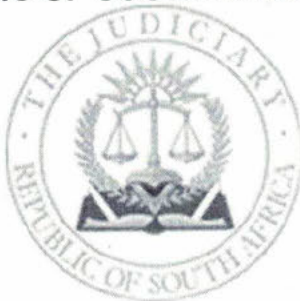


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 25792/2021

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
19/8/2020	
DATE:	SIGNATURE

In the matter between:

MAMELODI SUNDOWNS FOOTBALL CLUB (PTY) LTD

Plaintiff

AND

**MOIRA TLHAGALE SPORTS MARKETING AND
MANAGEMENT (PTY) LTD**

First Defendant

PITSO JOHNNY HAMILTON MOSIMANE

Second Defendant

JUDGMENT

MIA J:

INTRODUCTION

[1] The plaintiff, Mamelodi Sundowns Football Club (Pty) Ltd (Sundowns), is a professional South African football club affiliated to the National Soccer League. The second defendant (Mr Mosimane) was employed as the head coach of the plaintiff for three consecutive terms, the contracts ran from 2012 to 2016, 2016 to 2020 and 20 May 2020 envisaged to end in May 2024. The Mr Mosimane resigned on 30 September 2020. The first defendant, Moira Thlagale Sports Management and Management (Pty) Ltd (Thlagale Sports Marketing (TSM)) was appointed as Mr Mosimane's intermediary. Sundowns seeks to recover from the defendants, jointly and severally, the amount of R7 912 905, being a portion of the commission paid to TSM, plus interest at the prescribed legal rate and costs of suit. The claim relates to the last contract which commenced on 20 May 2020 and was envisaged to conclude at the end of May 2024. The action is defended.

[2] The defendants raised several defences. They pleaded that the court lacked jurisdiction, that the agreement was terminated by mutual agreement, that there was a breach of the agreement between Sundowns and the second defendant amounting to constructive dismissal, and that the intermediary agreement and the employment agreements were constitutionally unenforceable as it contravenes various rights protected by the Constitution.

BACKGROUND FACTS

[3] Ms Moira Thlagale is the sole director and shareholder of TSM. It is common cause that the TSM was the intermediary when the contract was concluded between him and Sundowns in May 2020. TSM received a commission of R8 632 260 on 29 May 2020 upon finalisation of the contract between Sundowns and Mr Mosimane for the period May 2020 to May 2024. The contract agreement provided for the payment of a monthly salary and bonuses payable upon performance to Mr Mosimane. It was a part of the agreement that he would furnish pre-match reports and attend meetings as required.

[4] Mr Mosimane left Sundowns in September 2020, four months into the contract, which should have endured for 48 months. After the contract was terminated, Mr Mosimane accepted a contract with a North African Football Club. Six months after the termination of the agreement, Sundowns claimed the amount of R7 912 905 from the defendants. The claim flows from clause 1.1.3 of the intermediary agreement, which provides for the recovery of the portion of the intermediary commission paid to TSM calculated for the balance of the contract remaining, which Mr Mosimane did not serve with Sundowns. The formula for calculating the amount is set out in clauses 1.1.3.1 and 1.1.3.2 of the intermediary agreement. A similar provision is found in clause 6.5 in the contract concluded between Sundowns and Mr Mosimane. It provides for the recovery of a portion of the commission paid to the intermediary calculated from the date of termination of Mr Mosimane's contract, i.e. September 2020, until the end of May 2024. The clause provides that the Mr Mosimane agreed to be jointly and severally liable for the repayment of that portion of the commission that was paid, upfront to the intermediary for the period that he was not employed by Sundowns for the full 48-month period. The clauses in each agreement were referred to as the "clawback" clauses.

[5] The intermediary agreement providing for the upfront payment of commission in the amount of R8 623 260.00 to TSM also provided in Clause 1.1.3 of the agreement:

"1.1.3. If for whatever reason, as governed or provided for the employment contract of the Head Coach, he (the Head Coach) does not continue to be employed by Sundowns then.

