

Mutual Separation Agreements: The Good, the Bad and the Ugly

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Abstract

The highest court has accepted the validity of terminating an employment relationship by means of a mutual agreement between an employer and an employee. These agreements are known as mutual or voluntary separation agreements or mutual termination agreements (MSAs). This type of termination of employment neither constitutes a dismissal, nor is it a resignation. Termination of employment by way of MSAs has several potential benefits, including that it decreases the number of referrals of labour disputes, and it is possible that the employment relationship can be terminated amicably on terms that are agreeable to both the employer and employee and in a manner that maintains and protects the reputations of both parties. However, signing an MSA means that the employee waives certain rights: the right to receive unemployment benefits, and the right to refer a labour dispute in terms of the employment contract for resolution. Employees may also be forced or coerced into agreeing to terms and conditions that they would not otherwise agree to, or be misled into signing an MSA, as is evidenced by the cases referred to the courts. It is also possible for employers to abuse MSAs. They can, in instances where the labour legislation sets prescriptions that must be followed, attempt to bypass the prescribed procedures. Although MSAs have been recognised by South African courts, there is no clear legislation or Code of Good Practice to guide their use, nor is there academic literature that examines how MSAs operate in practice or the risks they may pose. This article addresses that gap by analysing relevant case law and legal doctrine to highlight areas of uncertainty and concern, offering guidance to help employers and employees navigate the negotiation of MSAs more safely and responsibly.

Keywords

Dismissal; full and final settlement of disputes; mutual separation agreements; mutual termination agreements; termination of employment; retrenchment settlement agreements; settlement agreements; voluntary separation agreements; waiver of rights.

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1 Introduction

A mutual or voluntary separation agreement (MSA) is a formal agreement between an employer and an employee that marks the end of an employment relationship. It serves as a valid and acceptable alternative to resignation¹ or dismissal² as a method of termination of employment.³

There are many benefits attached to this form of termination. It excludes the onerous process of instituting disciplinary action, where appropriate.⁴ Moreover, where there has been a breakdown in the employment relationship and the employer and employee wish to terminate the employment relationship amicably, it may be useful to conclude an MSA.⁵

Because an MSA is an agreement, the concept of freedom of contract dictates that it is possible for employers and employees to negotiate the terms of the separation mutually.⁶ However, because these agreements mark the end of the employment relationship, by signing an MSA, employees forfeit certain rights.⁷

MSAs are a recognised method of terminating employment in South African labour law. However, there is no dedicated legislation governing MSAs, or

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¹ A resignation is a unilateral act by an employee that has the effect of terminating the employment relationship. *Monareng Jeffrey Mohlwaadibona and Dr JS Moroka Municipality* 2022 43 ILJ 1855 (LC) para 10. See, however, *Wesbank, a Division of Firstrand Bank Limited v CCMA* (C293/2021) [2024] ZALCCT 1 (18 January 2024) (hereafter *Wesbank*) para 35, where the arbitrator in the initial referral of the dispute erroneously stated that a mutual separation agreement (MSA) had been proposed by the employer and that its acceptance by the employee would mean that the employee would resign.

² A dismissal is defined in section 186 of the *Labour Relations Act* 66 of 1995 (*LRA*) as "any termination of employment by an employer with or without notice". For a dismissal to be fair, it must be affected for a fair reason and a fair procedure must be followed - Schedule 8 to the *LRA*: Code of Good Practice Dismissal. In *Tshabalala v Total South Africa (Pty) Ltd* (JS277/18) [2022] ZALCJHB 289 (19 October 2022) (hereafter *Tshabalala*) paras 1-9 and 32 the court held that termination by agreement does not fall within the definition of a dismissal as envisaged in s 186(1) of the *LRA*.

³ In *Kgwedi v Bidvest Protea Coin (Pty) Ltd* 2019 6 BLLR 562 (LC) (hereafter *Kgwedi*) para 37, the Labour Court confirmed that concluding an MSA is a mechanism for termination of the employment relationship that does not fall in the definition of dismissal in the *LRA*.

⁴ See, for instance, *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd* 2016 37 ILJ 2723 (CC) (hereafter *Gbenga-Oluwatoye CC*) para 3. The employee in this case concluded an MSA after it was discovered that he was guilty of gross misconduct. Also see *Khumalo v Industrial Development Corporation of South Africa* 2024 45 ILJ 123 (LC) (hereafter *Khumalo*) paras 1 and 4.

⁵ See the discussion under section 2 below.

⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) (hereafter *Barkhuizen*) para 57.

⁷ Refer to the discussion under section 3.

a Code of Good Practice to guide their application. This doctrinal investigation examines the legal nature and consequences of MSAs, with reference to relevant case law, to clarify how courts interpret and enforce these agreements. The article aims to make this analysis accessible to both legal practitioners and laypersons, particularly employers and employees, by explaining the implications of concluding an MSA in simple and practical terms. In doing so it seeks to broaden understanding of the risks, safeguards and legal effects associated with MSAs, and to support more informed decision-making in the workplace.

The article commences with a brief discussion of the legal recognition of MSAs as a mechanism to terminate an employment relationship and the rationale for the acceptance of MSAs.⁸ An exposé of the consequences of the conclusion of MSAs follows this,⁹ which is divided into discussions concerning the waiver of the right to claim unemployment benefits,¹⁰ excluding the right to legal recourse,¹¹ and the tax implications of concluding MSAs.¹²

Next, the validity requirements for the conclusion of MSAs are briefly explained.¹³ Cases in which the courts have considered whether MSAs or clauses contained in MSAs ought to be disregarded are examined to point out aspects that employers and employees should be aware of when concluding MSAs.¹⁴ This is followed by a concise discussion of how the courts evaluate whether an MSA should be enforced.¹⁵ The conclusion provides an overview and a summary of the findings.¹⁶

2 The legal recognition of MSAs and the reasons for the conclusion of MSAs

Due to its contractual nature, it is possible for the parties to negotiate the separation on mutually acceptable terms in an MSA.

In the English Court of Appeal case, *Globe Motors Inc v TRW Lucas Electric Steering Ltd*,¹⁷ (hereafter *Globe Motors Inc*) it was held: "Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree on

⁸ See the discussion below under section 2.

⁹ Discussed under section 3.

¹⁰ See the discussion under subsection 3.1.

¹¹ This is discussed under subsection 3.2.

¹² Refer to the discussion under subsection 3.3.

¹³ Discussed under section 4.

¹⁴ Refer to the discussion under section 5.

¹⁵ This aspect is discussed under section 6.

¹⁶ See the discussion under section 7.

¹⁷ *Globe Motors Inc v TRW Lucas Electric Steering Ltd* [2016] EWCA Civ 396.

whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct."¹⁸ The principle of freedom of contract entitles parties to agree on whatever terms they choose, subject to certain limits imposed by public policy.¹⁹

These principles have been equally adopted into South African Law. A contract of employment can be terminated by concluding an MSA.²⁰ The Constitutional Court in *Gbenga-Oluwatoye CC* confirmed that MSAs that are concluded freely and voluntarily between employers and employees are lawful and valid.²¹

There are many reasons why an employer would opt to negotiate a voluntary or mutual separation: an MSA may be used in instances where the requirements of the work that was previously performed by the employee have changed, and the employee no longer possesses the required skills.²² It could also be applied where the employer has found someone more suitable than the employee to perform the duties.²³ Negotiating an MSA would also be appropriate in instances where an employee's work performance is not up to standard,²⁴ or if there is suspected misconduct which would be difficult for the employer to prove,²⁵ or if the employee, for some other reason, is incompatible in the workplace.²⁶

¹⁸ *Globe Motors Inc v TRW Lucas Electric Steering Ltd* [2016] EWCA Civ 396 para 100. See also *Mwenda v Afri Business LLP* [2024] KEELRC 2346 (KLR) (hereafter *Mwenda*) para 60.

¹⁹ *Mwenda* para 68.

²⁰ This is what distinguishes termination by means of MSAs from dismissals. In terms of s 186(1) of the *LRA* a dismissal is termination of an employment relationship with or without notice by the employer. If the employee formally agrees that concluding an MSA will terminate the employment relationship, it follows that the conduct is reciprocal and will not fall in the definition of dismissal.

²¹ *Gbenga-Oluwatoye CC* para 9.

²² See for instance *Baudach v United Tobacco Company Ltd* 2000 3 All SA 153 (A) (hereafter *Baudach*) para 4. In this case the MSA was declared invalid as the employer misrepresented to the employee that the position he was filling was redundant.

