

SOUTH AFRICA / JUDGMENT

Joyco (Pty) Limited v WV Squared (Pty) Limited and Others (2024-137245)

[2025] ZAGPJHC 131 (21 February 2025)

[2025] ZAGPJHC 131

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

2024-137245

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

case

NO: 2024-137245

DATE:

21
February 2025

In the matter between:

JOYCO
(PTY) LIMITED
Applicant
and
WV
SQUARED (PTY) LIMITED
First Respondent
KEVIN
SEAN WHITTAKER
Second Respondent
GARETH
HARVEY
Third Respondent
GAVIN
HOWARD VAREJES
Fourth Respondent
BLACKWAVE

INVESTMENTS (PTY) LIMITED
Fifth Respondent
RICHMARK
HOLDINGS (PTY) LIMITED
Sixth Respondent

Neutral Citation: Joyco v WV Squared and 5 Others (2024-137245) [2025]
ZAGPJHC --- (21 February 2025)

Coram: Adams J

Heard: 11 February 2025

Delivered: 21 February 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 21 February 2025.

Summary: Civil procedure – urgent application – for interdictory relief against erstwhile employees of company – unlawful competition and unlawful use of confidential information –

to constitute confidential information, such information should: (a) involve and be capable of application in trade or industry; (b) must be useful; (c) must not be public knowledge and public property, that is objectively determined, it must be known only to a restricted number of people or to a closed circle of persons; and (d) objectively determined must be of economic value to the person seeking to protect it – applicant failed to comply with these requirements – no protectable interested demonstrates – application should therefore fail – application should also fail due to lack of urgency – any urgency self-created – Urgent application struck from the roll for lack of urgency.

ORDER

(1)
The applicant's urgent application be and is hereby struck from the urgent court roll for lack of urgency.

(2)
The applicant shall pay the first to sixth second respondents' costs of this urgent application, such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel, such charges to be taxed on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. The applicant (Joyco) is in the so called 'Fast Moving Consumer Goods' (FMCG) business and provides the mass retail market with high quality products that are sourced by Joyco from around the world. Joyco claims to 'bridge the gap between international suppliers and local retailers, thereby providing consumers with access to the finest products from overseas'. The fifth respondent (Blackwave Investments) previously owned fifty percent of the shareholding in Joyco. The second respondent (Mr Whittaker) was, until May 2024, in the employ of Joyco essentially as a Key Accounts Manager. The third respondent (Mr Harvey) was also previously employed by Joyco as a Sales Manager. Both of these individuals are closely related to the fourth respondent (Mr Varejes), who appears to be the controlling mind behind and shareholder of Blackwave Investments and the fifth respondent (Richmark Holdings).

[2]. Towards the end of May 2024, Blackwave and Mr Varejes exited Joyco and terminated their involvement in the said company by selling its fifty percent shareholding in the said company back to its previous sole owner. At the same time Messrs Whittaker and Harvey resigned as employees of Joyco and immediately thereafter started trading, together with certain other individuals, as the first respondent (WV Squared), which they had registered with CIPC on 7 February 2024. Importantly, WV Squared and Mr Whittaker started marketing, promoting and selling a fast-moving consumer product, namely a 'Caliburn Bar B600' vape, which, according to Joyco, is the exact same vape that it had identified and wanted to sell. WV Squared also holds itself out as 'a

distinguished entity in the fast-moving consumer goods (FMCG) sector, serving as both a wholesaler and distributor with a broad reach across various markets'.

[3]. Joyco therefore alleges that the first to fourth respondents are unlawfully competing with it in that Mr Whittaker, in breach of his fiduciary duty to Joyco, is using its confidential information and has also stolen its business opportunity.

[4]. In this opposed urgent application Joyco applies on an urgent basis for an order in the following terms: -

'(1)

(2) The first respondent is finally interdicted and restrained, whether directly or indirectly through any other juristic entity or persona from which it will derive a benefit, from:

(2.1) pursuing, accepting, or making use of the corporate opportunity which was misappropriated from the applicant; namely the marketing an UWELL Technology co. Ltd ("UWELL"), Caliburn Bar 86000 white-labelled by the first respondent under the brand "EXSO" and

(2.2) directly or indirectly, competing unlawfully with the applicant.

