

Pitfalls of not preserving restraint of trade rights in final settlement

By [Brett Abraham & Jenna Atkinson](#)

1 Mar 2023

According to a recent judgment from the Labour Appeal Court (LAC), when concluding settlement agreements with former employees, employers must actively preserve their rights to enforce restraint of trade undertakings, and other important protections.



Image source: elhur – [123RF.com](#)

On 21 February 2023, the LAC handed down judgment in which it found that a CCMA settlement agreement disposed of an employer's rights in terms of a restraint of trade agreement concluded with a former employee. Webber Wentzel represented the employee in this matter before the CCMA, the Labour Court and ultimately the LAC.

The appellant before the LAC referred an unfair dismissal dispute to the CCMA. The parties settled the dispute at the arbitration, and (with the assistance of legal representatives) concluded an agreement recording the terms of the settlement. The parties drafted and concluded an annexure to the CCMA's standard form settlement agreement, which annexure was to be attached to, and read with, the CCMA's standard form agreement.

In February 2022, the employer brought an urgent application to the Labour Court, in an attempt to interdict the employee from breaching a restraint of trade agreement entered into between the parties in 2010. The essential dispute between the parties before the Labour Court was the meaning and consequence of the full and final settlement clauses contained in the settlement agreement concluded at the CCMA (ie. in the CCMA's standard form settlement agreement and the annexure thereto), and whether the settlement agreement disposed of the restraint of trade agreement between the parties. The settlement agreement contained two important clauses stating that the agreement was concluded in full and final settlement of all claims which the parties may have against each other, including whether such claims arise from contract, delict, operation of law, equality, fairness or otherwise.



The employee argued that the restraint of trade agreement had been disposed of, with the effect that the employer was prohibited from enforcing the restraint. The employer, on the other hand, argued that it had not waived its rights in terms of the restraint agreement, and that the settlement agreement was only meant to cover those matters that were specifically referred to the CCMA.

The Labour Court found in favour of the employer, and granted the interdict sought on the basis that the employee was in breach of the restraint of trade agreement.

The employee applied for, and was granted, leave to appeal against the judgment and order of the Labour Court. In overturning the judgment of the Labour Court (and ordering that the employer pay the employee's costs) Davis JA, writing for a unanimous bench held as follows:

- the full and final settlement clause in the annexure attached to the settlement agreement extended beyond the specific dispute referred to the CCMA;
- the clause specifically provided for any claims the parties may have against each other whether such claims arise from "contract, delict, operation of law, equality, fairness or otherwise". None of these causes of action were relevant to the specific issues which had been referred to the CCMA;
- the settlement agreement was specifically constructed by the parties, who chose the express words which they considered would represent the purpose they had in mind in reaching a settlement agreement;
- it was clear that the employer was aware that the employee may not adhere to the restraint agreement and there was the possibility that the employer's proprietary interest would be infringed since the employee had already been dismissed. A sensible interpretation of the meaning of the full and final settlement clause could not be confined to the specific claims which were referred to the CCMA; and
- if the employer was concerned about the protection afforded to it under the restraint agreement, it should have carved out an exclusion so that the restraint of trade agreement continued to be operative despite the conclusion of the settlement agreement.



Know-how, trade secrets and the additional protection by copyright

Tyrone Walker 25 Oct 2022



It was on this basis that the LAC ordered that the appeal be upheld with costs. The principle extends beyond restraint of trade agreements and employers may wish to exclude various undertakings previously given in the employer's favour when

concluding settlement agreements with employees, depending on the circumstances of the case. For example, employers should seek to preserve their rights in terms of confidentiality agreements and intellectual property agreements to ensure that a former employee does not claim that the settlement agreement disposed of these rights.

The judgment should act as a cautionary reminder to employers (and legal representatives) in relation to the wording of settlement agreements, and particularly those concluded at the CCMA or bargaining council (using or in conjunction with the pro forma settlement agreements of those fora). Parties to settlement agreements have to at all stages remain mindful of what it is that the settlement agreement seeks to resolve and whether, or to what extent, specific rights or obligations should be carved out.

ABOUT THE AUTHOR

Brett Abraham, Partner & Jenna Atkinson, Associate at Webber Wentzel

For more, visit: <https://www.bizcommunity.com>