertakings, and the respondents' continuing conduct thereafter.

[16] The applicant has demonstrated that it acted expeditiously once the breaches came to light. It addressed correspondence, sought voluntary compliance, and attempted to resolve the matter without litigation. Only after it became apparent that the respondents intended to persist with the impugned conduct did the applicant approach this court.

[17] The respondents' argument that the applicant should have anticipated future breaches and litigated before they occurred is unsustainable. An applicant cannot be expected to approach the court to restrain conduct that has not yet taken place.

[18] In the circumstances, I am satisfied that the matter is urgent and that the applicant cannot obtain substantial redress at a hearing in due course. The point in limine is dismissed.

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1 2016 (2) SA 561 (GJ) at para 22

2 See *Basson v Chilwan and Others* 1993 (3) SA 742 (A).

Authority

[19] The respondents contend that the applicant was not shown to have authorised the institution of these proceedings, as no resolution was attached to the founding affidavit.

[20] The applicant has since attached the board resolution authorising Mr Potgieter to institute these proceedings and to depose to the affidavits filed herein (RA1). The resolution confirms that the applicant had authorised the institution of these proceedings from the outset, albeit that the formal record of that authority was not immediately available.

[21] I am satisfied that the applicant has cured any procedural defect. The respondents have suffered no prejudice. The point in limine is dismissed.

Hearsay

[22] The respondents object to the applicant's reliance on hearsay evidence, particularly the allegation that the first respondent stated he would continue rendering services until restrained by a court order. The respondents contend that this allegation reaches the court through triple hearsay: from Mr van Vreden (who filed no affidavit) to Mr Pretorius (whose affidavit was initially unsworn) to Mr Potgieter.

[23] The applicant has addressed this objection in its replying affidavit. Mr Pretorius has deposed to a supplementary supporting affidavit (RA2) confirming matters within his personal knowledge. Mr van Vreden has deposed to a confirmatory affidavit (RA3) confirming his discussions with the first respondent.

[24] The evidence relied upon by the applicant is now placed before the court by witnesses with first-hand knowledge of the relevant events. The respondents' objection is accordingly without merit. The point in limine is dismissed.

The Structure of the Relief

[25] The respondents contend that the relief sought is defective because no arbitration existed at the time the application was launched, and because the

relief against the first respondent (who is not a party to the Services Agreement or its arbitration clause) would be effectively final.

[26] The applicant has since instituted arbitration proceedings with AFSA (RA4 and RA5). It has also sought to amend its Notice of Motion (RA6) to distinguish between final relief against the first respondent (for the duration of his employment restraint) and interim relief against the second respondent (pending arbitration).

[27] The amendment is appropriate and does not introduce a new cause of action. It merely clarifies the contractual positions of the respective respondents. The point in limine is dismissed.

The merits

<u>The Legal Framework for Restraints of Trade</u>

[28] The starting point is that restraint undertakings are valid and enforceable unless enforcement is shown to be unreasonable or contrary to public policy: *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[3]. Once the restraint and breach or threatened breach are shown, the party resisting enforcement bears the burden of demonstrating that enforcement would be unreasonable and therefore against public interest.[4]

[29] The recognised enquiry includes whether the party seeking enforcement has a protectable interest, whether that interest is threatened, whether the restraint is broader than necessary, and whether public policy favours enforcement.[5]

[30] The relevant protectable interests are, in substance, trade connections (customer connections) and confidential information (trade secrets). The need to protect trade connections "arises where the employee has access to customers and is in a position to build up a particular relationship with the

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[3] 1984 (4) SA 874 (A)
[4] See *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) at 794D-E and 795G-I
[5] *Basson v Chilwan and Others* 1993 (3) SA 742 (A).

customers so that when he leaves the employer's service, he could easily induce the customers to follow him to a new business".[6]

[31] The Supreme Court of Appeal has recognised that a restrained employee may be interdicted even without proof of actual misuse where the employee had access to confidential information and customer connections and joins or assists a competitor in circumstances giving rise to a real risk of harm.[7]

[32] In *Experian South Africa (Pty) Ltd v Haynes and Another*[8] , this court (per Mbha J) treated trade secrets, confidential information and customer connections as proprietary interests and emphasised that the employee's ability to exploit those interests may justify restraint enforcement.

