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NEWSLETTER 17

AUTOMOTIVE TOOLING SYSTEMS (PTY) LTD v WILKENS & OTHERS (2007) 28 ILJ 145 (SCA)

Contract of employment - Enforcement - Service agreement seeking to disguise true relationship between parties - Agreement attempting to circumvent provisions of LRA 1995 - Such agreement not unenforceable merely because it is designed to escape provisions of law, unenforceable only if true nature of relationship is one that law forbids. Restraint of trade - Enforcement - Protectable interest - Restraint not seeking to protect legally recognizable interest of employer - Restraint unreasonable, contrary to public policy and unenforceable. Restraint of trade - Enforcement - Protectable interest - Skill, expertise and know-how acquired by employee during employment - Whether interest accruing to employer or employee - Question of fact - Skills acquired by employees in course of developing their trade, accruing to employees as part of their general stock of skill and knowledge they cannot be prevented from exploiting - No proprietary interest vesting in employer - Restraint inimical to public policy and unenforceable.

SUMMARY

The first and second respondents were skilled toolmakers employed by the appellant company which specialised in the design, manufacture and customization of special purpose marking machines and tooling. After some time in the company's employment the respondents entered into 'independent contractor' agreements with the company in terms of which their status was changed from employee to independent contractor with no material change to the nature of the work they performed. These 'service agreements' contained restraint of trade and confidentiality clauses. In 2005 the first and second respondents resigned from the company and took up employment at the third respondent, AMS Manufacturing. The company considered their employment with AMS Manufacturing to be in breach of the restraint clause. The **High Court found** the service agreements to be unenforceable because they had been concluded in fraudem legis to circumvent the provisions of the LRA 1995. The grounds for that conclusion were that they purported to create relationships of independent contractors between the appellant and each of the first and second respondents whereas the substance of the relationship was one of employment**. On appeal,** the Supreme Court of **Appeal found** that the conclusion reached by the High Court was not sound. The mere fact that a contract is unsuccessfully designed to escape the provisions of the law does not in itself render it unenforceable. It is unenforceable only if the true nature of the relationship is one that the law forbids. Accepting for present purposes that the service agreements were, in truth, contracts of employment, the law did not prohibit them, and the restraints were not forbidden in themselves. In these circumstances, the court below was wrong to declare the service agreement contracts unenforceable merely because they sought to disguise the true relationship between the parties. Turning to the enforceability of the restraint of trade clause, the court noted that at issue was whether the company did have a proprietary interest worthy of protection. An agreement in restraint of trade is enforceable unless it is unreasonable. It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognizable interest of the employer but merely seeks to exclude or eliminate competition.

The question in this matter was whether the interest relied upon - the skill, expertise and 'know-how' that the employees acquired in the techniques of manufacturing - was one that accrued to the employer or to the employees themselves. In practice, the dividing line between the use by an employee of his own skill, knowledge and experience which he cannot be restrained from using, and the use of his employer's trade secrets or confidential information or other interest which he may not disclose if bound by a restraint, is notoriously difficult to define. Similarly, it is difficult to determine whether the process by which a machine is built depends, in the main, for its success on the utility of the steps of the process or on the skill and discretion of the operator. If the former, knowledge of the process is protectable (provided it is sufficiently secret). If it depends on the latter for its success, it is likely that the employer has no secret process, he has only a skilled employee whose skill he cannot restrain from utilizing after the termination of the employment. Where the line is to be drawn is often one of degree. Having considered the facts of the company's case, the court found that they established that the know-how for which the company sought protection was nothing other than the skills in manufacturing machines, albeit that they were specialised skills. These skills had been acquired by the first and second respondents in the course of developing their trade and did not belong to the company - they did not constitute a proprietary interest vesting in the company - but accrued to the first and second respondents as part of their general stock of skill and knowledge which they could not be prevented from exploiting. The court was accordingly satisfied that the company had no proprietary interest that might legitimately be protected. The restraint was therefore inimical to public policy and unenforceable.

The appeal was dismissed with costs.