²³ *Baudach* para 14. In such an instance the employer must be honest about the reason for the termination to avoid the employee challenging the validity of the MSA as was the case here.

²⁴ See for instance, *Rinick Consultants CC v Smith* (1740/2013) [2013] ZAFSHC 175 (27 September 2013) (hereafter *Rinick Consultants CC*) para 10 where an MSA was signed instead of going through the disciplinary process where the employee had stolen money from the employer. In *Swanepoel v KPMG Services (Pty) Ltd* 2022 43 ILJ 656 (LC) (hereafter *Swanepoel*) para 23, instead of being confronted with a disciplinary action dismissal for his poor work performance, Swanepoel negotiated an MSA with KPMG Services to terminate his employment.

²⁵ *Swanepoel* para 23.

²⁶ *Baudach* paras 4 and 14.

Employers may choose to negotiate an MSA with an employee to avoid certain time-consuming and often expensive legal procedures.²⁷ For example, instead of following the route of instituting disciplinary action against an employee where there was misconduct, the employer and employee can agree to conclude an MSA.²⁸

MSAs often contain confidentiality and non-disparagement clauses to assist in maintaining the reputation of the employer and the employee.²⁹ Employees may also be afforded financial compensation and benefits that are agreed upon, which they would not have been entitled to if a dismissal or resignation were at play.³⁰ Instead of taking the uncertain route of referring an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council having jurisdiction, where it is not guaranteed that any monetary compensation will be awarded, the amount in an MSA is set.³¹

It is clear that the courts have accepted that the voluntary conclusion of an MSA brings the employment relationship to an end. It also means that the employee will be bound to the agreement. Several circumstances would justify the conclusion of an MSA instead of following the route of dismissing an employee. There are also obvious benefits attached to choosing this option. However, there are also certain negative consequences attached to concluding an MSA, which will be discussed next.

3 The legal consequences of concluding an MSA

A valid MSA supersedes a contract of employment. An employee waives certain rights when he or she signs an MSA. First, he or she would forfeit any possible claim based on unfair dismissal or based on his or her employment contract.³² The highest court in *Gbenga-Oluwatoye CC* confirmed that, in principle, the waiver of the right to access to courts that is

²⁷ *Rinick Consultants CC* para 10.

²⁸ An example can be found in *Rinick Consultants CC* para 10. Also see *Gbenga-Oluwatoye CC* para 23, in which the employee was found liable of misconduct by misrepresenting his previous place of work. He concluded the MSA to settle the dispute.

²⁹ See for instance, *Gbenga-Oluwatoye CC* para 23. Also see Bradfield *Christie's Law of Contract* 451-452 for a general discussion on restraints of trade and the protection of confidential information.

³⁰ See for example *Tshabalala* para 19; *Makhothokho v Pick n Pay Supply Chain (Pty) Ltd* (JS345/17) [2022] ZALCJHB 114 (24 May 2022) (hereafter *Makhothokho*) paras 86-87.

³¹ Refer to section 193 of the *LRA* in regard to the remedy of compensation. Compensation is not always awarded, and the remedy is inadequate as the compensation amounts are capped in the legislation, and labour disputes often take so long to resolve that the value of the remedy compensation is negated. See Geldenhuys 2016 *PELJ* 1-2, 8, 15 and 18-21.

³² Refer to the discussion under subsection 3.1.

the result of the conclusion of these agreements is not against public policy.³³

Regardless, an employee would forfeit the right to claim unemployment benefits under the *Unemployment Insurance Act* 63 of 2001 (the *UIA*).³⁴ An MSA usually includes a "full and final settlement of disputes" clause, which means that future disputes between the employer and employee may also be prevented.³⁵ This is discussed under separate headings below.

3.1 Unemployment insurance not applicable when there is a valid MSA

An employee who signed an MSA cannot claim unemployment benefits from the Unemployment Insurance Fund, as the employment relationship is not terminated by means of a dismissal as envisaged in the *Labour Relations Act* 66 of 1995 (the *LRA*).³⁶ Section 16(1)(a) of the *UIA* determines that an unemployed contributor is entitled to unemployment benefits if the reason for the unemployment is the termination of a fixed term contract, a dismissal as envisaged in section 186 of the *LRA*, or insolvency under the *Insolvency Act* 24 of 1936.

Due to the fact that signing an MSA would mean that an employee would not be able to claim unemployment benefits under the *UIA* or his or her personal insurance, the employer and employee may attempt to find a loophole by changing the reason for dismissal. However, this is impermissible.

In terms of section 64 of the *UIA*:

- (1) No person may—
 - (a) knowingly make a statement or cause a statement to be made which is materially false or which results in an incorrect payment of benefits in an application for benefits in terms of this Act.
 - (b) wilfully make any false entry on a contributor's record card or any other book, record or document relating to either a contributor's employment history or to a contributor's claim for benefits; or
 - (c) contravene or refuse or fail to fully comply with any provision of this Act or of any regulation or notice issued in terms of this Act.
- (2) Any person who contravenes subsection (1)(a), (b) or (c) is guilty of an offence.

Swanepoel serves as an example of an instance where the employer did not provide the actual reason for the termination of *Swanepoel's* (the

³³ *Gbenga-Oluwatoye CC* para 9. See the discussion under subsection 3.2.

³⁴ See for instance *Swanepoel*.

³⁵ This is discussed under subsection 3.2.

³⁶ Refer to the definition of dismissal in section 186 of the *LRA*.

employee's) employment. On the employee's UI19 form and other relevant forms, KPMG Services (Pty) Ltd (the employer) indicated that the reason for the termination was an "involuntary resignation"³⁷ even though the parties concluded an MSA.³⁸

The employee was unable to claim unemployment benefits because the reason for the termination of his employment was indicated as "involuntary resignation", and, as discussed above, this reason does not meet the eligibility criteria as contained in the *UIA*.³⁹

The employer was willing to fix the error in the UI-19 form by changing the reason for the dismissal to reflect that the employee's service was terminated in terms of an MSA, but the employee requested that the employer state "retrenchment" as the reason so that he could claim unemployment benefits.⁴⁰ The employee approached the Labour Court seeking an order that KPMG must change the reason for termination to retrenchment or some other reason so that he would be able to claim unemployment benefits.⁴¹ In the Labour Court the employer admitted that the reason for the termination of employment was not accurately stated in the documents, but denied that the employee was dismissed. Instead, the employer sought to rely on the MSA, and that the conclusion thereof settled all the claims under the contract of employment.⁴²

The court noted that the MSA that was concluded between the parties clearly indicated that the employment relationship had been terminated voluntarily and on a mutual basis. Therefore, the employee's claim was dismissed. However, the court held that in this instance the employer had contravened section 64(1) of the *UIA* and by doing so was guilty of a criminal offence under section 64(2) of *UIA*.⁴³

The decision in *Swanepoel* makes it clear that, although an employer and an employee can negotiate the terms of an MSA freely, they cannot legally exclude one of the legal effects associated with the conclusion of an MSA. By signing an MSA an employee waives the right to claim unemployment benefits, and it would constitute a criminal offence for an employer to amend the true reason for the termination from mutual agreement to anything else to enable an employee to claim unemployment benefits under the *UIA*.

Swanepoel highlights the rigidity of Unemployment Insurance Fund (UIF) eligibility criteria and the legal consequences of misrepresenting termination

³⁷ *Swanepoel* para 3.

³⁸ *Swanepoel* paras 1 and 3.

³⁹ *Swanepoel* para 6.

⁴⁰ *Swanepoel* para 12.

⁴¹ *Swanepoel* paras 1, 3 and 4.

⁴² *Swanepoel* para 7.

⁴³ *Swanepoel* para 14.

reasons in UIF documentation. Existing academic commentary, such as the works of Dupper, Olivier and Govindjee,⁴⁴ have examined issues related to the exclusion of atypical workers and the limitations of UIF coverage.⁴⁵ However, there has been little to no scholarly engagement with how MSAs intersect with these exclusions.

This analysis shows the legal implications of MSAs under the *UIA*, and how their use may undermine access to social protection for employees who exit employment through consensual but unregulated means.

3.2 Exclusion of current and future disputes between the employer and the employee

An MSA serves as a full and final settlement of any dispute between the employer and employee.⁴⁶ Consequently, MSAs can be used to prevent being subjected to protracted and often expensive legal disputes.⁴⁷ However, one of the main areas of contention regarding MSAs in the courts is the fact that by signing an MSA, employees usually forfeit their rights to refer disputes arising from their employment.⁴⁸

In *Gbenga-Oluwatoye CC*, Mr Gbenga-Oluwatoye (the employee) came to South Africa to work for Reckitt Benckiser South Africa (Pty) Ltd (the employer).⁴⁹ The employee started working for the employer, but it was later discovered that he had misrepresented his employment history. A sign-on bonus was paid to the employee based on the untruthful statement made during negotiations (he had stated that he was working for Unilever, when he was actually working for Standard Chartered Bank).