<u>The Applicable Standard</u>

[33] Since the restraint is for a limited period and the applicant seeks final relief against the first respondent, the application must be treated as substantially one for final relief. A final order can only be granted in motion proceedings if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order .[9] This is the *Plascon-Evans* rule.[10]

[34] The respondents contend that the genuine disputes of fact on this record include:

a. whether the restraints protect any threatened interest;

b. whether the appointed activity was consented to;

c. whether the Services Agreement was validly terminated;

d. whether any of the alleged incidents occurred as alleged;

e. the circumstances and choreography of the resignation and of the backdating of the Services Agreement; and

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[6] *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at page 541
[7] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA).
[8] 2013 (1) SA 135 (GSJ)
[9] *Reddy v Siemens Telecommunications* footnote 7 above at para 4
[10] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)).

f. what, if anything, the first respondent said to Mr van Vreden.

[35] Each of these disputes must be resolved on the respondents' version for purposes of this application.

The Protectable Interests

[36] The applicant contends that it has protectable interests in its confidential information, customer connections and goodwill. It has identified pricing structures, margins, customer requirements, purchasing patterns, surgeon preferences, strategic business plans and operational systems as confidential information deserving of protection.

[37] The respondents contend that the surgeon relationships at issue are the first respondent's own stock-in-trade, built over eight years at SA Biomedical/Arthromedix before he joined the applicant. They rely on statements from Dr Dawadi ("what made me use them was having you available ... not the products"), Dr Mostert ("a long history with the agency of Werner le Roux"), and Dr C Pretorius (his "representative of choice" since his "transition from Arthrex to Rejoin (Ortho-Xact)").

[38] The respondents further point to the applicant's own Services Agreement. Clause 2.2.1 defines the "Services" as the "introduction of the Company to the Doctors and the Medical Practises for purposes of the Company securing sales of its products and services". Clause 4.2 fixes the Fee at 17.5% of the value of sales "solely and directly attributable to the provision by the Service Provider of the Services". The respondents argue that one does not pay 17.5% of turnover to be introduced to one's own customers.

[39] The respondents have also provided a schedule (WLR20) mapping each (Annexure A) doctor and each of the sixteen (Annexure C) hospitals against the first respondent's service history. This shows that nine of the sixteen hospitals have no service history with the applicant through the first respondent at all; two more reflect only a single year; and in the five that are shared, the first respondent's Arthrex history predates the applicant's in every case.

[40] The applicant disputes the respondents' characterisation. It contends that Dr Hartzenberg was an established customer of the applicant before the first respondent commenced employment. It further contends that Mr Pretorius and Mr van Vreden personally serviced Dr Hartzenberg and had established and maintained that professional relationship on behalf of the applicant.

[41] The applicant also contends that Life Wilgeheuwel Hospital and Johannesburg Surgical Hospital are expressly identified in Annexure A to the Services Agreement as protected hospitals, and that the protection necessarily extends to the surgeons practising at those hospitals.

[42] On the approach applicable to final relief on motion, the genuine disputes of fact must be resolved on the respondents' version. On that version, the surgeon relationships at issue were established by the first respondent over many years before he joined the applicant. The customers themselves have identified their relationship as with the first respondent personally. The applicant's own Services Agreement defines the services as the introduction of the applicant to the doctors and pays 17.5% commission for that introduction.

[43] The applicant has not demonstrated that the respondents' version is so far-fetched or untenable that it can be rejected without the need for oral evidence. The disputes of fact are genuine and material.

[44] In these circumstances, the applicant has not established, on the *Plascon-Evans* standard, that it has a clear right to enforce the restraint against the first respondent. The respondents' version—that the relationships predate the applicant and are the first respondent's own professional connections—raises a triable issue that must be resolved in the respondents' favour at this stage.

<u>Written Consent – The Services Agreement</u>

[45] The respondents contend that the applicant consented in writing to the activity it now attacks. The employment restraint forbids the first respondent from being "employed by, concerned, engaged and/or associated with any business or concern which conducts business in competition with the company". But

working for Revive, within the scope of the Services Agreement, was never "competition with" the applicant—it was performance for the applicant.