(3) The second to fourth respondents are finally interdicted and restrained, whether directly or indirectly through any other juristic entity or persona from which they (or any of them) will derive a personal benefit, from:

(3.1) pursuing, accepting, or making use of the corporate opportunity which was misappropriated from the applicant; namely the marketing and sale of the UWELL, Caliburn Bar B6000 vape (whether white-labelled by the first respondent under the brand "EXSO" or otherwise); and

(3.2) directly or indirectly, competing unlawfully with the applicant.

(4) Alternatively, the interdicts in paragraphs 2 and 3 above are to operate immediately as interim interdicts pending an action to be instituted by the applicant within 30 days of this order for final interdicts.

(5) The applicant is to institute an action for damages against the first to fourth respondents within 30 days of this order.

(6) The first to fourth respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved. Alternatively, in the event of the fifth and/or sixth respondents opposing this application, ordering such respondents as who oppose the application to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

(7) Further and/or alternative relief.'

[5]. In issue in this opposed urgent application is whether the applicant has demonstrated a sustainable cause of action based on unlawful competition and the misappropriation of confidential information. Crystallised further, the question to be considered by me is whether the applicant has proven a protectable interest worthy of protection by an interdict, whether that be final or interim. Those issues are to be decided against the factual backdrop as set out briefly in the paragraphs which follow.

[6]. As the name suggests, FMCG are products that sell quickly at relatively low prices, such as perishables like milk and eggs, household items like detergents and toilet paper, to sweets, chewing gum and cigarettes. Vapes also fall in this sector. A vape is a battery-operated device that simulates smoking and is sometimes called an electronic cigarette. Most vapes are manufactured in China. Two manufacturers are relevant in this matter: UWELL (which makes the Caliburn B6000, which is then sold under brands owned by third parties) and Vozol (which is its own brand).

[7]. Joyco has been selling Vozol vapes, at the instance of Mr Whittaker and Mr Varejes, since 2022. Joyco got into the vape business only after Mr Whittaker joined, and he is the one who brought vapes and Vozol to Joyco, which, during 2022, acquired exclusivity over one of the vapes, a device known as the Vozol Bar 1200.

[8]. After a while, Mr Whittaker and Mr Varejes grew concerned about Joyco becoming beholden to Vozol and they suggested that Joyco expand its vape business to import and sell vapes under a Joyco-owned brand. They therefore proposed that Joyco identify vapes to import and sell under a Joyco-owned brand through a process called 'white labelling'. White

labelling is when a retailer or distributor sells a product using its own brand name but the product is manufactured by a third party. This is where UWELL came in. That Chinese company makes white label vapes, including the Caliburn B6000, which could be sold under different brand names.

[9]. During October 2023, Joyco sent to China a delegation, which included Mr Whittaker, to investigate the feasibility of extending its business to 'white label' vapes. Mr Whittaker and the delegation met with UWELL, and on their return from China, Mr Whittaker proposed to Joyco that it should venture into the purchase and sale of Caliburn B6000 vapes and resell it as 'white label' vapes. The respondents contend that there was nothing secret about UWELL and the Caliburn B6000 – by mid-2023, UWELL products, including the Caliburn B6000, were already widely available in South Africa. Mr Greenberg, the co-owner and Chief Executive Officer of Joyco, refused to take Joyco down the white label route and so that venture was not pursued further by the said company.

[10]. Mr Whittaker resigned at the end of May 2024, and Mr Harvey resigned at the end of June 2024. Neither signed a restraint, so they were free to start new jobs competing with Joyco. The only question is whether they, in competing with Joyco, did so unlawfully by trading as WV Squared, which then went on to acquire and sell the Caliburn B6000 vape under its brand, EXSO. UWELL has since discontinued the Caliburn B6000. WV Squared has about 12 600 Caliburn B6000 vapes left in stock.

