REPUBLIC OF SOUTH AFRICA

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

CASE NO: 31355/2014

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

....
DATE SIGNATURE

In the matter between:

BONE & ARTHROPLASTY RESEARCH CENTRE DEVELOPMENT CC Applicant

And

STEPHANUS HENDRIK PRETORIUS First Respondent

B BRAUN MEDICAL (PTY) LTD Second Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application initially brought by way of urgency. After listening to argument of both Counsel the court pronounced that it was not urgent in the conformist sense but nonetheless sufficiently pressing warranting a

hearing before the December/January recess. For that reason, the court referred it to be heard as a special motion matter. It is sheer happenstance that it came back to this court again as a special motion.

[2] The Applicant seeks to interdict the First Respondent from competing with it in any of its business activities including the sale and distribution of orthopaedic prosthesis implants and approaching any of its customers being surgeons, hospitals and clinics with a view to supplying them with orthopaedic prostheses implants pending the finalisation of the Applicant's action against the First Respondent for a final interdict and related relief.

[3] The Applicant is claiming no relief against the Second Respondent unless it opposes the proceedings directed at the First Respondent. The Second Respondent is a competitor of the Applicant and is joined to these proceedings as it has an interest in the outcome hereof. The First Respondent is currently in its employ under circumstances, which the Applicant alleges constitute a direct infringement of a restraint of trade agreement (hereinafter "the restraint"), which was concluded between it and the First Respondent.

[4] The background facts is that the Applicant's business is, as it has been during the last twenty-three years, to supply medical prostheses (hereinafter "prosthesis") to orthopaedic surgeons primarily, knees and hips. The Applicant has fifteen such surgeons as regular customers, all of whom have, for the period of the First Respondent's employment with the Applicant, been

serviced by him as a sales person. For that reason, it is common cause that they are well known to the First Respondent.

[5] The Second Respondent is a South African representative of a European company that produces and supplies some of the prostheses. In South Africa, the Second Respondent's role is to act as both a wholesaler and retailer of the prostheses. When the Second Respondent deals with the Applicant, it acts as a wholesaler of the prostheses and it is a retailer in those instances when it sells the prosthesis directly to orthopaedic surgeons.

[6] The Applicant avers that it employed the First Respondent as a sales representative on 13 April 2007, which employment came to an end on 31 July 2014. On 11 and 17 May 2007, the First Respondent and the Applicant respectively concluded two written agreements, a contract of employment and a restraint. The former was deemed to have commenced on 13 April 2007.

[7] Save to state that the conclusion of the two agreements to which I have referred above are a common cause between the Applicant and the First Respondent, I do not deem it necessary at this stage to scrutinize their terms and conditions particularly, the restraint of trade. Although the Applicant has fervently argued that the contract of employment and the restraint should be viewed discretely, it is not possible as the reference to the employment agreement in the restraint is too conspicuous to ignore.

[8] The First Respondent has contended that he does not regard himself as bound by the restraint. Assuming that the court were to conclude that a valid and binding agreement between the Applicant and the First Respondent was concluded, he argues that such agreement would have terminated a year after his employment with the Applicant – 31 May 2008. He cites among his reasons for that contention the following:

8.1 The Applicant employed him on 13 April 2007 and he received his first and only salary in terms of that agreement on 30 April 2007;

8.2 His employment with the Applicant having come to an end on 31 May 2007, it follows that if the restraint was for a period of one year from termination of his employment, it would have come to an end on 31 May 2008;

8.3 The agreement of employment that he concluded with the Applicant, made a provision that depending on his performance he would become a permanent employee, this was not done and was therefore not entitled to those benefits that permanent employees would normally enjoy;

8.4 The above could not be done because Ms Webber of the Applicant insisted that he should sign certain documents with Highveld PFS without disclosing the nature thereof. It later

transpired that the outcome of signing up with Highveld PFS was that it henceforth became his employer and the Applicant's consultant;