The employee's services were terminated by means of an MSA.⁵⁰ The employee argued in the highest court that the clause in the MSA concluded

⁴⁴ For a critique of Unemployment Insurance Fund (UIF) exclusions, particularly those affecting non-standard workers, see Dupper, Olivier and Govindjee 2010 *Stell LR* 438-462.

⁴⁵ Refer in particular to the discussion in Dupper, Olivier and Govindjee 2010 *Stell LR* 448.

⁴⁶ Refer to *National Automobile and Allied Workers Union (National Union of Metal Workers of SA) v Borg-Warner SA (Pty) Ltd* 1994 15 ILJ 509 (A) 518B-C, F-H. Any dispute in terms of the employment contract is finally settled when the employee signs the MSA and accepts the money as agreed upon in the MSA. This is the end of any live dispute, and the Labour Court has no jurisdiction to deal with the matter; *Makhothokho* para 20. Also see *Moseleni v DHL Supply Chain (SA) (Pty) Ltd* (JS 156/2011) [2013] ZALCJHB 283 (31 October 2013) (hereafter *Moseleni*) para 45; *Xaba v IG Tooling & Light Engineering (Pty) Ltd* 2019 40 ILJ 638 (LC) (hereafter *Xaba*) para 25. Notably *Makhothokho* and *Xaba* concerned retrenchment settlement agreement. However, this principle applies equally to MSAs.

⁴⁷ See for instance *Swanepoel*.

⁴⁸ This was an issue in almost all of the cases discussed in this article.

⁴⁹ *Gbenga-Oluwatoye CC* para 1.

⁵⁰ *Gbenga-Oluwatoye CC* para 3.

between him and the employer which excluded the right to judicial redress restricted his rights under sections 4 and 5 of the *LRA*, and that this was contrary to fair labour practices under section 23 of the *Constitution of the Republic of South Africa, 1996*.⁵¹ The employee averred further that the MSA was contrary to public policy as that it deprived him of the right to challenge his dismissal.⁵²

In the Labour Court it was held that the bar to judicial redress was only a means of giving effect to a final settlement agreement.⁵³ The Labour Appeal Court agreed that the MSA, *in casu*, did not violate the public policy in limiting the applicant's right to access to court.⁵⁴ The Labour Appeal Court measured the circumstances of the parties when concluding the contract against the criteria for determining whether a term is *contra bonos mores*.⁵⁵ After considering the relative positions and knowledge of the employer and the employee, their level of bargaining power and the absence of duress, the Labour Appeal Court was satisfied that there was no reason why the employee should not be held bound to the MSA.⁵⁶

In *Gbenga-Oluwatoye CC* the Constitutional Court accepted that the employee concluded the MSA to put the relevant dispute to rest. However, the Constitutional Court remarked that it may have been different if the employee had agreed to renounce recourse to the courts in future disputes between the parties.⁵⁷ It is important to note that this remark was made in the context of the particular facts of the case.

In this particular case the employee was deceitful and had lied about a material fact concerning his previous employment. He signed the MSA to avoid the negative consequences that would follow after his lack of frankness was discovered by the employer. The court was convinced that when signing the MSA, the employee knew that it was in his own best interest to do so as it would exclude further disciplinary processes and potential further court actions against the employee, which had the potential of irreparably harming his future career prospects.⁵⁸

⁵¹ Section 34 of the *Constitution 1996* states: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

⁵² *Gbenga-Oluwatoye CC* para 13.

⁵³ *Gbenga-Oluwatoye CC* para 20.

⁵⁴ *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd* 2016 37 ILJ 902 (LAC) (hereafter *Gbenga-Oluwatoye LAC*) paras 24-25. Also see *Gbenga-Oluwatoye CC* para 9.

⁵⁵ *Gbenga-Oluwatoye LAC* paras 15, and 22-24.

⁵⁶ *Gbenga-Oluwatoye LAC* paras 26-27.

⁵⁷ *Gbenga-Oluwatoye CC* para 23.

⁵⁸ *Gbenga-Oluwatoye CC* para 23.

The conclusion reached by the Constitutional Court in *Gbenga-Oluwatoye CC* is, however, of general application to MSAs and with regard to "full and final settlement of dispute" clauses in MSAs:

The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort... When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.⁵⁹

The highest court has accepted that MSAs are a valid and lawful manner of terminating the employment relationship. The court also recognises the important role that these agreements play in putting to rest labour disputes, whether it is through the enforcement of the "full and final settlement of disputes" clause, or through the mere conclusion of a valid MSA.

3.3 Tax implications associated with the conclusion of an MSA in employment

The reason for the termination of employment plays an important role in the tax treatment that the employer must follow in respect of the employee whose employment is terminated. If an employee is dismissed for operational reasons,⁶⁰ the employee should be paid at least the minimum as prescribed in section 41 of the *Basic Conditions of Employment Act 75* of 1997 (hereafter the *BCEA*) as severance pay.⁶¹ A portion of the lump sum payment made in the event of redundancy can be excluded for tax purposes if the employer obtains a tax directive from the South African Revenue Service.

The tax applicable to the severance payments is calculated as follows (subject to previous severance payments made if applicable):

The first R550 000 is not taxed. The next R220 000 is taxed at eighteen percent. Any amount above R770 001 up to 1 155 000 is subject to payment of R39 600 and 27 per cent of the amount above R70 000. For payments exceeding R1 155 001, the tax is R143 550 plus 36 percent of the income exceeding R1 155 000.

⁵⁹ *Gbenga-Oluwatoye CC* para 24.

⁶⁰ "Operational requirements" are defined in section 213 of the *LRA*.

⁶¹ Section 41 of the *Basic Conditions of Employment Act 75* of 1997 (*BCEA*) determines that an employee who is dismissed for operational reasons is entitled to one week's compensation for every completed year of service. A dispute about the entitlement to the statutory severance pay may be referred to a bargaining council having jurisdiction or the CCMA. A retrenched employee will forfeit the severance pay if he or she unreasonably refuses an offer of alternative employment made by the employer.

Notice pay, pro-rata bonus pay, and leave pay are not considered to be part of the severance pay and are taxed as normal.⁶²

Where an employment relationship is terminated by means of an MSA, the financial benefit that is paid out to the employee in terms of the agreement is not a "severance payment" as in the case of a dismissal for operational reasons, which means that part of the amount is not excluded from tax. The full financial benefit paid in terms of an MSA is subject to normal income tax; operational requirements in the *LRA*,⁶³ an employee opts to conclude an MSA with the employer instead, he or she should also consider the tax implications.⁶⁴

4 Requirements for a valid mutual separation agreement

The labour legislation is silent on MSAs. There is also no Code of Good Practice governing MSAs. MSAs are regulated under common law, and the normal requirements for the conclusion of a valid contract apply in respect of these agreements.⁶⁵ A contract of employment, which forms the basis of the employment relationship, can be concluded in writing, verbally or even tacitly.⁶⁶ There are also no prescribed formalities for the conclusion of an MSA.⁶⁷

From the court cases, it appears that MSAs can be agreed to in writing, verbally and even tacitly.⁶⁸ In *Workforce Staffing (Pty) Ltd v Mjoli*,⁶⁹ (hereafter *Workforce Staffing (Pty) Ltd*), there were written MSAs, but the employees later contested the validity and/or the enforceability of the MSAs,

⁶² SARS 2024 <https://www.sars.gov.za/individuals/tax-during-all-life-stages-and-events/tax-and-retrenchment/>. Note that this information and the amounts relate to the 2025 tax year only and are subject to change.

⁶³ Operational requirements as defined in section 213 of the *LRA* are "requirements based on the economic, technological, structural or similar needs of an employer".

⁶⁴ In *ABSA Investment Management Services (Pty) Ltd v Crowhurst* (2006) 2 BLLR 107 (LAC) (hereafter *ABSA Investment Management Services (Pty) Ltd*) paras 10 and 21, the employer was busy with a restructuring exercise when the employee was offered the option of signing the MSA. The court held that the employer must explain the tax benefits of a retrenchment to the employee.

⁶⁵ *Gbenga-Oluwatoye CC* para 12. Also see *Cook4life CC v CCMA* 2013 34 ILJ 2018 (LC) (hereafter *Cook4life*) paras 1214.