[46] Clause 2.1 of the Services Agreement appoints the Service Provider "on a non-exclusive basis," and the Service Provider accepts "on a non-exclusive basis". The applicant knew that the first respondent is Revive's driving force and only operative. The signed Services Agreement is therefore the applicant's written consent to the first respondent rendering services through Revive. To the extent that the employment restraint would otherwise have reached that activity, the applicant relaxed it *pro tanto* in writing.

[47] The applicant's answer—that the restraints "remained operative" and were "repeatedly explained" orally—founders on its own drafting. Clause 13.1 of the Services Agreement provides:

> "This Agreement constitutes the whole agreement between the Parties relating to the subject matter hereof and supersedes any other discussions, agreements and/or understandings ... regarding the subject matter hereof."

[48] Clause 13.4 adds:

> "No Party shall be bound by an express or implied or tacit term, representation, warranty, promise or the like not recorded herein."

[49] The drafter had every opportunity to record the reservation now alleged. It did not. The applicant cannot enforce its boilerplate against Revive and disclaim it for itself in the same breath.

[50] If the applicant contends that its consent endured only for so long as the Services Agreement did, its restraint case depends entirely on a valid termination on 11 June 2026, which is denied and which is the very dispute clause 11 reserves to arbitration (see below).

[51] In *Road Accident Fund v Mothupi*[11], the court held that waiver is not presumed, and the onus is on the party alleging it. However, clear proof of

[11] 2000 (4) SA 38 (SCA)

unequivocal conduct is required. A written agreement, drafted by the applicant, appointing the very activity said to be restrained, is clear proof of consent.

[52] On the *Plascon-Evans* standard, the respondents' version—that the applicant consented in writing to the activity it now attacks—must be accepted. This is fatal to the applicant's case against the first respondent.

The Termination Dispute

[53] The Services Agreement, in clause 10.2, provides:

> "Should any Party (the 'Defaulting Party') breach any provision of this Agreement and fail to remedy such breach within 14 (fourteen) days after receiving written notice requiring it to do so from any other Party (the 'Aggrieved Party'), then the Aggrieved Party shall be entitled, without prejudice to its other rights in law, including any right to claim damages, to claim immediate specific performance of the Defaulting Party's obligations, or in the case of a breach of a material provision, to cancel this Agreement ..."

[54] No such notice was given. The applicant resorted instead to a purported acceptance of a "repudiation", a construction the respondents rejected in writing on the day it was delivered.

[55] Repudiation is a serious matter not lightly to be presumed: the conduct relied upon must be "clearcut and unequivocal, i.e. not equally consistent with any other feasible hypothesis"[12]

[56] The applicant's subsequent conduct is inconsistent with its purported cancellation. On 29 June 2026, it paid Revive's May fee of R177,292.66, eighteen days after its purported "acceptance of repudiation and immediate termination" and eight days before launching this application. The fee was computed on the applicant's own May sales report, which included the very practitioners outside Annexure A whose servicing the applicant now brands repudiation. The applicant invoiced, took the revenue on, and paid the fee for the precise conduct it characterises as repudiation.

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[12] See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at para 18.

[57] On the applicant's own alternative case (its 60-day notice of 24 June 2026 under clause 10.1), the Services Agreement subsists until about 23 to 25 August 2026. Clause 10.1 permits termination on 60 calendar days' written notice.

[58] Whether the Services Agreement was validly terminated is a dispute squarely within clause 11, which provides:

> "A dispute which arises in regard to ... the termination or purported termination of ... this Agreement ... (other than where an interdict is sought or urgent relief may be obtained from a court of competent jurisdiction), shall be submitted to and decided by arbitration."

[59] The applicant cannot, on motion, and in proceedings it treats as interim, obtain a finding on the central merits question that belongs to the arbitrator. On the approach applicable to final relief on motion, the respondents' version—that the termination was invalid and the Services Agreement subsists—must be accepted. This is fatal to the applicant's case against the second respondent.

The Requisites for Interdictory Relief

[60] The requirements for a final interdict are a clear right, an injury committed or reasonably apprehended, and no adequate alternative remedy.[13]

[61] On the *Plascon-Evans* standard, the applicant has not established a clear right. The respondents' version—that the restraints are unreasonable, that the applicant consented in writing to the activity, and that the termination is disputed—must be accepted.

