

SOUTH AFRICA / JUDGMENT

**Surgical Innovations (Pty) Ltd v Bouwer
and Others (2024/132565) [2024]
ZAGPJHC 1273 (6 December 2024)
[2024] ZAGPJHC 1273**

COURT
South Gauteng High Court, Johannesburg

BEFORE
Wright

CASE / FILE NUMBER
2024/132565

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IN THE
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE
NO: 2024/132565

1.

Reportable: No

2.

Of interest to other judges: No

3.

Revised

Date: 6 December 2024

Signature: SURGICAL INNOVATIONS
(PTY) LTD
Applicant
and
RIAAN
BOUWER
1ST Respondent
DIVAN
BOUWER
2ND Respondent
LANOY MEDICAL
CC
3RD Respondent

JUDGMENT

WRIGHT J

1. In this application, brought as one of urgency, the applicant, SI seeks to enforce restraint of trade agreements.
2. The papers are long and complex. Given the urgency, I shall be brief. There is a sharp difference between the reasons for an order and reasoning, manufactured after an order to justify the order. Litigants and their lawyers are entitled to the reasons for the order. Manufacturing reasoning for an order after the order has been made carries the danger that the judicial officer concerned might feel the need to force the reasoning to fit the order. What is a judicial officer to do if it is thought, on reflection, that the order granted should not have been granted?
3. In short, SI sells medical equipment. The first and second respondents, the Bouwer brothers used to work for SI. The third respondent, Lanoy is a competitor of SI. The Bouwers recently took up employment with Lanoy.
4. During their employment with SI the Bouwers learned about the business of SI and about customers of SI and pricing.
5. On 30 September 2024, the Bouwers resigned from SI. SI seeks to restrain the Bouwers until 30 September 2025.
6. On 30 September 2024, Divan Bouwer, in an exit interview with SI, in answer to a question from SI “ Who is your new employer ? “ stated that “ I am doing my own thing. “
7. On the same day, Riaan Bouwer, in his exit interview, in answer to the same question stated “Going to work for myself and a friend of mine with a logistics company. “
8. The Bouwers had serviced one of SI’s clients, ARC. ARC had years ago appointed SI as distributor of its products.
9. On 21 October 2024, SI received a letter from ARC. ARC stated that it was terminating the current distribution agreement with SI with immediate effect and that as from 1 January 2025, ARC would be using Lanoy and that SI would no longer be allowed to service and sell ARC products.
10. On 22 October 2024, SI sent letters of demand to the Bouwers that they desist from breaching their restraints.
11. On 23 October 2024, SI wrote to ARC informing ARC that the Bouwers, who had dealt with ARC, had shortly before left SI and joined SI’s competitor, Lanoy.

12. On 30 October 2024, Lanoy's attorneys wrote to SI saying that discussions between ARC and Lanoy had commenced in August 2023. The letter went on to state that ARC had appointed Lanoy as a distributor from 13 August 2024 and as sole distributor from 1 January
2025. The letter alleges that Lanoy did not engage in discussions with the Bouwers, about the Bouwers possibly coming to work for Lanoy, prior to Lanoy's appointment by ARC. The statement is made that Lanoy was unaware, when it offered employment to the Bouwers, that the Bouwers had restraint agreements with SI. The letter includes an undertaking by Lanoy that it will not use the confidential information of SI nor will it solicit any SI employees during a restraint period.
13. On 6 November 2024, ARC wrote to SI. ARC alluded to previous better times between the two but complained that ARC had been unable to get a signature from SI to a certain agreement. ARC also complained of lack of interest by SI. The letter says that in July 2023, Mr Furbank of Lanoy approached ARC, offering to replace SI as distributor of ARC products.
14. It needs underlining that the Bouwers serviced the ARC account when they were with SI and when they moved to Lanoy.
15. On 15 November 2024 the present application was launched, set down for Tuesday 3 December 2024. Due to a shortage of judges, the matter was allocated to me on Thursday 5 December 2024 for hearing on Friday 6 December 2024.
16. In the answering affidavits by the Bouwers they say that SI has no interest to protect. They say that the loss by SI of the right to distribute ARC products means that the application is just brought to stifle the Bouwers from working. They say that the information they have is in the public domain. They tender search of their laptops and other electronic devices.
17. On 28 November 2024, Mr Furbank, the COO of Lanoy deposed to an affidavit. He says that he knew the Bouwers as sales representatives of SI. He confirms that SI and Lanoy are competitors. He says that he personally interviewed the Bouwers for their jobs with Lanoy. He asked them twice if they had restraints with SI. He was told no by both Bouwers. On that basis, the Bouwers were employed by Lanoy. When Lanoy realised that the Bouwers had breached their restraints and that they had materially misrepresented the facts Lanoy initiated proceedings against the Bouwers, seeking their dismissal.
18. On 2 December 2024, Lanoy dismissed the Bouwers from their employment with Lanoy. The Bouwers say now that the application is moot, especially when considered in the light of the undertakings given by Lanoy.
19. The dismissal of the Bouwers from the employ of Lanoy gives SI impetus on the question of urgency, which urgency is conceded by the Bouwers, and on the merits of the application. The Bouwers now have an added motive to carry on with efforts to seek other employment or otherwise to compete with SI.

20. I shall assume, in favour of the Bouwers but without deciding the point, that ARC changed from SI to Lanoy only because of ARC's unhappiness with SI, rather than at the behest of the Bouwers. The fact remains that the Bouwers serviced the ARC account when they were at SI and then again when they were at Lanoy.
21. The manner in which the Bouwers left SI and the timing of the events as set out above are against the Bouwers. This leads to the conclusion that the Bouwers left the employ of SI with the intention of competing with SI.
22. The Bouwers suggest that their agreements contain, in addendums thereto, an arbitration clause and that the present application is accordingly premature. I disagree. I have a discretion to enforce the arbitration clause or not. The manner in which the Bouwers left SI and then sought to compete with SI, and clearly intend trying to do so in the future, makes it inappropriate for me to refrain from dealing with the case now.
23. The relief sought in the notice of motion is now trimmed somewhat in relation to Lanoy and it caters generally for water which has flowed under the bridge since the application was launched. A draft order has been prepared by SI's lawyers. Lanoy consents to the order in relation to it. Costs are not sought against Lanoy. The draft seeks that the Bouwers jointly and severally pay the costs of SI. There is no reference to a scale of costs, nor to more than one counsel, nor to senior counsel, nor should there be. One counsel is sufficient and the lower scale A is suitable.
24. The draft order is not a model of consummate syntax but it suffices.

ORDER

1. An order is made in the draft order at 21-9 to 21-16 of caselines.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

HEARD

: 6 December 2024

DELIVERED : 6 December 2024

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Prepared on 12 October 2026 · Esheria