8.5 According to his contract of employment with Highveld PFS, which he signed towards the end of May 2007, his employment was deemed to have commenced on 1 May 2007. The First Respondent was unhappy with the amounts that Highveld was deducting from his salary consequently he requested the Applicant if he could transfer his employment to another close corporation, which would charge him less;

8.6 Thus, on 30 June 2009 the Applicant's employment with Highveld terminated and another employment relationship with Eneleg CC begun on 1 July 2009. It is this employment relationship that the First Respondent asserts culminated on 14 July 2014;

8.7 On 17 May 2007, the Applicant and the First Respondent entered into a restraint. The restraint alludes to a contract of employment concluded between the Applicant and the First Respondent.

[9] The Applicant asserts that the contract of employment between Highveld PFS and later, Eneleg CC with the First Respondent was a charade

whose main objective was to relieve the Applicant of certain administrative duties by transferring them to a third party. The intention has always been that the First Respondent would be employed by the Applicant. Probably as an alternative, the Applicant also contends that the restraint should be regarded as distinct and separate from the contract of employment.

[10] The central issue to be decided in this matter is the enforceability of the restraint between the First Respondent and the Applicant. That issue, however, cannot be independently decided without resolving who the actual employer of the First Respondent was – has it always been the Applicant or Highveld and later Eneleg? The approach that this court adopts is that since the aforesaid issue could be dispositive of the whole case, it is sensible to consider it first.

[11] The additional defence that the undertakings contained in the restraint are not enforceable as they do not serve a protectable interest, more particularly that the First Respondent did not establish a special relationship with the applicant's clients and/or customers which will see such customers leave the applicant in order to follow the First Respondent, will be unnecessary to decide if the First Respondent is not bound by the terms and conditions of the restraint.

[12] I have already mentioned previously that the contents of the restraint make reference to employee and employer relationship. The anomalous thing about that presupposed employee-employer relationship is that it is not

supported by a contract of employment concluded specifically by the two parties.

[13] The contract of employment that was entered into on 11 May 2007 recorded as having commenced on 13 April 2007, was replaced by the one concluded by the First Respondent and Highveld PFS. It is in this context that the Applicant is persuading this court to disregard that between Highveld PFS and the First Respondent in favour of that between itself and the First Respondent.

[14] That kind of interpretation cannot find favour with this court as to agree with the Applicant will be to ignore what the parties intended besides, it will, as the First Respondent has asserted, disentangle and complicate other agreements that the Applicant has with other parties and these are -

14.1 between Highveld and the Applicant;

14.2 between Eneleg CC and the Applicant;

14.3 between the other salesperson in the employ of the Applicant, Ruan Pretorius, and Eneleg CC.

[15] There are a whole host of factors, which suggest that the First Respondent was in fact employed by Highveld PFS and not the Applicant. Among these are the following:

15.1 Highveld PFS paid the salary of the First Respondent for the period for which it engaged his services, 1 May 2007 to 30 June 2009. For the month of July 2009, the First Respondent was paid by Jip Consulting CC as Eneleg CC was still in the process of being registered. And from 1 August 2009 Eneleg CC then took over as the employer of the First Respondent;

15.2 His contract of employment with Highveld PFS did not have a provision that the contract was a sham as it is a mere way of relieving the Applicant of its administrative duties;

15.3 The IRP5 was issued by Highveld PFS. Moreover, it was Highveld PFS, which paid tax to the South African Revenue Service, and not the Applicant. Jip Consulting CC assumed the role previously played by Highveld PFS for the month of July 2009 and thereafter Eneleg CC took over.

15.4 Highveld PFS attended to payment of Workman's Compensation Fund and Unemployment Insurance Fund;

15.5 The 11 May 2007 contract of employment between the Applicant and the First Respondent provided that the latter would be assessed and if the Applicant was satisfied, he would be employed permanently, so that he would enjoy the status of permanent employees. The assessment did not occur as per

the provisions of the employment contract. That suggests that it was because he ceased to be the Applicant's employee on 30 April 2007 and the assessment therefore became unnecessary;

15.6 The Applicant was pleased to advise the South African Revenue Service when its tax affairs came under scrutiny that the tax of the First Respondent was paid by a labour broker, Eneleg CC at the time, by which he was employed;

15.7 On the advice of one Mr Venter during the first quarter of 2012, the Applicant directed Eneleg CC to transpose its particulars on the contract that was concluded between the Applicant and Highveld PFS such that the agreement became a replica of that between it and Highveld PFS.

