

# Benefits Of Separation Agreements Affirmed

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## Benefits of separation agreements affirmed

SEPARATION agreements are often underutilised to the detriment of both employers and employees.

A separation agreement brings to an end an employment relationship by way of mutual consent, rather than unilateral termination. A separation agreement sets out the agreed terms by which an employment contract will be terminated, most often after a labour dispute has arisen.

Negotiations for separation agreements are usually conducted at an emotionally fraught time. For example, an employer might feel aggrieved after uncovering the misconduct of an employee and the employee concerned might feel victimised or afraid of losing his/her livelihood. On many occasions, while negotiations for a separation agreement fail, settlement is often reached on the steps of court after both the employer and employee have incurred substantial legal fees, which itself materially affects the terms of separation.

The chances of settlement seem

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to improve once a matter has been referred to court as emotions have subsided and the reality of legal fees, the prospect of being cross-examined and the possibility of long court delays have set in for both parties.

Better education about the inherent risks and costs of litigation may see a rise in the use of separation agreements.

The Constitutional Court judgment of *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd* provides comfort to employers who are reluctant to enter into separation agreements as, in this case, the Constitutional Court strongly endorsed their enforceability.

In this case, an employee

admitted that he misrepresented the identity of his former employer, which caused Reckitt to pay him a sign-on bonus of US\$40 000 (R556 400). He entered into a separation agreement with his employer in terms of which he waived all recourse to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court.

The employee argued that he was coerced into entering the agreement and specifically that the waiver was against public policy as he should not be barred from obtaining judicial redress. The court found that the agreement should be upheld and took into account that the employee occupied a senior management position and understood the terms of the agreement, which protected him from the "possibility of a disciplinary process that could wound his career irremediably".

The court emphasised that no party could be lightly released from a settlement agreement, and

thus dismissed the employee's application for leave to appeal with costs.

The judgment affirms the benefits of separation agreements for certainty and finality. Careful wording of any waiver and confidentiality clause is essential. Such clause may enhance the value of a separation agreement to an employer who is concerned about setting a precedent for settlement in labour disputes. A well drafted separation agreement, on the basis of sound legal advice, should be able to cover the concerns of all the parties and ensure that the settlement is indeed final.

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