[11]. The case on behalf of Joyco is that the Caliburn B6000 venture is a 'corporate opportunity' that Mr Whittaker misappropriated for WV Squared. It is also alleged by Joyco that Mr Whittaker misused the connections he made whilst an employee of Joyco and its confidential information, to set up the business of WV Squared. This, so Joyco contends, amounts to 'springboarding', which is a term of art in unlawful competition. It is defined as the process by which someone acquires and uses as a springboard the confidential information and trade secrets of his competitor with the aim of gaining an unfair advantage in the market.

[12]. Mr Subel SC, who appeared on behalf of the respondents with Mr Mitchell, argued that there are no facts that fairly support a case based on protecting confidential information and no facts that fairly support a case based on preventing the growth of the EXSO brand. Neither is a case made out, so the contention continues, in support of the case that the respondents stole a corporate opportunity belonging to Joyco.

[13]. I find myself in agreement with these contentions on behalf of the respondents. It is so, as submitted by the respondents, that Mr Whittaker did not sign a restraint of trade, which means that nothing stopped him from exercising his constitutional right to trade, including in competition with Joyco,

[14]. The first point to be made about Joyco's 'corporate-opportunity' case is that the corporate-opportunity rule does not apply after an employee resigns. Even if an opportunity falls squarely within an employer's line of business, a former employee 'is at liberty in the absence of explicit contractual restraints, to exploit it to the full'.^[1] An employee cannot, however, resign to take the opportunity for himself, but that rule does not apply – and so the employee is free to compete with his former employer – if the resignation was for other reasons.^[2] In this case, it cannot be said with any conviction that Mr Whittaker was prompted or influenced by a wish to acquire for himself the alleged corporate opportunity. There is no evidence in support of such a conclusion.

[15]. In any event, the Caliburn B6000 was not a corporate opportunity for Joyco, which, on the evidence in the matter, had made a conscious decision not to go the route of 'white label' vapes like the Caliburn B6000. On the respondents version, which I have to accept, Joyco, represented by its Chief Executive Officer, disagreed with the white

label proposal and Joyco never took any concrete steps towards that business operation.

[16]. That, in my view, is the end of the applicant's case based on the misappropriation of a corporate opportunity. The simple point is that the Caliburn B6000 was not a corporate opportunity for Joyco at all, or, even if it were, Joyco was never genuinely interested in the Caliburn B6000 (or any white label vape).

[17]. As regards the use of Joyco's alleged confidential information, it is so, as contended on behalf of the respondents, that an employee must keep his employer's confidential information confidential for as long as he remains employed by his employer. However, confidential information is inevitably carried away in the employee's head after the employment has ended and which the employee then remains free to use for the benefit of himself or others provided that he has not, whilst still employed by that employer, broken his duty of good faith by, for example, making or copying a list of that customers.^[3]

[18]. In my view, the applicant fails to prove the requirements for a cause of action based on confidential information and springboarding. As submitted on behalf the respondents, information about the Caliburn B6000 is not confidential. The existence of white label vapes and those that make them, including UWELL and the Caliburn B6000, is not confidential. There is also no dispute that UWELL and the Caliburn B6000 have been widely available in South Africa for several years – even before Joyco got into the vape business.

[19]. Moreover, Joyco's business process is not confidential. Its process amounts to finding products, importing products and selling products. That information is 'trivial or easily accessible', not unique to Joyco and 'not confidential at all'.^[4] Also, as was held by this court in *Combustion Technology (Pty) Ltd v Peck*^[5], where there is 'nothing unique about the way an applicant is doing business or nothing unique about its sales methods, and its methods are those generally adopted in a particular trade or industry, such methods cannot be considered confidential and therefore protectable'. This, in my view, is apt in casu.