1.1.3.1. Sundowns will not recover the commission paid for the period of his employment contract that has expired, but

1.1.3.2 Sundowns shall be paid back within a period of 6 months, the commission paid for the remaining period, when the Head Coach will not be employed by Sundowns (For example; the duration of the Head Coach's Employment Contract is 48 months, if the Head Coach were to leave the employ of Sundowns as governed or provided for by the employment contract of the Head Coach at month 36 for instance, Sundowns will not recover the commission paid for 36 months, but shall be paid back the commission on the balance of the contract period, being 12 months."

[6] Mr Mosimane's contract with Sundowns provides in clause 6.5 that:

"6.5 The Club agrees to pay a 10% (ten percent) agent's commission to Moira Tlhagale Sports Marketing and Management (Pty) Ltd (**Moira Sports**

Marketing) for the entire contract period in advance. The terms of commission are contained in a separate agreement between the plaintiff and Moira Sports Marketing known as the "Intermediary Agreement". In terms of this agreement, in the event of any early termination of this Employment Contract prior to 31 May 2024, for whatever reason, a pro rata portion of the agent's commission in respect of the remaining period, when the Head Coach will not be employed by the Club, is subject to recovery by the Club. Notwithstanding the terms of the Intermediary Agreement, the Employee undertakes and agrees to be jointly and severally liable for any and all payments due to the Club in terms of the Intermediary Agreement."

[7] At the outset, the parties had agreed that Sundowns bore the onus of proving paragraphs 13-15 of their particulars of claim. The defendants bore the onus in respect of their special plea¹ and their plea².

ISSUES IN DISPUTE

[8] The issues for determination are:

- 8.1. Whether Sundowns proved its claims for recovery of the amount of R7 912 905.
- 8.2. Whether the court has jurisdiction over the dispute.
- 8.3. Whether Sundowns' claim was extinguished when the parties agreed to terminate the employment contract of the second defendant, in September 2020, having the effect that the clawback clauses in both written agreements were cancelled, and the defendants were not expected to make any payments in terms of the clawback clauses.
- 8.4. Whether there was a breach of the agreement between Sundowns and Mr Mosimane, such that he was constructively dismissed and that this released the defendants from having to repay any commission paid in advance.

¹ Defendants' Plea, paragraphs 4-5 and 7-12.

² Defendants' Plea, paragraphs 15- 16.

8.5. Whether the agreements concluded with the defendants were constitutionally enforceable.

[9] Dr Rejoice Simelane and Mr Makhanye testified on behalf of Sundowns.

[10] Mr Makhanye's evidence dealt with the circumstances around the negotiation of the contracts and in particular the contract of employment negotiated to commence in December 2012. This evidence highlighted that TSM was not involved in the negotiation of that contract. He confirmed the term of the contract concluded from May 2020 to May 2024 which provided for a 48-month contract of employment. His evidence clarified the context of negotiations which resulted in the inclusion of clause 6.5 of the employment agreement and clause 1.1.3 of the intermediary agreement. He described the circumstances around the re-negotiation of the contract with the second defendant and how the plaintiff conducted its relationship with the defendants and its general operations. His evidence elucidated that the Sundowns only negotiated with Mr Mosimane after they were requested by him to do so in relation to the contract commencing in May 2020.

[11] Dr Simelane gave evidence on her negotiation and communication with the Ms Thlagale representing TSM regarding the agreement as well as the circumstances after the termination and the extent of her knowledge about other intermediary agreements.

