

EMPLOYMENT

The danger of cutting and pasting provisions in your settlement agreements!

3 May 2023 3 min read

On 21 February 2021, the Labour Appeal Court in *Wheelwright v CP de Leeuw Johannesburg (Pty) Ltd* (2023) 44 ILJ 767 (LAC) found against an employer who sought to enforce a restraint of trade on the grounds that the wording of the liability clause in the settlement agreement was wide enough to expunge any other claims arising from the employee's employment.

The impugned provision emanated from an addendum attached to a standard [CCMA](#) settlement agreement which was concluded in settlement of an unfair dismissal dispute relating to; retrenchment as a result of the employer's operational requirements, and the calculation of severance pay due to the employee. At the time, issues that eventually triggered the restraint of trade clauses were not in existence.

In terms of the impugned clause, the parties recorded that the agreement was "*in full and final settlement of all and any claims which the parties have against each other whether such claims arise from contract, delict, operation of law, equity, fairness and otherwise*".

Interestingly, the standard CCMA agreement generally limits settlements to the actual dispute that is referred to the CCMA. A deviation from the restricted nature of the standard CCMA agreement is what fuelled the dispute in *Wheelwright*. Here, the employer stretched the scope of the CCMA standard agreement to include claims that were initially not incorporated nor envisioned by the CCMA agreement. A critical finding against the employer was that the clause in the addendum extended beyond the referral at the CCMA. So the employer's argument that the settlement was confined to the unfair dismissal dispute and the calculation of the severance pay, could not stand. In fact, the Court agreed with the employee's contention that the bespoke addendum signalled the parties' true intention; to craft an agreement that tailored to their desire to settle all matters between them.

Therefore, employers need to take caution against cutting and pasting provisions that may not be applicable to their specific circumstances. Not all settlement provisions will be suitable to your particular facts. Employers have to select and, where necessary, customise clauses that speak to their circumstances. While it is understandable that wide liability clauses provide the comfort of legal certainty – knowing that any and/or all disputes relating to that specific employment have been dealt with – such clauses may also pose considerable risk. For example, broad liability clauses may potentially stifle an employer's ability to pursue legal action against employees on the grounds of unjustified enrichment where the employer seeks to recoup any outstanding monies or restraint of trade where the employer seeks to protect its financial and intellectual interests and competitive advantage. Employers must always assess whether caveats must be built into liability clauses so that any existing rights and/or entitlements are protected.

Visit our [Employment Practice Area](#) page for your legal requirements.



Sandile July

Head of Employment

[View Profile](#)



Nonkosazana Nkosi

Director

[View Profile](#)