When boilerplate clauses hinder rather than assist a party

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While no contract is ever the same, certain clauses are generally agreed upon to include in the contract (especially when a lawyer is the individual responsible for drafting the contract), known as “boiler-plate” clauses. These clauses include, but are not limited to, provisions which state what law governs the contract, the non-variation clause, and a clause pertaining to clauses which are illegal or invalid not affecting the remainder of the terms of the contract.

While these “boilerplate” clauses are used universally, and continue to be used and have been used by lawyers regularly, and even though the parties may agree to some or all of these “boiler-plate” clauses, this does not necessarily mean that a court will uphold them.

A settlement agreement is a contract between the parties determining how they will settle a dispute or legal action. Settlement agreements arise (mostly) in two ways. Either as a way to prevent litigation and/or dispute resolution or in a matter that is already litigious and before court, to settle the matter without actually going to trial. Therefore, given that it is a contract and that it is used to try avoid dispute or further litigation, a lawyer drafting the settlement agreement will often have a precedent which sets out the basic skeleton of a settlement agreement, and the “boiler-plate” clauses mentioned above. One of these “boiler-plate” clauses which are often included in a settlement agreement provides that the parties may make the settlement agreement into an order of a court.

However, depending on the nature of the settlement agreement in question, this type of “boilter-plate” clause can be problematic. A settlement agreement arising out of litigation differs from a settlement agreement which the parties have agreed to prior to engaging in litigation. Where litigation is ongoing, the disputes will already be before the court and, therefore, the court in question; if the requirements for a legitimate settlement agreement have been met, the court may turn it into an order of court.

The Constitutional Court Judgement of Eke v Parsons found in obiter that :

[25] This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper.[36] A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place, "relate directly or indirectly to an issue or lis between the parties".[37] Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court.

However, where no dispute is before the court, it will not make a settlement agreement an order of court.

[38] Accordingly, I can find no basis to disagree with the High Court's finding that the settlement agreement is final in its terms and that Mr Parsons is entitled to approach a court for enforcement of that order in accordance with the procedure set out in it.

Now, generally, parties may agree to just about anything unless it is illegal, immoral, impossible or where a third party is involved without agreement. A clause which states that the parties may approach a court to make the settlement an order of court does not seem to fall into any of the above categories..."

In the case of Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited and Another the court relied on Eke V Parson and had the following to say regarding making a settlement agreement an order of court:

[35.4] In a case where a settlement agreement has been reached and is sought to be made an order of court, there is inevitably no live dispute between the parties, but it is also difficult to conceive what "uncertain legal position" could be applicable. The very point of the application before me (and the application before Van der Byl AJ in Growthpoint Properties) is that the parties are not in dispute or a state of uncertainty about the existence of their agreement. It is on this basis that I am asked to enforce the agreement via court order. It therefore seems to me that section 21 of the Superior Courts Act[37] does not provide me with the necessary jurisdiction to make the settlement agreement an order of court."

There are a number of cases which deal with the issue of a settlement agreement being made an order of court. The position now is that a settlement agreement cannot be made an order of the court unless it is before the court because the settlement agreement finalises a dispute .

This notwithstanding, a settlement order is still a contract, and the parties can therefore approach the court should a term thereof be breached and enforce the settlement agreement on that basis.

Therefore, based on these judgements, lawyers need to approach the settlement agreement as a contract and apply their minds fully when drafting a settlement agreement, even with regard to “boilerplate” clause. Preparing a settlement agreement which contains the order of court clause can create an expectation to the client that they have a remedy to lean on, when in fact, that remedy does not exist. This may have been a threat used against the party with obligations in the past, but this is no longer a legitimate option and an attorney who advises their client otherwise may find themselves facing their own legal battle for negligence or wilful misconduct.