[62] Even if a *prima facie* right were established, the applicant has not demonstrated a well-grounded apprehension of irreparable harm. The applicant sells and invoices directly. Its alleged loss is the margin on identifiable procedures, computable from its own monthly sales reports. Its attorneys wrote on 24 June 2026 that a damages claim is an adequate remedy for the respondents. Its founding affidavit says the same at paragraph 124.

[13] *Setlogelo v Setlogelo* 1914 AD 221.

[63] The balance of convenience is decisively against the relief. The order sought would destroy a functioning business and the first respondent's livelihood for up to 12 months. The applicant's exposure is quantifiable and recoverable. On its own alternative case, the Services Agreement terminates in late August 2026 in any event. An interdict will not deliver surgeons' cases to the applicant; on the events of 1 July 2026 themselves, it delivered them to the applicant's competitors.

[64] An alternative remedy exists: the expedited arbitration under clause 11.3, together with a damages claim. The applicant demanded arbitration and then came to court without instituting it until after the proceedings were launched.

<u>The Reply and Amended Notice of Motion</u>

[65] The replying affidavit, delivered on 17 July 2026 with the hearing set down for 21 July 2026, introduces new matter:

a. that the first respondent “had already commenced working for Enovis during October 2025” and was thereby guilty of “gross dishonesty”;

b. the confirmatory affidavit of Mr Goles and fuel-card records;

c. that the first respondent was dismissed by his previous employer and “begged” for employment;

d. an amended notice of motion recasting the relief against the first respondent as final.

[66] It is trite that an applicant stands or falls by its notice of motion and founding affidavit; a case cannot be made out in reply for the first time.[14]

[67] The new matter falls to be struck out or disregarded. The respondents have had no opportunity to answer it on oath. To the extent that the court has any regard to it, every element of the new matter is genuinely disputed. On the *Plascon-Evans* standard, those disputes are resolved on the respondents' version.

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[14] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635.

Conclusion

[68] This application is fundamentally flawed. The applicant seeks to enforce a restraint of trade against a former employee and a service provider it itself appointed, but the respondents' version—which must be accepted on the applicable standard—raises genuine and material disputes of fact that are fatal to the applicant's case.

[69] The surgeon relationships at issue were built by the first respondent over many years before he joined the applicant. The customers themselves have identified their relationship as with the first respondent personally. The applicant's own Services Agreement (clause 2.2.1) defines the services as the introduction of the applicant to the doctors and (clause 4.2) pays 17.5% commission for that introduction.

[70] The applicant consented in writing to the activity it now attacks. The Services Agreement, drafted by the applicant, appointed the second respondent to provide services through the first respondent. To the extent that the employment restraint would otherwise have reached that activity, the applicant relaxed it *pro tanto* in writing.

[71] The termination of the Services Agreement is disputed and is the very dispute that the parties agreed to refer to arbitration (clause 11). The applicant cannot, on motion, obtain a finding on the central merits question that belongs to the arbitrator.

[72] The applicant has not established the requisites for interdictory relief. It has not shown a clear right, a well-grounded apprehension of irreparable harm, or the absence of an adequate alternative remedy. The balance of convenience is decisively against the relief.

[73] In the circumstances, the application falls to be dismissed.

Costs

[74] The applicant chose the most aggressive procedural course available: a summary cancellation without the contractual breach notice required by clause

10.2; extra-judicial self-help; a one-day ultimatum; a truncated urgent timetable; punitive costs prayers; and service of papers whose central corroborating "affidavit" was unsworn and whose linchpin allegation is double hearsay.

[75] The respondents, a small business and the individual whose livelihood it carries, were forced to oppose at speed. A punitive costs order against the applicant is warranted.

Order

[76] In the result, I make the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the respondents' costs, on the scale as between attorney and client, including the costs consequent upon the employment of counsel.

MUDAU J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

For the Applicant:	Adv A Saldulker
Instructed by:	Brand Potgieter Incorporated
For the First and Second Respondents:	Adv SM Van Vuren
Instructed by:	Weavind and Weavind Inc
Date of Hearing:	22 July 2026
Date of Judgment:	30 July 2026