[12] Ms Thlagale was the only witness called by the defendants. Ms Thlagale's evidence related to the negotiations with Sundowns, which included confirming Mr Mosimane's meeting with Mr Motsepe. It is evident from Ms Thlagale's evidence and the correspondence between the intermediary and Mr Mosimane that Ms Thlagale reached out to Mr Mosimane to finalise the broad agreement reached between Mr Mosimane and Mr Motsepe. Ms Thlagale also insisted that Sundowns communicate with her as Mr Mosimane's intermediary in relation to the renewal of Mr Mosimane's contract. Sundowns acknowledged her correspondence and confirmed that they would engage with TSM to ensure that the process remained fair and that TSM was treated equitably. (My underlining.) The communication thereafter continued between

TSM and Sundowns pertaining to Mr Mosimane's employment contract and the intermediary agreement.

[13] When the contract was sent to TSM for consideration, it requested the agreement be sent in a format which enabled tracked changes. This did not occur. The contract was concluded with the final version including the clawback clauses despite TSM indicating that it was unsatisfactory and should be removed. When the contracts were eventually signed, the clawback clauses were present in both the employment contract signed by the Mr Mosimane as well as the intermediary contract signed by TSM. Ms Thlagale indicated that TSM was not able to negotiate for the removal of the clawback clauses in either contract. The reason furnished for not negotiating further was because Mr Mosimane, wanted to return to the field to coach and was willing to sign the agreements which included the clawback clauses.

[14] Ms Thlagale testified that she discussed her concern about the clawback clause with other intermediaries when Sundowns sought to recover monies from TSM. During their discussions other intermediaries informed her that their contracts did not include clawback clauses which provided for repayment of a part of the commission that had been paid upfront. The defendants introduced agreements that Sundowns concluded with two intermediaries to demonstrate the differences between those contracts and the contracts concluded with them.

LACK OF JURISDICTION

[15] It is appropriate to deal with the issue of jurisdiction at the outset.

[16] Clause 28.4 of the Employment Agreement provided that:

"This agreement is governed by and shall be construed in accordance with the laws of the Republic of South Africa and the FIFA Statutes and Regulations. Any and all

disputes will be submitted exclusively to the Premier Soccer League Dispute Resolution Chamber.”³

The defendants placed reliance upon the above clause as well as clause 7.1 of the intermediary agreement to support their defence that this court cannot determine the dispute.

[17] Clause 7.1 provides:

“Any dispute, difference or question which may arise at any time hereafter between the parties will be referred to the exclusive jurisdiction of:

7.1.1 the NSL to be dealt with and determined by arbitration before the Dispute Resolution Chamber of the NSL in accordance with and subject to the then applicable provisions of the NSL Handbook; or

7.1.2 the High Court of South Africa should the Dispute Resolution Chamber of the NSL not have jurisdiction over the dispute or difference, or is unable to deal with the dispute or difference for any reason whatsoever”

[18] The defendant’s reliance on the special plea evinces that the dispute ought to have been determined by the Dispute Resolution Chamber of the Premier Soccer League in terms of the National Soccer League Handbook (NSL handbook). The NSL handbook is comprised of the Constitution and the League Rules.

[19] Article 1 of the League Rules defines the scope of application and indicates that the Rules:

“[A] Apply to every match and competition organised by the League and to any act or conduct required by the NSL Handbook, and to any breach thereof.”⁴

The dispute before this court does not relate to a match or competition organised by the League or a breach thereof. Therefore, the League Rules are not applicable.

³ Caseline: 001-46 to 001-47, para 2 of the amended plea.

⁴ Article 1 League Rules titled “SCOPE OF APPLICATION: SUBSTANTIVE LAW”.

[20] The Constitution of the NSL Handbook defines the jurisdiction and powers of the Dispute Resolution Chamber.