⁶⁶ *Wallis Labour and Employment Law* 2-21 states: "The contract of employment requires no special formalities for its formation, and it accordingly arises from nothing more than the agreement between the parties on its material terms, namely, the services to be rendered and the remuneration to be paid as well as such other terms as they may regard as necessary to incorporate in their agreement. These terms may be agreed upon express, impliedly or tacitly."

⁶⁷ Unless the parties agree to formalities, it is not required that an MSA must be concluded in writing. See *Khumalo* para 38.

⁶⁸ *South Africa State Theatre v CCMA* (JR2607/16) [2018] ZAGPJHC 510 (20 September 2018) (hereafter *South Africa State Theatre*) para 9.

⁶⁹ *Workforce Staffing (Pty) Ltd v Mjoli* (2024) 7 BLLR 734 (LAC) (hereafter *Workforce Staffing (Pty) Ltd*).

purely because they denied signing the agreements.⁷⁰ The court considered the surrounding facts and noted in particular that the employees were not contesting the contents or the terms of the agreement in any other respect.⁷¹ The court consequently concluded that the termination of their employment was based on mutual agreement and did not constitute a dismissal as envisaged in section 186(1) of the *LRA*.⁷²

To ensure clarity, legal protection and peace of mind for the parties and a measure of assurance that the agreement can be enforced, it is preferable for an MSA agreement to be concluded in writing and properly executed by both parties and witnesses signing the document.⁷³

There are many templates available online, but there are no prescriptions regarding the clauses that must be included in an MSA. An employer and the employee may negotiate the terms of the MSA freely, subject to certain restrictions.⁷⁴ Some crucial information that ought to be included can be adduced from the cases concerning employees whose employment was terminated by MSAs that challenged the validity of the agreements. An MSA should include a statement that the parties have agreed to mutually terminate the employment relationship.⁷⁵

The MSA should also stipulate the date upon which the mutual separation will take effect. Moreover, it should be indicated clearly in the agreement whether the employee will receive any financial compensation and, if so, the amount of compensation. If financial compensation is agreed upon, the MSA must also include the date upon which the amount will be paid and how the compensation will be paid.⁷⁶

It is possible for the parties to agree that financial compensation will be paid to the employee, and on the amount to be paid. The length of the employment relationship is a relevant factor that is often considered in calculating the amount of compensation that would be paid to the employee. Employers often refer to the severance pay calculation in the *BCEA* during

⁷⁰ *Workforce Staffing (Pty) Ltd* para 41.

⁷¹ *Workforce Staffing (Pty) Ltd* para 41.

⁷² *Workforce Staffing (Pty) Ltd* para 41.

⁷³ *Mwenda* para 55 shows how important it is for employers and employees to conclude formal properly executed MSAs. Ultimately, the court ruled in favour of the employer, but it was a close call due to the fact that there was no formal MSA presented to the court, only e-mail correspondence.

⁷⁴ *Barkhuizen* paras 70-71.

⁷⁵ In *ABSA Investment Management Services (Pty) Ltd* para 10, the *pro forma* termination letter that was used by the employer to terminate the employee's services did not mention that the termination was voluntary or agreed upon between the employer and the employee. This played at least a role in swaying the court into accepting the employee's version of the events that she had been dismissed unfairly.

⁷⁶ This is evidenced by the facts that the court considered pertinent in all the cases dealing with MSAs discussed herein.

negotiations.⁷⁷ Before an MSA is concluded it is also important for the employer to discuss the tax implications resulting from the conclusion of such an agreement with the employee.⁷⁸

To exclude the future referral of disputes an MSA should contain a statement that the MSA is in "full and final settlement of disputes" between the parties involved.⁷⁹ Optional clauses may be negotiated between the employer and employee, including a confidentiality clause, and where appropriate a restraint of trade may be agreed to in order to prevent the employee from acting in competition with the employer for a specific time.⁸⁰

5 Exceptions when MSAs will be declared invalid or ignored

If an employee can prove that an MSA was not concluded voluntarily⁸¹ or that the purported agreement was concluded based on misrepresentations,⁸² the CCMA or bargaining council may review the validity of the MSA.⁸³

Cases concerning MSAs in which employees contested their validity or enforceability are highlighted below under separate headings.

5.1 Where the employer and the employee are not ad idem

As evidenced by its name, an MSA must be mutual.⁸⁴ An employee may refuse to sign an MSA when it is presented to him or her by the employer, and a subsequent termination will then qualify as a dismissal.⁸⁵

⁷⁷ See for instance, *Makhothokho* paras 19 and 26.

⁷⁸ In *ABSA Investment Management Services (Pty) Ltd* paras 10 and 21 the employer had used wording more suited to a dismissal for operational reasons instead of an MSA, apparently for tax reasons. The court held that the tax benefits ought to have been explained to the employee. Also refer to the discussion of the tax implications under subsection 3.3.

⁷⁹ *Makhothokho* para 20. Also see *Moseleni* para 45 and *Xaba* para 25.

⁸⁰ Refer to Bradfield *Christie's Law of Contract* 451-452 for a general discussion regarding the restraint of trade clauses and the protection of confidential information.

⁸¹ *Kgweedi* para 37. Refer to the discussions under subsections 5.1 and 5.2.

⁸² In *WBHO Construction (Pty) Ltd v Masenye* (JR1124.21) [2024] ZALCJHB 288 (30 July 2024) (hereafter *WBHO Construction (Pty) Ltd*) paras 7, 34 and 37-38 the employee argued that he had been misled into signing the MSA under misrepresentation and duress as he never intended to be retrenched. If the employer and employee are not on the same page as to the nature of the agreement (i.e., in this case, whether it is an MSA or a retrenchment letter/agreement) or if it is clear from the contents of the agreement that there is a misrepresentation regarding the nature of the agreement, the court will not give effect to the MSA.

⁸³ *Kgweedi* para 37. In *Cook4life para 14*, the Labour Court confirmed that the CCMA enjoys the discretion to determine the validity of the MSA.

⁸⁴ *South Africa State Theatre* paras 7 and 9. There must be an offer made by the employer and acceptance of that offer by the employee, either in writing or verbally.

⁸⁵ See generally the *South Africa State Theatre*; *Makhothokho* para 88.

Suggesting that an employee should enter into an MSA with the employer can be viewed as an indication that the working relationship may have become unsalvageable. In *Wesbank, a Division of FirstRand Bank Ltd v CCMA*, the employee requested to be transferred to another division as he found his current employment conditions difficult, as his relationship with his direct supervisor had soured.⁸⁶ A Human Resources official suggested, without prejudice, that the employer and the employee should negotiate an MSA instead of pursuing the transfer, as it would be in the best interest of both the employer and employee.⁸⁷

Although the parties did not proceed to conclude an MSA as suggested, the employee viewed this suggestion as an indication that the employer wanted to terminate his employment.⁸⁸ The Labour Court opined that it was reasonable to say that it indicated that the Human Resources official who made the suggestion did not view the working relationship between the employer and the employee as repairable.⁸⁹ However, the court did not consider the suggestion to mean that there was a common intention in the employer that the employee should resign, as "it could have been couched as a mutually agreed termination".⁹⁰

It is clear that the courts accept that for MSAs to be valid and enforceable, they must be accepted by both parties, and they must be concluded voluntarily.

5.2 Coercion, duress and the consequences of accepting benefits under an MSA

The lack of job security or the prospect of losing your job is a daunting prospect for an employee. The employee in *ABSA Investment Management Services (Pty) Ltd* serves as an example. She was under considerable emotional strain; so much so that she had to visit a doctor, because she was expecting to be retrenched.⁹¹

It is accepted by the courts that the employer and employee may not have equal bargaining power when it comes to signing an MSA. In *Makhothokho* the court confirmed that if the elements of duress or undue pressure could be proven, this would point to the fact that the parties to such an agreement had not reached true consensus.⁹² In these circumstances the innocent

⁸⁶ *Wesbank* para 54.

⁸⁷ *Wesbank* para 54.

⁸⁸ *Wesbank* para 23.

⁸⁹ *Wesbank* para 77.

⁹⁰ *Wesbank* para 77.

⁹¹ *ABSA Investment Management Services (Pty) Ltd* para 16.

