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GOING SEPARATE WAYS:

THE EFFICACY OF DISCHARGE AGREEMENTS WHEN TERMINATING EMPLOYMENT

Background

When an employment contract is terminated, it is common practice for employers to issue their employees with a clearance form that contains a clause which purports to discharge the employer *"from all further or future claims whatsoever"* upon payment of final terminal dues to the employee. Such clauses constitute what is referred to as a discharge agreement.

The discharge agreement is essentially a contract between an employer and an employee that crystalizes the rights of each party at the date of the termination of employment. Discharge agreements ordinarily contain an undertaking by the employer to make payment in full and final settlement of all salary and benefits payable to the disengaged employee in consideration of the employee discharging the employer from any further liability arising from the employment relationship.

The question that has innumerably arisen in ensuing litigation is whether discharge agreements are effectively binding on the parties, and whether the Courts are therefore obliged to uphold them. Put differently, whether the discharge agreements have the effect of barring further claims from being made by either of the parties.

The Employment and Labour Relations Court (**ELRC**) has laid down a general presumption that there is no equality of bargaining power in an employment relationship, with the employer holding the upper hand. Consequently, the ELRC has tended to water down the binding nature of discharge agreements. This general presumption flows from the fact that an employee, at the time of termination, would be desperate to receive payment of his terminal dues and would therefore sign the discharge forms with an element of economic duress at play, and without giving much thought to the implications of the discharge agreement.

Consequently, the ELRC's general position has been that discharge clauses contained in termination clearance forms do not discharge

the parties from further claims or statutory obligations. This article discusses and highlights the apparent paradigm shift from this erstwhile position held by the ELRC by considering emerging case law emanating from the Court of Appeal and a recent landmark decision by the ELRC that sets out the principles to consider when dealing with the legal effect of discharge agreements.

Paradigm Shift

In the case of *Thomas De La Rue (K) Ltd. v David Opondo Omutelema (2013) eKLR*, the Respondent (an employee) had signed a clearance form which was duly witnessed, in which he confirmed having received from the Appellant (the employer) *"in full and final settlement of all salary and benefits payable towards my redundancy package and all other claims arising from my employment with the company except for provident fund."* The Court of Appeal, whilst observing that the ELRC gave the discharge agreement short shrift, agreed with the ELRC that a discharge agreement cannot, in itself, absolve an employer from statutory obligations, and that it cannot preclude the ELRC from enquiring into the fairness of a termination.

However, the Court of Appeal emphasized that each case turns on its own peculiar facts and that the trial Court should make a determination whether the discharge agreement was freely and willingly executed when the employee was seized of all the relevant information and knowledge.

The Court of Appeal further found that the suggestion that the Courts should treat all cases involving discharge agreements in the same way was erroneous, and clarified that the ELRC should not adopt a general presumption and apply it rigidly in each and every case without considering whether the presumption has been rebutted or not i.e., whether evidence had been led to support or disprove the validity of a discharge agreement in the circumstances of the case.

It therefore follows that the answer to the question as to whether discharge agreements should be a bar to further claims turns on the facts of each case. In the case of *Coastal Bottlers Ltd. v Kimathi Mithika (2018) eKLR*, the Court of Appeal was once again called upon to consider the validity of a settlement agreement which read in part:

"I,...certify having received the sum of Kenya Shillings One Million Five Hundred Sixteen Thousand, Two Hundred and Eighty-One (Kshs. 1,516,281) being my full and final payment due to me from Coastal Bottlers Limited as follows...I confirm that, I have no further claim against the Company whatsoever."

The Court of Appeal held that the parties had agreed that payment of the amount stated in the settlement agreement would not only absolve the employer from any further claims under the contract of employment, but also in relation to the employee's termination. Consequently, the agreement was a binding contract between the parties as the employee neither denied signing the same nor was there any evidence of misrepresentation, duress or incapacity on the employee's part at the time of executing the settlement agreement.

In upholding the binding nature of the discharge agreement in the *Coastal Bottlers Ltd.* case, the Court of Appeal upheld the finding in *Trinity Prime Investment Ltd. v Lion of Kenya Insurance Company (2015) eKLR*, that the execution of a discharge voucher constituted a complete and binding contract. Accordingly, all the ELRC is required to do is to give effect to the intention of the parties as discerned from the discharge agreement, upholding the notion that the function of the Court is to enforce and give effect to the intention of the parties as expressed in their agreement as enunciated by Sir Charles Newbold P., in *Damondar Jihabhai & Co Ltd. & Anor v Eustace Sisal Estates Ltd. (1967) EA 153.*

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Guidelines

What then should one look out for when entering into a discharge agreement upon termination of an employment relationship?

In the recently decided case of *Pauline Waigumo v Diamond Trust Bank Ltd. (2021) eKLR*, the ELRC, in declining to reopen the question of monetary compensation between parties who had signed a discharge agreement, laid out general guidelines in dealing with the effect of discharge agreements on further claims by concerned parties through future litigation, as follows:

- As a general principle, a pre-trial settlement operates as a contract between the parties
- It is to be considered as generally binding on the parties unless it is assailed on the usual grounds that will vitiate a contract
- Such settlements may, albeit not always, constitute a full settlement of the issues under consideration with the consequence that parties to them may not pursue further claims on the same subject either in Court or otherwise
- There is no general principle that such settlements will inevitably discharge an employer from his/her statutory obligations under the contract of service
- In order to determine whether the settlement operates as a bar to further claims by the parties to it, a trial Court or other arbiter must consider: the import of the settlement; whether the parties executed the agreement freely; and whether they had relevant information and knowledge regarding the settlement
- The mere existence of a pretrial settlement should not be construed as taking away the Court's jurisdiction to inquire into the lawfulness of a termination of a contract of service

Consequently, a Court faced with a question on the validity of a discharge agreement ought to address its mind firstly, to the import of such an agreement and secondly, to whether the same was freely and voluntarily executed by the parties.

Upshot

Discharge agreements are intended to determine with finality the rights of the parties at the time of termination of employment. The common grain flowing from the foregoing analysis is that discharge agreements are binding on parties if the they are entered into freely and willingly, and in the absence of any of the conditions that would warrant the setting aside of a contract such as coercion, fraud, mistake, misrepresentation, or incapacity.

It cannot be gainsaid that there is an apparent shift by the Courts in dealing with the effect of discharge agreements on further claims by the affected parties through litigation. Whereas it can be said that Courts have breathed life into discharge agreements, it must be noted that these agreements do not negate an employee's right to institute a claim for unfair or unlawful termination – with each case turning on its own facts, including the validity (or lack thereof) of the discharge agreement.

Ultimately, employers are still duty-bound to ensure strict compliance with the provisions of the Employment Act, 2007 during termination of employment.