[21] In terms of Article 23.1.1, the Dispute Resolution Chamber “is an independent arbitration tribunal vested with authority to adjudicate *disputes other than those of a disciplinary nature or which are status matters arising from international transfers.*” The Dispute Resolution Chamber obliges the NSL, member clubs and players to refer disputes to it for resolution.⁵

[22] In considering whether this court has jurisdiction, I have regard to article 23.2 of the Constitution of the NSL which provides:

“23.2 Jurisdiction

23.2.1 The Dispute Resolution Chamber will have jurisdiction over, inter alia determination of the following issues or disputes: -

- 23.2.1.1 disputes between Member Clubs;
- 23.2.1.2 employment related disputes between Member club and player;
- 23.2.1.3 employment related disputes between a Member Club, a Coach and any other employee who is part of the Member Club's Technical Team;
- 23.2.1.4 employment related disputes between a Member club Official and a Member Club;
- 23.2.1.5 training and development compensation and solidarity and or payment disputes.
- 23.2.1.6 The Dispute Resolution Chamber will not have jurisdiction in respect of issues or disputes that may arise as between parties that are not subject to the jurisdiction of the League such as “agents” or intermediaries as they are now described.”

⁵ *Ndoro & another v South African Football Association & others* [2018] ZAGPJHC 74; [2018] 3 All SA 277 (GJ); 2018 (5) SA 630 (GJ) (“*Ndoro v SAFA*”) para 59.

[23] Sundowns' claim against TSM, a company and intermediary, does not fall within the jurisdiction of the Dispute Resolution Chamber. This is clearly iterated in article 23.2.1.6 of the Constitution. The Dispute Resolution Chamber thus has no jurisdiction in the dispute between Sundowns and TSM, as the dispute is explicitly excluded in Article 23.2.1.6 indicated above.

[24] The claim against the Mr Mosimane is similarly considered in terms of Article 23.2 of the Constitution. He left Sundowns in September 2020 to join a North African Football Club. When Sundowns issued the demand for the repayment of the agent's fee in terms of clause 6.5 of the employment agreement with Mr Mosimane, he was no longer employed by the Club. Having regard to the evidence before me, Mr Mosimane did not coach a team that was subject to the NSL after he left Sundowns in September 2020. Currently, he is not the coach of any team subject to the NSL. The action herein was issued in May 2021, when he fell outside the jurisdiction of the NSL and the Dispute Resolution Chamber thus had no jurisdiction.

[25] Sundowns' claim against Mr Mosimane in terms of the clawback clause is for the repayment of part of the intermediary's commission. It is not an employment related dispute between Sundowns and Mr Mosimane in that it does not pertain to his rights, duties or entitlements as an employee.

[26] In addition to the dispute not being employment related or covered in any of the sub articles in 23.2, the parties disagree on the forum which has jurisdiction. This court has jurisdiction where there is a dispute between the parties that is not capable of resolution. In addition to the dispute relating to the applicable forum, the defendants have raised constitutional issues which invoke this court's inherent jurisdiction where constitutional issues have been raised. In any event, since the Dispute Resolution Chamber's jurisdiction over TSM is expressly excluded, it is convenient and necessary that the entire claim be adjudicated by a forum that has jurisdiction over all the parties. This obviates the need for the same matter to be heard by different fora; an unnecessary duplication and costs in the resolution of the disputes.

[27] This court has jurisdiction to determine the dispute.

TERMINATION BY MUTUAL AGREEMENT

[28] The defendants' defence that the agreement was mutually terminated and thus released them of repayment of the commission is based on the press statements issued by Sundowns on behalf of Mr Mosimane. Ms Thlagale was the only witness who testified on this aspect. Her evidence was that a meeting occurred with Mr Motsepe where Mr Mosimane indicated he did not wish to continue with Sundowns. Mr Motsepe accepted that Mr Mosimane no longer wished to continue his employment as the coach of Sundowns. Neither Mr Motsepe nor Mr Mosimane were called to clarify their discussion and any agreement around the termination of the contract and the terms thereof. There is no record of communication regarding any discussions or confirmation that the defendants were released from the requirement to pay back part of the commission in terms of the clawback clause.