⁹² For a general discussion on true agreements between contracting parties, refer to Bradfield *Christie's Law of Contract* 34.

party may seek an order for the court to set aside the agreement or resist the enforcement of the agreement.⁹³

In instances of alleged duress an MSA will remain valid and binding unless the party to the contract who wishes to escape the consequences of the settlement agreement is able to prove that "there existed a threat of considerable evil to the person or his family which induced fear, that the fear was reasonable, that the threat was imminent or inevitable, that the threat was unlawful and that the contract was concluded as a result of a threat".⁹⁴

In *Medscheme Holdings (Pty) Ltd v Bhamjee*⁹⁵ the Supreme Court of Appeal held that English and American law accept that financial pressure would, in certain rare cases, constitute duress that might affect the validity of the contract. However, it has not been accepted that economic pressure (hard bargaining) qualifies as a form of duress in South African Law, despite the possible uneven bargaining position between the employer and the employee.⁹⁶

It does not qualify as economic duress, even if the employer threatens the financial ruin of the employee.⁹⁷ In *Kgwedi* the employee approached the Labour Court claiming that he had been unfairly dismissed based on operational requirements despite the fact that the employee had signed an MSA. The employee argued that he was under economic duress when he signed the MSA because the employer had stated that if he did not sign the MSA he would not receive the financial benefit as indicated in the agreement.

In considering the employee's position and status in the matter under scrutiny, it could not be said that the threat of not being paid the financial benefit if he failed to sign the settlement agreement did not amount to a reasonable fear on the employee's part.⁹⁸

Makhothokho hinged on the question of whether a statement made to employees that they would not receive the payments and benefits in accordance with an MSA if they did not sign the agreement constituted financial duress.⁹⁹ On the facts of this particular matter, the court concluded

⁹³ Also see *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (CPD) (hereafter *Arend*) 306A-C; *Broodryk v Smuts* 1942 TPD 47 53; *Steiger v Union Government* 1919 NPD 75 79.

⁹⁴ *Arend* 306A-C. See also *Buthlezi v Liberty Group Ltd* 2012 33 ILJ 607 (LC) para 8.

⁹⁵ *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 5 SA 339 (SCA) para 18.

⁹⁶ *Van den Berg & Kie Rekenkundige Beampies v Boomprops* 1028 BK 1999 1 SA 780 (T) 795E-796A. Also see *Makhothokho* para 78.

⁹⁷ *Makhothokho* para 80.

⁹⁸ *Kgwedi* para 38.

⁹⁹ *Makhothokho* paras 76-77.

that the employees had not proved the elements of duress and that the MSA had settled the disputes between the employer and employee.¹⁰⁰

In the most recent referral concerning potential financial duress, *WBHO Construction (Pty) Ltd*, during the meeting between a representative of the employer and the employee, the employee intimated that he was experiencing financial challenges. The employer took advantage of the employee's financial position and coerced him into signing an MSA.¹⁰¹ The court concluded that in the original referral the CCMA arbitrator was correct in finding that the employee's dismissal was both substantively and procedurally unfair.¹⁰²

Importantly, South African law also holds that a party who accepts the benefits of an MSA – especially where the agreement includes a "full and final settlement" clause – cannot later seek to have the agreement declared void without offering to repay those benefits.¹⁰³

In *Makhothokho* the employees signed retrenchment agreements¹⁰⁴ but nevertheless claimed that their dismissals were unfair as their retrenchment did not comply with section 189 of the *LRA*.¹⁰⁵ In this case the employer had advised the employees that there were alternative positions available for them to consider, and that only if the employees opted not to work in the alternative positions would a retrenchment process ensue.¹⁰⁶ In that case they would be paid one week's salary for every completed year of service as prescribed in the *BCEA*.¹⁰⁷

The employees received the proposed retrenchment agreement, and after further negotiation it was eventually agreed that the employees would be paid two weeks' severance pay per completed year of service and for employees with less than a year's service, one week's severance pay.¹⁰⁸ The employees signed the agreement, and the agreed-upon amounts and benefits were paid out to them.¹⁰⁹ The agreement contained a "full and final settlement" clause that excluded the employees' right to further pursue claims arising from their employment.¹¹⁰

¹⁰⁰ *Makhothokho* para 93.

¹⁰¹ *WBHO Construction (Pty) Ltd* para 53.

¹⁰² *WBHO Construction (Pty) Ltd* para 59.

¹⁰³ *United Tobacco Co Ltd v Baudach* 1997 18 ILJ 506 (LAC) para 20. Also see *Makhothokho* para 19; *Makiwane v International Healthcare Distributors* 2003 24 ILJ 2150 (LC) paras 18-19.

¹⁰⁴ *Makhothokho* para 4.

¹⁰⁵ *Makhothokho* paras 1-2.

¹⁰⁶ *Makhothokho* para 13.

¹⁰⁷ *Makhothokho* paras 22-23.

¹⁰⁸ *Makhothokho* para 29.

¹⁰⁹ *Makhothokho* paras 31-32.

¹¹⁰ *Makhothokho* para 53.

Nevertheless the employees approached the Labour Court claiming that they had not entered into the settlement agreements voluntarily as they had been informed by the employer's management that if they did not sign the agreement they would not be paid in accordance with the agreement.¹¹¹ A witness testified on behalf of the employees at the hearing that the employees were willing to sign the agreement only as it was nearing the end of the year, and they were desperate to get money.¹¹² This, she claimed, was a form of indirect duress, which affected the validity of the separation agreement.¹¹³

The court emphasised the fact that the employees had been paid in accordance with the agreement, and that they had received the payments and benefits that were agreed upon.¹¹⁴ Although they had challenged the validity of the settlement agreement, the employees had not offered to pay back the benefits they had received under the agreement.¹¹⁵ The court decided, endorsing the finding in *Xaba*,¹¹⁶ that absent an offer to repay the moneys received in accordance with the MSA, an employee who accepted the payment could not seek for the MSA to be declared void.¹¹⁷ The court held that signing the MSA in this case also excluded any possible claim based on unfair dismissal.¹¹⁸

In *Tshabalala*, the Labour Court had to decide whether an employee had been dismissed for operational reasons and failed to follow the procedure in section 197 of the *LRA* for the transfer of a business after the call centre that he worked at was transferred as a going concern.¹¹⁹ The employee had signed an MSA that conferred severance pay that exceeded the amount that the employee would be entitled to under the labour legislation.¹²⁰

The employee contested the validity of the MSA, which contained a "full and final settlement of disputes" clause and a clause excluding the possibility of challenging the fairness of his dismissal on the basis of duress.¹²¹ The employee claimed that he had been enticed with the severance pay.¹²² Nevertheless, the employee had accepted the payment of the financial benefit as agreed to in the agreement and used it to pay off a bond.¹²³ The

¹¹¹ *Makhothokho* para 54.

¹¹² *Makhothokho* para 53.

¹¹³ *Makhothokho* para 53.

¹¹⁴ *Makhothokho* para 54.

¹¹⁵ *Makhothokho* para 71.

¹¹⁶ *Xaba* para 27.

¹¹⁷ *Makhothokho* para 103.

¹¹⁸ *Makhothokho* para 102.

¹¹⁹ *Tshabalala* para 19.

¹²⁰ *Tshabalala* para 9.

¹²¹ *Tshabalala* para 24.

¹²² *Tshabalala* para 25.

¹²³ *Tshabalala* para 30.

court concluded that no dismissal had occurred as the employment relationship had been terminated by the MSA.¹²⁴

In *Makhothokho* the court considered the other alternatives that the employees could have followed instead of signing the retrenchment settlement agreement: They could have taken up the alternative positions on offer,¹²⁵ or they could have refused to sign the settlement and proceeded with the retrenchment process, during which they could have considered other alternatives to remain employed.¹²⁶ However, the employees had not been interested.¹²⁷ They had opted to sign the settlement agreement so that they could get paid substantially more than what they would have been entitled to in terms of labour legislation.¹²⁸

The employees had accepted that this was the outcome which was most beneficial for them.¹²⁹ The employees had accepted the money paid to them, and they had never offered to repay the money that they had received under the agreement.¹³⁰ This case confirms that if employees dispute the validity of an MSA, they cannot retain the benefits that they received in terms of the MSA.¹³¹

In *Khumalo* the court also found that it is required under the ordinary common law rules relating to contract that if an employee who entered into an MSA challenges the validity of the MSA and seeks for it to be declared null and void or requests the court to set it aside, the employer would be entitled to the repayment of any financial compensation or benefits that had been received by the employee in terms of the MSA.¹³²

These cases confirm that while emotional and financial pressure may be present, South African courts require proof of unlawful coercion before setting aside an MSA. Moreover, employees who accept the benefits of an MSA cannot retain those benefits while disputing the agreement's validity.

5.3 Where the agreement is concluded based on misrepresentation

Where an employee concluded an MSA he or she is not automatically debarred from challenging the fairness of the terms of the MSA if it is later discovered that he did not intend to enter into the MSA because he or she was placed under a misconception.¹³³ In general, an agreement concluded

¹²⁴ *Tshabalala* para 32.