[20]. By the same token, the customers of Joyco are not confidential. They are the major names in the fast-moving consumer goods sector. As for the invoices which Mr Whittaker had in his possession at the time he resigned, the applicant could simply have asked for it to be returned to them. The fact that they did not must lead to the conclusion that the invoices were not a genuine concern for Joyco. They are, in any event, not confidential. The names and contact details of large retailers like Spar and Pick n Pay are not confidential. And as for the prices on the invoices, the invoices relate to sales that Mr Whittaker made before he resigned from Joyco.

[21]. As was held in *Alum-Phos (Pty) Ltd v Spatz and Another*^[6], to constitute confidential information, such information should: (a) involve and be capable of application in trade or industry;

(b) must be useful; (c) must not be public knowledge and public property, that is objectively determined, it must be known only to a restricted number of people or to a closed circle of persons; and

(d) objectively determined must be of economic value to the person seeking to protect it.

[22]. As I have already indicated, none of these requirements have been proven by Joyco. What is more is that the invoices alleged to be confidential by the applicant would not be useful to a competitor and has no economic value. They lack any degree of confidentiality and are of no use to competitors which use the same or similar methods in their businesses.

[23]. In my view, the applicant has not demonstrated that they have protectable proprietary interest that are being or will be infringed by the respondents. The applicants have not presented any evidence of unlawful competition, and there is no evidence in the papers of any injury having been actually committed or reasonably apprehended.

[24]. For all of these reasons, the applicant's application should fail.

[25]. There is another reason why the applicant's application should fail and that relates to the issue of urgency. The respondents also oppose the urgent application on the grounds that the application is not urgent. In the event that it is determined that there is any urgency, then it is submitted on behalf of the respondents, that the urgency is entirely self-created.

[26]. The applicant, so the respondents contend, have been aware since as early as June 2024 that Mr Whittaker was marketing a new vape – that is five months before Joyco launched this application at the end of November 2024. The applicant's founding papers leave those five months entirely unexplained. Joyco does not explain, in detail, what happened between June 2024 and when it launched this application during November 2024. The rhetorical question to be asked is why the applicant took so long from June 2024 to November 2024 to launch this application, if, in their view, the matter is so urgent.

[27]. The simple fact of the matter is that howsoever one views this matter the applicant should have launched this application much sooner than they actually did.

[28]. This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self-created. Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives can only be ignored at a litigant's peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.

[29]. For all of these reasons, I am not convinced that the applicant has passed the threshold prescribed in Rule 6(12)(b) and I am of the view that the application ought to be struck from the roll for lack of urgency.

[30]. The application therefore falls to be struck from the roll and the costs should follow the suit.

Order

[31]. In the result, I make the following order:

- (3) The applicant's urgent application be and is hereby struck from the urgent court roll for lack of urgency.
- (4) The applicant shall pay the first to sixth second respondents' costs of this urgent application, such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel, such charges to be taxed on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 11 February 2025 JUDGMENT DATE: 21 February 2025 – Judgment handed down electronically FOR THE APPLICANT: A C Botha SC and C De Witt INSTRUCTED BY: Cox Yeats Attorneys (JHB), Sandton FOR THE RESPONDENTS: A Subel SC and J Mitchell INSTRUCTED BY: Stein Scop Attorneys Incorporated, Morningside, Sandton

[1] Da Silva v CH Chemicals (Pty) Ltd

[2008] ZASCA 110; 2008

(6) SA 620 (SCA) at para 21.

[2] Da Silva at para 20.

[3] Knox D'Arcy Ltd v Jamieson 1992

(3) SA 520 (W) at 527F-I. See also Waste Products Utilisation (Pty) Ltd v Wilkes 2003

(2) SA 515 (W) at 576E-H.

[4] Waste Products Utilisation at 576E-F.

[5] Combustion Technology (Pty) Ltd v Peck 2020 JDR 1935 (GJ) at para 55.

[6] Alum-Phos (Pty) Ltd v Spatz and Another

[1997] 1 All SA 616 (W) at 623A–624A;

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