[29] During her evidence, Ms Thlagale referred to the press statement released on 30 September 2020, which the defendants rely upon for their release from the contracts. The press statement reflects an amicable parting of ways from Sundowns and conveys support for Mr Mosimane's pursuit of growth opportunities. The content of the media statement indicates an announcement to the public to explain questions that might arise around Mr Mosimane's departure four months into the new contract. Whatever discussions occurred between TSM, Mr Mosimane and Mr Motsepe, the media statement did not indicate that Sundowns and the defendants were ill disposed to each other or that Mr Mosimane was leaving due to unsatisfactory work conditions. The reference to family that arose during Dr Simelane's and Ms Thlagale's evidence suggests that there was some intention to deal with the parting with grace and to ensure a continued relationship in the future.

[30] Both parties, through their media statements, communicated positive objectives regarding Mr Mosimane's departure from Sundowns. This served both parties' interests concerning the public view of the parties, as was evident from the evidence of Ms Thlagale and Dr Simelane. The press statements understandably reflected a positive disposition, especially where Ms Thlagale testified that the North African club Mr Mosimane wished to work with was unwilling to make an offer if Sundowns did not

release him. The press statements do not mention or relate to the specific conditions pertaining to Mr Mosimane's departure and the parties' obligations toward each other.

[31] The absence of communication between Sundowns and defendants regarding the termination of the agreement and the operation of the clawback clause is telling. The silence around this and the absence of communication does not allow for a conclusion that the defendants were released unless this was confirmed in writing. After Mr Mosimane's meeting with Mr Motsepe, prior to the finalisation of the 2020 employment contract, the TSM followed up with communication to finalise details regarding the employment contract. At the commencement of negotiations relating to Mr Mosimane's employment contract the communication between TSM and Sundowns was aimed at ensuring the contract was concluded on favourable terms. Given that TSM was unhappy about the clawback clause it seems apposite that it would follow up the exit meeting with Mr Motsepe with communication to Sundowns to ensure the parties had agreed on Mr Mosimane's departure and the terms applicable specifically the clawback clause. Whilst TSM communicated with Sundowns regarding the press statement to be released upon the second defendant's departure, there was, however no evidence of an agreement relating to the non-operation of the clawback clause. What followed was that that Sundowns issued a demand for the proportional repayment of the commission calculated in terms of the agreement after the departure of Mr Mosimane.

[32] The principle that a term written in a contract that specifies that variation must comply with formalities has consistently been applied in our courts. The agreements concluded with the defendants contain non-varying clauses requiring a variation to be in writing.⁶

[33] The Court observed in *HNR Properties CC & another v Standard Bank of SA Ltd*⁷:

⁶ *Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs & another* [2009] ZAECHC 28; 2010 (4) SA 261 (ECM) para 43.

⁷ *HNR Properties CC & another v Standard Bank of SA Ltd* [2003] ZASCA 135; [2004] 1 All SA 486 (SCA); 2004 (4) SA 471 (SCA) para 16.

“The clause, of course, requires that the release ‘be in writing’. This does not mean that when construing the writing it is impermissible to have regard to the background circumstances or, in the event of ambiguity, surrounding circumstances. Nonetheless, in every case the intention to release must appear from the writing itself. It may be explicit or implicit. But if the latter, the intention to release must be apparent from the writing on an ordinary grammatical construction of the words used or stated differently, the release of the surety must be a necessary implication of the words used. It is therefore not permissible to import into the writing, whether by reference to background or surrounding circumstances or any other source, an intention to release which is otherwise not ascertainable from the actual language of the document relied upon. If the position were otherwise the very object of the requirement of writing would be frustrated.”

[34] In the present instance, there is no written release from the obligation. Regarding the surrounding circumstances and on the version of TSM that the discussion between Mr Mosimane and Mr Motsepe afforded a release from the obligation to payback a portion of the commission in terms of the clawback clause, this discussion that occurred between Mr Mosimane and Mr Motsepe was not confirmed by either of the two gentlemen. Ms Thlagale’s recollection of the discussion relates to Mr Mosimane’s complaint to Mr Motsepe. There is no specific mention of the clawback clause being discussed. In any event the communication which followed this discussion related to the content of media statements and not to the release of defendants to repay the commission. The extensive negotiations prior to the contracts being signed is in stark contrast to the negotiations upon the defendants exit from the plaintiff as the coach. The negotiations upon the defendants exit related to the contracting party’s agreement that care be taken to ensure Mr Mosimane’s exit was managed sensitively.