¹²⁵ *Makhothokho* para 87.

¹²⁶ *Makhothokho* para 88.

¹²⁷ *Makhothokho* para 22.

¹²⁸ *Makhothokho* paras 86-87.

¹²⁹ *Makhothokho* para 88.

¹³⁰ *Makhothokho* para 90.

¹³¹ *Makhothokho* para 92.

¹³² *Khumalo* para 66.

¹³³ *WBHO Construction (Pty) Ltd* para 41.

where one party induces another party to conclude an agreement by misrepresenting an existing fact which is considered to be material in the circumstances may be rescinded by the innocent party who was coerced into signing the agreement.¹³⁴

An employer must be honest about the reason for the termination to avoid the employee challenging the validity of the MSA.¹³⁵ In *Baudach v United Tobacco Company Ltd* (hereafter *Baudach*) the employee complained that he had been placed under the impression by the employer that his position had become redundant. That was the reason why he had signed the settlement agreement that brought his employment to an end. However, he later discovered that his position had not become redundant and continued to exist and that someone else had been appointed to the position.¹³⁶ The court concluded that it was this misrepresentation that had induced the employee to accept the settlement and that the employer had committed an unfair labour practice.¹³⁷

In *Xaba* signing a retrenchment settlement agreement resulted in the termination of the employment of the employees. The employees sought to have the settlement agreement set aside as they claimed that at the time of the conclusion of the agreement, they were not aware of crucial information which had not been divulged to them by the employer. The employees averred that, if they had had knowledge of the information, they would not have entered into the settlement agreement.¹³⁸ In this case the employee did not prove, as he or she should have in such a case, that the misrepresentation was material and that it had induced them into signing the settlement agreement. As a result, the Labour Court concluded that the settlement agreement was valid and enforceable.¹³⁹

5.4 Where an employer uses an MSA to circumvent the retrenchment procedure in section 189 of the LRA by signing a retrenchment document disguised as an MSA

MSAs may not be abused and used by employers as vehicles for concealment or in an attempt to bypass prescribed legislative procedures.¹⁴⁰ The CCMA or bargaining council can declare such an MSA

¹³⁴ Bradfield *Christie's Law of Contract* 331.

¹³⁵ *Baudach* para 14.

¹³⁶ *Baudach* para 12.

¹³⁷ *Baudach* para 23.

¹³⁸ In this instance, however, the Labour Court held that it had no jurisdiction as the employees had signed the settlement agreement, had received the benefits in terms of the agreement, and had not offered to pay back the payments received. Also see *Makhothokho* para 103.

¹³⁹ *Xaba* para 28.

¹⁴⁰ *WBHO Construction (Pty) Ltd* paras 38-39.

void if the issue hinges on its jurisdiction to entertain the dispute for a dismissal.¹⁴¹

Sections 189 and 189A of the *LRA* regulate dismissal for operational reasons. For a small retrenchment affecting fewer than 50 employees, section 189 of the *LRA* is used.¹⁴² The procedures that must be followed by an employer contemplating dismissal for operational reasons are peremptory and strictly applied. The joint consensus-seeking exercise that is envisaged in section 189, through consultation with affected employees, requires that the consultations must precede the employer's final decision to dismiss employees.¹⁴³ Part of these consultations should be intended to consider possible alternatives to prevent retrenchment.¹⁴⁴

In *WBHO Construction (Pty) Ltd* the Labour Court considered the question of whether an employer and employee can conclude an MSA to avoid following these prescribed procedures.¹⁴⁵ In this instance Mr Gray a representative of *WBHO Construction (Pty) Ltd* (the employer), had a discussion with the employee regarding the employer's operational requirements.¹⁴⁶ During this discussion Mr Gray suggested that the employee be transferred to another location in the Northern Cape, but the

¹⁴¹ See *Cook4life* para 14. In this case the applicant argued with reference to *First National Bank Ltd (Wesbank Division) v Mooi* 2009 30 ILJ 336 (LC) that only the Labour Court or a civil court can make determinations on the validity of agreements, including MSAs under s 77(3) of the *BCEA* (paras 12-13). However, the court held (para 14) that the *CCMA* has jurisdiction to hear dismissal disputes, and that this implies that the *CCMA* can also consider whether a voidable agreement should be given effect to make that determination whether a dismissal occurred. The court stated that to require the applicant in such circumstances to first refer a contractual dispute to the Labour Court would be contrary to the principles of informal and expeditious dispute resolution and add a requirement that is not reflected in the legislation.

¹⁴² Section 189 of the *LRA* starts off as follows: "(1) When an employer *contemplates* dismissing one or more employees for reasons based on the employer's operational requirements, the employer *must* consult..." (own emphasis). A procedure is set out for proper consultation, for considering alternatives to retrenchment and for notifying the affected employee/s.

¹⁴³ Section 189(1) and (2) of the *LRA*.

¹⁴⁴ Section 189(3) of the *LRA*.

¹⁴⁵ Operational requirements as defined in section 213 of the *LRA* are "requirements based on the economic, technological, structural or similar needs of an employer". Item 1 of GN 1517 in GG 20254 of 16 July 1999 (Code of Good Practice on Dismissal Based on Operational Requirements) reiterates this definition and proceeds to state that: "[i]t is difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise."

¹⁴⁶ *WBHO Construction (Pty) Ltd* paras 4-5.

employee declined.¹⁴⁷ After this discussion the employer and the employee concluded an MSA.¹⁴⁸

The employee claimed that the terms used in the MSA were akin to a retrenchment agreement but that the employer had not followed the procedure prescribed in the *LRA*.¹⁴⁹ The employer had relied on the existence of an MSA and the employee had voluntarily consented to terminate the employment relationship.¹⁵⁰ The CCMA arbitrator found that the employee had been unfairly dismissed.¹⁵¹

On review the Labour Court agreed that as soon as the employer had discussed its operational requirements with the employee, section 189 of the *LRA* was invoked,¹⁵² and that it was compulsory for the employer to follow the procedure for the termination of an employment relationship based on operational reasons.¹⁵³ The words "the employer must" in section 189(1) of the *LRA* are peremptory.¹⁵⁴ An employer cannot use an MSA to circumvent the procedure set out in section 189 of the *LRA*.¹⁵⁵ This was not allowed as it would defeat the objects of section 189 of the *LRA*.¹⁵⁶ The court found that an unfair dismissal had occurred.¹⁵⁷ The MSA had been used to disguise the employee's retrenchment.¹⁵⁸ The right to access to justice dictates that employees should not be denied access to the statutory dispute resolution mechanisms in the *LRA*.¹⁵⁹

6 How labour forums decide whether an MSA should be enforced

One of the challenges facing an employee in referring a dispute where an MSA has been concluded is the issue of jurisdiction.¹⁶⁰ The court is tasked with giving effect to the MSA. The method used for the interpretation of MSAs is considered below.¹⁶¹ Cases concerning challenges to the validity

¹⁴⁷ *WBHO Construction (Pty) Ltd* para 6.

¹⁴⁸ *WBHO Construction (Pty) Ltd* para 5.

¹⁴⁹ *WBHO Construction (Pty) Ltd* para 30.

¹⁵⁰ *WBHO Construction (Pty) Ltd* para 29.

¹⁵¹ *WBHO Construction (Pty) Ltd* para 9.

¹⁵² *WBHO Construction (Pty) Ltd* para 7.

¹⁵³ *WBHO Construction (Pty) Ltd* paras 8 and 28.

¹⁵⁴ *WBHO Construction (Pty) Ltd* para 38.

¹⁵⁵ *WBHO Construction (Pty) Ltd* para 39.

¹⁵⁶ *WBHO Construction (Pty) Ltd* para 40.

¹⁵⁷ *WBHO Construction (Pty) Ltd* para 59.

¹⁵⁸ *WBHO Construction (Pty) Ltd* para 49.

¹⁵⁹ *WBHO Construction (Pty) Ltd* para 56.

¹⁶⁰ As discussed under section 3, an employee who enters into an MSA usually forfeits his or her right to pursue legal action based on the contract of employment.