[16] All these, in my opinion, are strong indications that militate against the argument that the First Respondent has always been employed by the Applicant. The arrangement is highly structured to be simply discounted. The only cogent support for the notion that the First Respondent was employed by the Applicant and not Highveld PFS IS Section 198 of the Labour Relations Act No. 66 of 1995 (hereinafter "the Act"). This, in my opinion, requires closer examination.

[17] During the hearing of this application, the applicant argued that the definition of a temporary employment service outlined in Section 198 of the

Act could be invoked to demonstrate that in the case *in casu*, the relationship between the First Respondent and Highveld PFS did not qualify as a temporary employment service and accordingly, the first respondent was in fact not an employee of Highveld.

[18] The Applicant sought to rely on *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A) for his contention. His reliance on the said case is misguided. It is true that the case dealt with the need to enquire into the intention of parties to establish whether or not it is a facade. In this case, however, the agreement between Highveld PFS and the First Respondent is not a sham as it expresses the true intention of both parties. It does not even state, which would have been illegal most probably, that while the First Respondent was employed by Highveld PFS in reality he would remain employed by the Applicant. There is thus no question of the agreement itself being a sham. The relationship between the parties is that of an employer-employee relationship.

[19] It is also noteworthy to mention that the cases to which Counsel for the Applicant referred this court concerned themselves with the protection of employees. For example, in *Khululekile Dyokwe v Coen de Kock N.O. and Others* (Case Number: C418/11, a case yet to be reported, the employee had been an employed by Mondi for three years when he was suddenly asked to sign a contract of employment with Adecco changing his three year old relationship with Mondi to an independent contractor leaving him with no benefits.

[20] On the facts of that case the transaction could be characterised as in *fraudem leges*. It must be borne in mind that each case should be determined on its own facts. A case that is more in line with the facts of this case is *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC), to which I intend to refer later in this judgment.

[21] The other cases to which this court has been referred dealt with a situation where an employer attempts to alter its employment relationship with an employee to that of an independent contractor to the disadvantage of the latter. Again, I emphasise that the client-independent contractor relationship is not akin to the facts of this case. Highveld PFS or Eneleg CC subsequently, procured the service for and provided it to the Applicant.

[22] The fundamental nature of the applicant's argument is that unless a labour broker prompts the appointment of the employee with a client, the Applicant in this instance, there cannot be an employment contract between the labour broker and the employee. I agree with the First Respondent that the aberrant upshot of the Applicant's approach will be that if a client such as the Applicant approached a labour brokerage with a request that it finds a contractor for a specific position with it, such contractor would not be an employee of the labour brokerage.

[23] Indeed, in the midst of that contention seems to be confusion between recruitment consultants, which enlist employees on behalf of their clients, with

labour brokers/temporary employment services who not only procure but also provide employees to their clients.

[24] Furthermore, and in any event, the applicant's argument loses sight of the fact that Section 198 of the Act speaks of "procures for" or "provides to". The two concepts and separated by the word "or" indicating that they are two very distinct concepts. Either one will suffice for an employment contract to come into being between a labour broker and an employee.

[25] To bring the analogy closer to the case *in casu*, I am in complete agreement with the First Respondent that Highveld PFS "provided" the service to the applicant and was therefore the employer of the First Respondent.

[26] I am indebted to Counsel for the Respondents for referring this court to the very useful case authority, *LAD Brokers supra*. Save to state that the facts and applicable law of the aforesaid case are 'on all fours' with the present matter, I do not deem it necessary to describe the facts. The case is directly pertinent and I have no doubt in following on its footsteps.