[35] In the absence of written communication evidencing an agreement to release the defendants from the obligation to repay the commission, neither Mr Mosimane nor Mr Motsepe were called to testify on this issue without a written variation referring to the communication or any verbal discussion reflecting an intention to release the defendants from their obligations under the clawback clause, it cannot be concluded

to Sundowns that this conduct impacted on Mr Mosimane's performance or ability to continue working for Sundowns in terms of the employment contract.

[39] Mr Mosimane's reliance on a deteriorating working relationship is not supported by his response to the request for daily pre- and post-match reports. He had agreed and requested more time to furnish these due to the time constraints and on the field coaching requirements.

[40] The end of the employment relationship between them appears to commence following the disciplinary enquiry called to address the statement made by him during a media briefing. Sundowns held the view that the statement brought disrepute to its employees and supporters. Sundowns required the issuance of an apology. He refused to issue an apology. In the ensuing meeting with Mr Motsepe, they agreed that their business relationship should come to an end to ensure that they were able to maintain family ties. TSM communicated to Sundowns that the second defendant had resigned.⁸ Sundowns and Mr Mosimane issued statements in the media indicating his departure.

[41] The gist of Mr Mosimane's statement indicated that he had left Sundowns and its supporters and fans to pursue a new challenge after having contributed significantly to Sundowns' substantial success. He said, in the statement:

"Whilst I had four years remaining in my contract, this offer is a huge opportunity that would not have come had I not had the privilege to be part of the team that lead Mamelodi Sundowns to winning the CAF Champions League and reaching the World Cup Finals.

I am the first to admit that in this journey there were mistakes and hiccups, but there were more laughs, victory success and camaraderie. And I take this to my next destination- never to accentuate the challenges over the achievements.

For all shortcomings I apologise to the President and the Yellow Nation."

⁸ Record, Caselines 011-27, Correspondence from the first defendant to the plaintiff, attaching the letter of resignation of the second defendant.

The defendant's departure permitted the second defendant to accept an offer made by the North African Football Club, Al-Ahly.

[42] Consequently, whilst the Mr Mosimane experienced problems with some employees, there is no correspondence on the record or in the media statement which suggests a breach of the employment agreement and specifically Clause 5.2 of the agreement on the part of Sundowns, which resulted in Mr Mosimane's resignation. In Mr Mosimane's media statement there is an acknowledgement that there were errors, but he underscores the triumphs which he states he was privileged to lead. This view is publicly stated and reflects his willingness to furnish the pre and post-match reports and attend meetings which do not support a version that Sundowns did not support him.

[43] I am unable to conclude that Sundowns breached the employment agreement as averred by the defendants.

AGREEMENT CONSTITUTIONALLY UNENFORCEABLE

[44] The defendants alleged that clauses 6.5 of Mr Mosimane's contract and 1.1.3 of the intermediary agreement are unreasonable, unfair, and unenforceable. Moreover, they contend that enforcing the clauses on the facts would constitute a breach of sections 9, 10, 22 and 23 of the Constitution⁹.

⁹ "9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Section 10 of the Constitution provides—

"10 Human dignity

Discrimination of Ms Thlagale

[45] In seeking to demonstrate that the agreement was unfair and unreasonable, Ms Thlagale testified that she was treated differently because she is a Black woman and Mr Mosimane's wife. She stated that she did not receive a commission after negotiating the agreements between Mr Mosimane and Sundowns in 2012 and 2016. In her view, any other intermediary in her position would have been compensated. To support this, she emphasised that white male intermediaries were not treated in the same manner. She further attributed the treatment she received to what she believed was an instruction issued by Mr Motsepe.