¹⁶¹ Refer to the discussion under subsection 6.2.

of MSAs where the employees have accepted the payments and benefits in terms of the agreement are also examined.¹⁶²

6.1 Determining jurisdiction

The *LRA* does not confer jurisdiction on the Labour Court to determine the validity of an MSA. The Labour Court can be approached if a party to the agreement seeks to make a settlement an order of the court.¹⁶³ However, the Labour Court cannot enquire into the validity of an MSA. The Labour Court may determine whether an MSA that was induced by duress or misrepresentation ought to be set aside if there was an alleged dismissal,¹⁶⁴ but the court will have jurisdiction only if the employee asserts a reason for dismissal that falls within the court's jurisdictional ambit.¹⁶⁵

In *Schroeder* the employment of the applicant employees was terminated by means of an MSA. However, both applicants later referred to unfair dismissal disputes.¹⁶⁶ In both referrals the respective bargaining councils concluded that they lacked jurisdiction to entertain the respective disputes as the employment relationship had been terminated by means of an MSA.¹⁶⁷ The question was whether the Labour Court could set aside an agreement on the grounds of duress and/or misrepresentation if an MSA was concluded.¹⁶⁸ It was argued on behalf of the employer that averments regarding the invalidity of the MSA based on duress or misrepresentation ought to have been made at the CCMA or the bargaining council in the enquiry as to whether a dismissal was in issue. If an agreement is induced by duress, this would render an MSA voidable, in which case the employer's conduct would amount to a dismissal if the arbitrator were required to set aside the MSA.¹⁶⁹ The Labour Court agreed with the argument. Section 158(2) of the *LRA*¹⁷⁰ does not empower the Labour Court to remit a matter

¹⁶² This is discussed under subsection 6.3.

¹⁶³ Section 158(1)(c) of the *LRA*.

¹⁶⁴ In the *Baudach* para 12, the employee successfully argued that he had signed the settlement agreement because the employer had misrepresented the fact that the position that he was filling became redundant. However, he later discovered that the position he had filled continued to exist and someone else was appointed by the employer to replace him.

¹⁶⁵ *Schroeder v Pharmacare Ltd t/a Aspen Pharmacare* 2015 2 BLLR 168 (LC) (hereafter *Schroeder*) para 10.

¹⁶⁶ *Schroeder* para 1.

¹⁶⁷ *Schroeder* para 2.

¹⁶⁸ *Schroeder* para 4.

¹⁶⁹ *Schroeder* para 5.

¹⁷⁰ Section 158(2) of the *LRA* grants the Labour Court the power to correct a mistake where a dispute was erroneously referred to it and ought to have been dealt with by the CCMA or bargaining council, or, where it is expedient to do so and with the litigants' permission, to continue hearing the dispute and then to make an order that a commissioner or arbitrator would have been empowered to make.

to arbitration in circumstances where the court lacks jurisdiction to entertain the original referral.¹⁷¹

If the CCMA or bargaining council decides that it does not have jurisdiction to entertain a dispute that is referred by an employee who has concluded an MSA which terminated the employment relationship, the Labour Court would therefore also not be in a position to assist the employee.

6.2 Interpretation of the MSA

How will the court interpret an MSA presented to it and give effect to its consequences?

In *Damondar Jhabhai & Co Ltd v Eustace Sisal Estates Ltd*¹⁷² it was held that it is "[t]he function of courts ... to enforce and give effect to the intention of the parties as expressed in their agreement".¹⁷³ The same principle is accepted in South Africa. In *Gbenga-Oluwatoye CC* the court held that it is important to give effect to agreements concluded by parties in instances where the parties enjoy approximate equality of bargaining power. It is also important to allow parties to settle their disputes. This is both in the personal interest of the parties and the public interest.¹⁷⁴ The entire labour dispute system in South Africa, and in particular the procedures envisaged in the Commission for Conciliation, Mediation and Arbitration, are designed to ensure the expedient, informal resolution of labour disputes.¹⁷⁵ Consequently, it makes sense that labour forums support the settlement of labour disputes between employers and employees on terms agreed to by them with the least amount of formality.

The scope and purpose of an MSA are determined by considering the background and context and the words used by the parties.¹⁷⁶ In the context of the interpretation of written documents the courts often refer to *Natal Joint*

¹⁷¹ *Schroeder* para 10.

¹⁷² *Damondar Jhabhai & Co Ltd v Eustace Sisal Estates Ltd* 1967 EA 153.

¹⁷³ *Damondar Jhabhai & Co Ltd v Eustace Sisal Estates Ltd* 1967 EA 153 156.

¹⁷⁴ *Gbenga-Oluwatoye CC* para 22.

¹⁷⁵ Refer to Ministerial Task Team 1995 ILJ clause 2 and the preamble to the *LRA*, which sets out the purpose of the *LRA*. The CCMA was established mainly to provide access to employees for the inexpensive and quick resolution of labour disputes. See *Shopleft Checkers (Pty) Ltd v CCMA* 2009 7 BLLR 619 (SCA) para 34; *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2010 2 SA 269 (CC) paras 12-13; *Bezuidenhout v Johnston* 2006 27 ILJ 2337 (LC) para 26, *Chillibush Communications (Pty) Ltd v Gericke* 2010 31 ILJ 1350 (LC) para 19; *Fraser Alexander (Pty) Ltd v CCMA* (JR710/21) [2025] ZALCJHB 110 (14 March 2025) paras 27-29.

¹⁷⁶ *Swanepoel* para 10. Also see *South African Football Association v Fli-Afrika Travel (Pty) Ltd* 2020 2 All SA 403 (SCA) (hereafter *South African Football Association*) 45-46.

*Municipal Pension Fund v Endumeni Municipality*¹⁷⁷ (hereafter *Natal Joint Municipal Pension Fund*) in which the Supreme Court of Appeal considered what must be pondered by the court when interpreting a written document.

In *Natal Joint Municipal Pension Fund* the court held that during the process the court must attribute meaning to the words that were used in the contract in the context of the document as a whole. The ordinary rules of grammar should be applied. The court must also consider the context in which the provision was included, the purpose and what the parties to the contract knew in the context. In the event of any ambiguity in the wording of the document, the court must weigh up the different possible meanings in light of these factors. The court must be objective in the assessment. It is important to interpret a document so that it is "reasonable, sensible or businesslike", but the court cannot substitute words or change what the parties agreed to.¹⁷⁸

The approach suggested in *Natal Joint Municipal Pension Fund* is used by the Labour Courts to assist with the technical interpretation of MSAs, i.e., in determining what certain words mean and in resolving ambiguity in the agreements. However, other considerations also play a role in labour law. In determining whether an agreement ought to be enforced, the public policy is taken into account. The Labour Courts also assess whether agreements, especially those involving termination, are fair.¹⁷⁹ Secondly, the unequal bargaining power existing between employers and employees in the employment relationship is accepted as an extra element that must be considered.¹⁸⁰ Lastly, the purpose of any applicable legislation, and especially the *Constitution of the Republic of South Africa, 1996* is considered and may override contractual terms.¹⁸¹

¹⁷⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter *Natal Joint Municipal Pension Fund*) para 18. Also see *Swanepoel*.

¹⁷⁸ Also see *Swanepoel* paras 8-9.

¹⁷⁹ In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) paras 31 and 59 and 61-64 the highest court emphasised that fairness is the standard that must be applied in labour disputes, and that all relevant factors must be considered in assessing dismissals. As the enforcement of an MSA also has the effect of terminating the employment relationship, the same standard should apply.

¹⁸⁰ See *Makhothokho* paras 78 and 80-81 in which the Labour Court acknowledged the unequal bargaining power between employers and employees and that this may affect the voluntariness of MSAs and whether the employees had a genuine choice in signing the agreement.

¹⁸¹ In *National Union of Metalworkers of South Africa v Vetsak Co-Operative Ltd* 1996 4 SA 577 (A) para 25, the appellate division held that fairness involves a value judgment balancing the interests of employers and employees, guided by the objectives of the *LRA*. *National Education, Health and Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) para 14 reaffirmed that the applicable legislation (in this case the *LRA*) gives effect to the right to fair labour practices under s 23(1) of the Constitution, and that labour legislation must be interpreted in line with constitutional values.

