

MUTUAL SEPARATION AGREEMENTS ARE LEGALLY ENFORCEABLE

A Mutual Separation Agreement differs from Resignation and Dismissal which are unilateral terminations of employment. Mutual Separation Agreements arise when both employer and employee agree to end the employment relationship.

Problems, however, arise when employees, after having signed the agreement, take issue with one of the clauses often found in such agreement, i.e. that employees are precluded from seeking judicial redress through the CCMA and Courts. In other words, a Mutual Separation Agreement is a full and final settlement.

The case of *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another* (2016) 37 ILJ 2723 (CC), in the Constitutional Court (“the CC”) considered the validity of a mutual separation agreement and re-affirmed that such agreements are lawful, even if they waive an employee’s right to seek judicial redress.

The employee was employed by Unilever in Dubai. In January 2013 he was approached with an opportunity to work at Reckitt Benckiser, which he declined. The employee left Unilever and took up employment at Standard Chartered Bank. Shortly after his tenure had begun, the employee inquired on the Reckitt Benckiser opportunity. An interview was arranged during which the employee stated that he was still employed at Unilever and indicated same on his *curriculum vitae*, when in truth he was employed by Standard Chartered Bank.

Based on the information given to them by the employee, Reckitt Benckiser negotiated the employee’s package which included a US\$40 000 sign-on bonus, a housing allowance and an extended work permit. Reckitt Benckiser came to discover that the employee had not been employed at Unilever at the time he was hired and he was subsequently called to a disciplinary hearing and dismissed for material misrepresentation.

The employee then requested a ‘softer exit’ and Reckitt Benckiser agreed. The employee entered into a mutual separation agreement with Reckitt Benckiser in full and final settlement of any claims that the parties may have against each other. In the agreement, the employee acknowledged and accepted that the termination of his employment was without duress or undue influence, and that he had voluntarily and unconditionally waived his right to approach the CCMA and any other Court for relief.

He referred the matter to the Constitutional Court but it was dismissed on the basis that it is not a matter of public interest. He referred it to the Labour Court (LC) on an urgent basis, citing that he signed the agreement under duress and was coerced into doing so. The employee further argued that the agreement limited his constitutional right to seek judicial redress and was therefore against public policy and invalid from the onset.

The LC found that the agreement was a valid compromise as the circumstances had been created by his own misrepresentation and the application was dismissed.

The employee then took the matter on appeal to the Labour Appeal Court (“the LAC”), which held that the burden of proof that the contract was entered into under duress would rest on the applicant. The LAC agreed with the LC and dismissed the application with costs.

The employee then appealed to the CC. The question before the CC was whether the full and final settlement limited his constitutional right to seek judicial redress in the CCMA and the Courts.

The CC found that there was no violation of his constitutional right of access to Courts because, as a senior manager, the employee had a full understanding of the consequences of the agreed waiver and allowed him equal bargaining power.

In determining the lawfulness of the waiver, the CC held that constitutional rights may be limited to the extent that such limitation is reasonable. Full and final settlement clauses, which provide for the finality of a dispute, are commonplace and lawful and not contrary to public policy.

The Court dismissed the application for leave to appeal with costs.

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