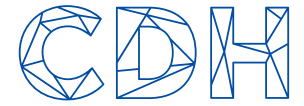


Employment Law

ALERT | 25 November 2024



In this issue

KENYA

Avoid costly mistakes: Why formal agreements are critical in mutual separations

For more insight into our expertise and services



**EMPLOYMENT LAW
ALERT**

Avoid costly mistakes: Why formal agreements are critical in mutual separations

What happens when a resignation is agreed upon without the clarity of a formal written agreement? The recent case of *Mwenda v Afri Business LLP and Another* [2024] KEELRC 2346 highlights the potential legal minefield employers face when mutual separations are not documented properly. While the court ruled in favour of the employer, the lack of a formal agreement nearly turned the tide in favour of the claimant. This case serves as a stark reminder that in employment matters, especially separations, formality and clarity are key to protecting your business from unnecessary disputes.

The claimant, Patrick Njoroge Mwenda, was employed as a consulting director earning KES 150,000 per month. He alleged constructive dismissal and breach of contract after the employer failed to pay his full salary, remit statutory deductions and address his grievances. The former employee claimed he was forced to resign due to the employer's failure to fulfil these obligations, describing the working conditions as intolerable.

The employer, argued that the employment relationship ended through a mutual separation agreement, effective 31 January 2018. However, no formal written agreement was presented to the court. Instead, the employer relied on email exchanges to show that computations for final dues had been made and a certificate of service had been issued. While the court ultimately dismissed the former employee's claim of constructive dismissal, it emphasised that the absence of a formal mutual separation agreement created unnecessary ambiguity. The court concluded that the separation was likely mutual based on the available evidence but this finding was far from guaranteed. This decision was a narrow escape for the employer as the lack of a formal agreement could easily have led to a different outcome.

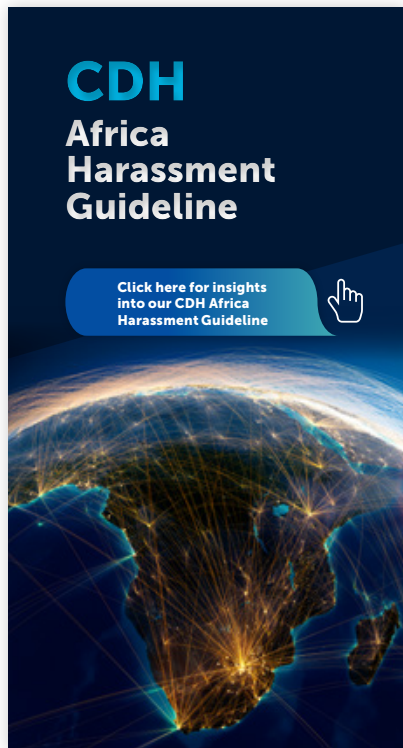
Documenting a clear agreement

This case highlights the critical importance of using clear and written agreements in mutual separations. A formal agreement outlines the terms of separation, including payment of final dues, statutory remittances and any additional benefits. This ensures clarity and finality for both parties. It also protects employers from disputes as it serves as evidence of mutual consent and reduces the risk of claims such as constructive dismissal or breach of contract. The lack of such an agreement in this case left the employer vulnerable to potential liability.

**EMPLOYMENT LAW
ALERT**

Avoid costly mistakes: Why formal agreements are critical in mutual separations

CONTINUED



Additionally, a well drafted mutual separation agreement should include key clauses such as an “*agreement not to sue*” and a “*non-disparagement*” clause to mitigate significant risks. The agreement not to sue ensures that the employee waives their right to pursue legal claims against the employer offering finality and reducing the risk of costly and time-consuming litigation. Meanwhile the non-disparagement clause protects reputations and prevents either party from making harmful or negative statements about the other preserving professional relationships and fostering goodwill. Another key clause to include is a confidentiality clause which serves multiple purposes. Firstly, it protects sensitive company information such as trade secrets, business strategies and proprietary data from being disclosed or misused. Secondly, the confidentiality clause also ensures that the terms of the agreement including financial settlements or other negotiated benefits remain private. This is particularly important for employers as it prevents setting precedents that other employees may attempt to leverage and reduces the risk of reputational harm or unnecessary scrutiny. By incorporating these clauses employers can create agreements that are legally sound, clear and enforceable reducing the likelihood of disputes and fostering positive post-employment relations.

The Courts in Kenya have consistently upheld mutual separation agreements when they are properly executed and free from coercion, duress or misrepresentation.

Employers should therefore take proactive steps to avoid similar pitfalls. Drafting clear agreements that detail the terms of separation is essential. Engaging legal counsel to ensure compliance with Kenyan labour laws and best practices can provide an added layer of protection. Maintaining thorough documentation of all communications, agreements and payments related to the separation is also critical. Additionally, equipping HR teams with the skills to handle separations professionally can reduce the risk of disputes and ensure a smooth process.

This case serves as a cautionary tale for employers. Although the court accepted that the separation was mutual despite the lack of a formal agreement, this outcome could have easily been different. Employers should never rely on informal arrangements as they leave room for disputes and ambiguity. Properly executed mutual separation agreements provide clarity, legal protection and peace of mind for all parties. Employers should prioritise formal agreements to safeguard their interests and foster positive employment relationships.

Desmond Odhiambo and Christine Mugenyu



OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel

Practice Head & Director:
Employment Law
Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Anli Bezuidenhout

Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



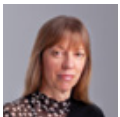
Asma Cachalia

Director:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Jose Jorge

Director:
Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



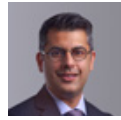
Fiona Leppan

Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Imraan Mahomed

Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Nadeem Mahomed

Director:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com



Yvonne Mkefa

Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com



Phetheni Nkuna

Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Hugo Pienaar

Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Mohsina Chenia

Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Jean Ewang

Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com



Thabang Rapuleng

Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Ebrahim Patelia

Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patel@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Daniel Kiragu

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E daniel.kiragu@cdhlegal.com



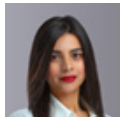
Jordyne Löser

Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Lee Masuku

Senior Associate:
Employment Law
T +27 (0)11 562 1213
E lee.masuku@cdhlegal.com



Leila Moosa

Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com



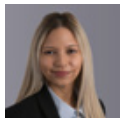
Christine Mugenyu

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com



Kgodisho Phashe

Senior Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Taryn York

Senior Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com



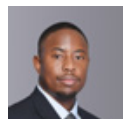
Lynsey Foot

Associate:
Employment Law
T +27 (0)11 562 1429
E lynsey.foot@cdhlegal.com



Kevin Kipchirchir

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E kevin.kipchirchir@cdhlegal.com



Malesela Letwaba

Associate:
Employment Law
T +27 (0)11 562 1710
E malesela.letwaba@cdhlegal.com



Biron Madisa

Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com



Thato Makoaba

Associate
T +27 (0)11 562 1659
E thato.makoaba@cdhlegal.com



Thato Maruapula

Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com



Sheilla Mokaya

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sheilla.mokaya@cdhlegal.com



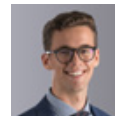
Billy Oloo

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E billy.oloo@cdhlegal.com



Sashin Naidoo

Associate:
Employment Law
T +27 (0)11 562 1482
E sashin.naidoo@cdhlegal.com



Alex van Greuning

Associate:
Employment Law
T +27 (0)21 481 6309
E alex.vangreuning@cdhlegal.com



Melisa Wekesa

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E melisa.wekesa@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2024 14172/NOV