In *Swanepoel* in determining what the intention of the parties were upon the conclusion of the MSA the court applied the principles in *Natal Joint Municipal Pension Fund* to interpret the wording of the MSA,¹⁸² and thereafter applied the extra protective principles. The court also considered the surrounding circumstances, including the fact that the employee had opted to sign the MSA instead of facing a disciplinary enquiry on allegations of poor performance.¹⁸³

Likewise, in *ABSA Investment Management Services (Pty) Ltd* the court looked beyond the wording of the MSA to assess fairness and compliance with employer policy. In this case the employer had used a *pro forma* letter to terminate the employee's services, which contained inappropriate wording instead of an MSA, apparently, according to the employer, because of the beneficial tax implications for the employee.¹⁸⁴ The salient facts were as follows. ABSA Investment Management Services (Pty) Ltd (the employer) had employed Crowhurst (the employee) for just over a year when her employment was terminated. The employer was in the process of restructuring. The employee's immediate superior had mentioned to the employee that she was going to be retrenched, plus she had attended a slide presentation presented by the managing director where the proposed restructuring and its rationale were explained,¹⁸⁵ and her position was identified as being at least potentially redundant.¹⁸⁶ After the slide show there was a discussion with the employee and other affected employees. According to the employee the redundancy was presented to her as an accomplished fact. The employer's policy required that if an employee's position became redundant, he or she should not immediately be retrenched. Instead, the employee should be placed in an alternative position, and if no alternative employment was available the employee had to work out a period of three months, during which period attempts would be made to find another suitable position. However, the employee was not required to work out the three months. The employee was offered two choices: work out the notice month and receive two weeks' severance pay, or leave immediately, be paid for the month, and receive two months' severance pay. She had been offered retrenchment only, unlike the other affected employees. She was not offered reassignment.¹⁸⁷ The employee later discovered that there were jobs available in the group for which she would have qualified.¹⁸⁸

¹⁸² *Swanepoel* para 9.

¹⁸³ *Swanepoel* paras 9 and 11.

¹⁸⁴ *ABSA Investment Management Services (Pty) Ltd* para 10.

¹⁸⁵ *ABSA Investment Management Services (Pty) Ltd* para 2.

¹⁸⁶ *ABSA Investment Management Services (Pty) Ltd* para 3.

¹⁸⁷ *ABSA Investment Management Services (Pty) Ltd* para 5.

¹⁸⁸ *ABSA Investment Management Services (Pty) Ltd* para 6.

A witness during the trial in the Labour Court testified that the employee's line manager wished to get rid of the employee.¹⁸⁹ She was the only one who had not been offered reassignment.¹⁹⁰ The Labour Appeal Court considered the employee's personal and financial circumstances and based on this found that the employee's version, i.e., that she had been singled out and not offered reassignment like the other affected employees as required in the employer's policy, was more likely.¹⁹¹ This led the Labour Court to the ultimate conclusion that the employee in this case had been dismissed.¹⁹² The failure to offer reassignment rendered the dismissal unfair.¹⁹³

The courts use the same general rules to interpret MSAs as they do with other written agreements. The leading case, the *Natal Joint Municipal Pension Fund* case, serves as a foundation for interpreting MSAs. In that case it was held that courts must look at the wording of the agreement, the context in which it was signed, and what the parties knew at the time. But in labour law, courts go further. They also consider whether the agreement was fair in light of the parties' conduct, and whether the employee had a genuine choice to enter into the agreement, given the relative positions of the parties. This ensures that MSAs are not only interpreted correctly, but also assessed against the broader principles of fairness that underpin labour law.

7 Conclusion

Terminating an employment relationship by mutual agreement between the employer and employee is an accepted termination mechanism¹⁹⁴ which also holds benefits for both the contracting parties.¹⁹⁵ There are various reasons why it would be preferable to conclude an MSA.¹⁹⁶ The courts accept that the voluntary conclusion of an MSA terminates the employment relationship, and that employees are generally bound to MSAs, and they must accept the consequences of entering into MSAs.¹⁹⁷ The legal aftermath of concluding an MSA is: that employees forfeit their right to claim unemployment benefits under the *UIA*,¹⁹⁸ and they waive their rights as employees to refer a dispute based on the employment relationship.¹⁹⁹

¹⁸⁹ *ABSA Investment Management Services (Pty) Ltd* para 7.

¹⁹⁰ *ABSA Investment Management Services (Pty) Ltd* para 7.

¹⁹¹ *ABSA Investment Management Services (Pty) Ltd* para 19.

¹⁹² *ABSA Investment Management Services (Pty) Ltd* para 29.

¹⁹³ *ABSA Investment Management Services (Pty) Ltd* para 29.

¹⁹⁴ Refer to the discussion under section 2.

¹⁹⁵ See the discussion under section 2.

¹⁹⁶ This is discussed under section 2.

¹⁹⁷ See the discussion under section 2.

¹⁹⁸ Refer to the discussion under subsection 3.1.

¹⁹⁹ See the discussion under subsection 3.2.

Moreover, signing an MSA in instances where the termination would qualify as a dismissal for operational reasons under the labour legislation would have negative tax implications for the employee, as the financial payment received in terms of the MSA does not qualify as "severance pay".²⁰⁰

There are no prescriptions for what information must be included in an MSA, and the ordinary rules for the validity of contracts in general apply to MSAs.²⁰¹ This gives employers and employees freedom to negotiate terms in MSAs that are agreeable to both parties. However, it also opens the door to potential irregularities or even the misuse of these agreements.²⁰²

MSAs must be concluded on terms that are mutually acceptable to the parties.²⁰³ However, the courts have accepted that employers and employees are not necessarily on an equal footing when concluding MSAs. The unequal bargaining position of an employee standing to lose his or her job and the associated income has, in at least one instance, been recognised as a form of financial duress affecting the validity of the MSA.²⁰⁴ It is also possible for an employee to successfully challenge the validity of an MSA based on a misrepresentation of a material fact during the negotiations preceding the conclusion of the MSA.²⁰⁵ Where a dismissal for operational reasons is the reason for the dismissal, an MSA cannot be used by an employer to bypass the procedure that is prescribed for dismissal of this sort, as the *LRA's* regulating provision is peremptory.²⁰⁶

The decision of whether an MSA should be enforced or ignored determines whether the CCMA or a bargaining council has jurisdiction to entertain a dispute concerning an alleged unfair dismissal where there is an MSA in the mix.²⁰⁷ The Labour Court has jurisdiction to entertain only disputes where the CCMA had original jurisdiction, and it cannot assume jurisdiction otherwise.²⁰⁸ Therefore, the validity assessment should be done in the initial referral to the CCMA or the bargaining council.²⁰⁹

²⁰⁰ Refer to the discussion under subsection 3.3.

²⁰¹ However, the case law suggests that the agreement should be formalised and that certain clauses should be included in the agreement. This is discussed under section 4.

²⁰² See the discussion under section 5.

²⁰³ As explored in subsection 5.1.

²⁰⁴ Refer to *WBHO Construction (Pty) Ltd* para 59. Also see the discussion under subsection 5.2.

²⁰⁵ See *Baudach* para 14. Also refer to the discussion under subsection 5.3.

²⁰⁶ Refer to the discussion under subsection 5.4.

²⁰⁷ This is discussed under section 6.

²⁰⁸ There is no legislation that confers general jurisdiction on the Labour Court to decide on the validity of an MSA. Refer to *Schroeder* para 10. Also see the discussion under section 6.

²⁰⁹ This issue is examined in detail in section 5 and 6.

When interpreting an MSA the court has the purpose to give effect to the agreement that the parties reached. In this exercise the Labour Courts use the same methods for interpretation of a written MSA as are used in other courts to determine the scope and purpose of the MSA by considering the words used in the document and the context.²¹⁰

It is generally accepted by the courts that if an employee agreed to terminate his or her employment by means of an MSA and has accepted the benefits in terms of the MSA, he or she cannot challenge the validity of the MSA without tendering repayment of the benefits received under the agreement.²¹¹

With all of this in mind, the gist is: when signing an MSA, employees must understand the implications, both positive and negative, and remember that the benefits of an MSA come with binding consequences.²¹²

Courts apply established principles such as those in *Natal Joint Municipal Pension Fund* to interpret MSAs, focussing on the wording, the context, and what the parties knew at the time. But in labour law, courts also consider fairness, the conduct of the parties, and whether the employee had a genuine choice, particularly in light of the power imbalance in employment relationships. As MSAs are recognised as a method of terminating employment, and their effects carry significant consequences for employees, it may be appropriate to consider a dedicated Code of Good Practice to guide their use. Clearer guidance could promote legal certainty, protect employees, and preserve the flexibility that makes MSAs attractive to employers.

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²¹⁰ *Natal Joint Municipal Pension Fund* para 18. Also see *South African Football Association* paras 45-46. Refer to the discussion under subsection 6.2.

²¹¹ This is discussed under subsection 6.2.

²¹² *Tshabalala* para 92.

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List of Abbreviations

BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation, Mediation and Arbitration
ILJ	Industrial Law Journal
LRA	Labour Relations Act 66 of 1995
MSA	mutual separation agreement
PELJ	Potchefstroom Electronic Law Journal
SARS	South African Revenue Service
Stell LR	Stellenbosch Law Review
UIA	Unemployment Insurance Act 63 of 2001
UIF	Unemployment Insurance Fund