[27] The Respondents' Counsel also drew this court's attention to the introductory portions of Section 198(1) and (2] of the Act) both of which are introduced by the phrase, "*In this section"* and *"For the purposes of this Act …*" *respectively*. The Respondents argued that the legislature meant to be

explicit that it did not intend to change the common law definition of an employee and employer.

[28] Furthermore, that the provisions and definitions relating to labour brokers in the Labour Relations Act were only meant to deal with rights and obligations emanating from the Act. It does not have an effect on the law of contract by which restraints of trade are managed.

[29] The introductory phrases are there to give a particular meaning to the section and that is that their application should be limited to this Act. Taking it out of the context of the Act where they express a certain meaning may result in far reaching unintended consequences. See in this regard, *Commissioner For Inland Revenue v Estate Hullet* 1990 (2) SA 786 (A). Had the Legislature's intention been that the definition should govern all relationships of employment by a labour broker, it would not have limited the definition to the section and to the Act as it did. The Applicant's contention on Section 198 of the Act is thus rejected as devoid of any merit.

[30] The conclusion that the contract of employment between Highveld PFS and later Eneleg CC is valid, allows this court to focus squarely on the restraint. When the contract of employment and the restraint between the Applicant and the First Respondent were concluded, the intention was unmistakable – contrary to the Applicant's belief, the existence of the restraint was dependent on the contract of employment. This is obvious from the

provisions of the restraint itself as it makes reference to an employee-employer relationship.

[31] As a matter of course, it should follow that if the contract of employment between the First Respondent and the Applicant is replaced by another, the restraint cannot continue to have a life of its own. The fact that Highveld PFS and later Eneleg CC took over the role played by the Applicant makes it solid and concrete that they became the employers of the First Respondent.

[32] The natural consequences of an employer-employee relationship must flow from that contract. The purpose and role of the restraint was dislodged by the conclusion of a contract of employment with other entities – Highveld PFS and Eneleg CC. The contracts of employment with Highveld PFS and Eneleg CC were not coupled with a restraint. Even if they were, once this court has made a decision that the First Respondent was employed by those entities and not the Applicant, a restraint would not assist the Applicant.

[33] The restraint between the Applicant and the First Respondent fell away at the conclusion of the contract of employment with Highveld, 1 May 2007. That being the case and in line with the provisions of the restraint of trade agreement itself, the period of restraint came to an end on 30 April 2008. Accordingly, the First Respondent could not have been under any form of a restraint of trade when he resigned on 31 July 2014.

[34] In the circumstances I find that:

34.1 The Applicant and the First Respondent concluded a contract of employment and a restraint of trade agreement on 11 May and 17 May 2007 respectively;

34.2 The relationship between the Applicant and the First Respondent created by the aforesaid agreements terminated on 30 April 2007 at which stage the First Respondent entered into another contract of employment with Highveld;

34.3 Highveld PFS became the employer of the First Respondent from 1 May 2007 and that relationship came to an end on 30 June 2009;

34.4 Jip Consulting CC stepped in for the month of July 2009 until 1 August 2009 when Eneleg CC assumed the role previously played by Highveld PFS;

34.5 In consequence of the dependent nature of the restraint upon the contract of employment between the First Respondent and the Applicant, it could not have survived the contract of employment on which it depended;

34.6 The restraint cannot be enforced against the First Respondent as the period of restraint ended a year following the termination of the employment relationship with the Applicant, 30 April 2008;

34.7 The First Respondent was not under any form of restraint when he resigned on 31 July 2014.

[35] In view of this conclusion, I find it unnecessary to make any additional pronouncements based on the other arguments advanced by the Applicant. In the premises I make the following order:

1. The application is dismissed with costs.

_____

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 14 November 2014
Date of Judgment: 29 January 2015
Counsel for the Applicant: Adv. J Daniels
Instructed by: Gordon Holtman Attorneys
Counsel for the Respondent: Adv. X Stylianou
Instructed by: DJ Greyling Incorporated