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# EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

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### AN EMPLOYEE WHO MAKES HIS BED MUST LIE IN IT

Employers and employees who elect to resolve disputes between themselves often conclude settlement agreements wherein they record the terms of their agreement. It is common that these agreement include a clause in terms of which the employee agrees to waive his rights to approach the Commission for Conciliation, Mediation and Arbitration (CCMA) and Labour Court (LC) in respect of any dispute arising from his employment or the termination thereof.



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# AN EMPLOYEE WHO MAKES HIS BED MUST LIE IN IT

Recently, the Constitutional Court (CC) considered such a clause in the decision of *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another* (CCT41/16) [2016] ZACC 33.

*The LC found that the employee's claim that he was forced to sign the settlement agreement was not supported by the facts and it further dismissed the allegation that the waiver provision was contrary to public policy.*



Employers and employees who elect to resolve disputes between themselves often conclude settlement agreements wherein they record the terms of their agreement. It is common that these agreements include a clause in terms of which the employee agrees to waive his rights to approach the Commission for Conciliation, Mediation and Arbitration (CCMA) and Labour Court (LC) in respect of any dispute arising from his employment or the termination thereof.

Recently, the Constitutional Court (CC) considered such a clause in the decision of *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another* (CCT41/16) [2016] ZACC 33. In this case an employee concluded a settlement agreement with his employer after it discovered that the employee had made material misrepresentations during the time of his appointment. The employee misrepresented that he would forego shares at his previous employer, for taking up employment with the company, his new employer. On this basis, the company paid the employee a sign-on bonus of US\$40,000.

After the misrepresentation was discovered, the employee was dismissed. He then requested a 'softer exit' and the settlement agreement was concluded. The settlement agreement contained a provision whereby the employee waived his rights to approach the CCMA or LC for relief emanating from his employment.

Despite this clause, the employee approached the LC claiming that, among other things, the waiver provision, being the provision in the agreement which restricted him from approaching the LC or CCMA, was contrary to public policy and that he was forced to sign the settlement agreement.

The LC found that the employee's claim that he was forced to sign the settlement agreement was not supported by the facts

and it further dismissed the allegation that the waiver provision was contrary to public policy.

On appeal, the Labour Appeal Court (LAC), confirmed the LC's decision and rejected the contention that the waiver provision was against public policy.

Of interest, when determining whether the waiver provision was contrary to public policy, the LAC considered the relative positions of the employee and the employer in the company, their bargaining power and their understanding of the settlement agreement. It found that the waiver provision was a common provision that brought finality to labour disputes. Accordingly, the LAC found that the provision was not unlawful nor contrary to public policy.

The matter did not end there, it was brought before the CC. The CC held that "when parties settle an existing dispute in full and final settlement, none should be released from an undertaking seriously and willingly embraced". The CC agreed with the LAC's approach and noted that such agreements should be enforced especially in circumstances where the agreement is "for the benefit of the party seeking to escape the consequences of his own conduct – namely the employee who had no defence whatsoever to his act of misrepresentation. Accordingly, the CC held that the parties must be bound in these circumstances.

# AN EMPLOYEE WHO MAKES HIS BED MUST LIE IN IT

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*The CC held further that even if the clause itself was to be declared invalid, the employee's claim would still fail as "he concluded an enforceable agreement that finally settled his dispute with his employer."*

Importantly, the CC held further that even if the clause itself was to be declared invalid, the employee's claim would still fail as "he concluded an enforceable agreement that finally settled his dispute with his employer."

This case confirms that the use of waiver clauses by employers which restrict access to the CCMA or courts remain lawful and that parties may settle their disputes

on such terms which are agreeable to them. However, employers should still be mindful that the use of such clauses are not immune from further investigation and that employers should always consider the position of the employee relative to the employer and the specific circumstances of the case.

*Nicholas Preston, Sean Jamieson and Samantha Coetzer*



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# Employment STRIKE GUIDELINE

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EMPLOYMENT STRIKE GUIDELINE  
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Topics discussed include strikes, lock-outs and picketing.

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Michael Yeates named winner in the **2015 and 2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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