[46] Sundowns disputed this and countered this view with the explanation that it was implausible that she would not receive a commission for 2012 and 2016, where Mr Mosimane, as a professional, had access to legal representation. It was not likely that TSM would have tolerated non-payment for services rendered by it. Dr Simelane explained that the reason why Sundowns did not pay a commission to an intermediary for the negotiation of the 2012 and 2016 employment contracts with the Mr Mosimane, was that they were not aware that he had an agent at that stage. Dr Simelane stated

Everyone has inherent dignity and the right to have their dignity respected and protected."

Section 22 of the Constitution provides—

"22 Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

Section 23 of the Constitution reads—

"23 Labour relations

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right-

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation have the right-

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer have the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1)."

that Mr Mosimane informed them in 2020 that he had a new agent representing him. He informed Sundowns that TSM was his agent. Upon receiving this information, Dr Simelane indicated that Sundowns pursued discussions with TSM about the renewal of Mr Mosimane's employment contract and the commission to be paid.

[47] The defendants' failure to produce any documents or correspondence pertaining to employment agreement negotiations conducted in 2012 and 2016 on behalf of Mr Mosimane, even though Ms Thlagale said the documents existed relating to the 2012 and 2016 contracts lends credibility to Sundowns' version that there was no intermediary. It is inexplicable that TSM would forgo a commission for a contract it had negotiated. TSM successfully negotiated a higher remuneration package for the Mr Mosimane than he had previously concluded and secured a favourable commission which was 10% of his package. By comparison, TSM secured a more favourable contract than the intermediaries represented by white males had secured. The evidence presented by Ms Thlagale relating to TSM being treated differently focused her experience during the negotiations with Sundowns and did not relate to TSM. TSM as a juristic entity and Ms Thlagale as a person are different. Even when considering that Ms Thlagale conducted negotiations on behalf of TSM, her favourable results make it impossible to conclude that she or TSM were treated differently to other intermediaries to their prejudice, having regard to the favourable agreement secured by TSM.

Unfair treatment vis-à-vis other intermediaries

[48] In respect of the unfair treatment Ms Thlagale stated that TSM was treated differently when compared to other intermediaries. The defendants' amended plea avers that the agreements concluded between TSM and Sundowns, when compared to the agreements concluded between Sundowns and two companies that concluded intermediary agreements with it, discriminate against TSM based on race and gender.

[49] To prove the discrimination based on race and gender, the defendants presented contracts concluded between the plaintiff and other intermediaries. The first was the contract between JDR Consulting and the plaintiff, which provided for a

commission payable in three instalments: the first instalment was payable upon submission of the intermediary's invoice, followed by two further payments. The second and third payments were paid each year upon the anniversary of the assistant coach's employment contract. The contract did not place any obligation upon the intermediary to repay any portion of the commission upon termination of the contract.

[50] The same allegation of race and gender discrimination is raised against Sundowns' agreement concluded with AKP Trading 79 Proprietary Limited (t/a Prosport International) (Prosport International). The Prosport International agreement outlines the commission payable. When compared to the intermediary agreement concluded with TSM, the Prosport International agreement does not contain a clawback clause and provides for the advance payment of the commission. It does not place any obligation on the intermediary to repay the portion of the commission already paid if the employment relationship between the coach and Sundowns is terminated on any ground before the expiration of the contract.

[51] In response to the submission that Sundowns discriminated against them based on race and gender as the negotiator for Mr Mosimane, Sundowns argued that Ms Thlagale is not TSM. The defendants conflate Thlagale Sports Management (Pty) Ltd, the juristic person, with Moira Thlagale, the natural person. It was argued that this held true for both JDR Consulting and Prosport International, where the defendants did not prove that the ownership and management of the two companies reflected a composition that was predominantly white and male among their directors and shareholders. The comparison made by the defendants was artificial. Thus, counsel for Sundowns concluded, the race of the intermediary is not conclusive as the basis for a constitutional attack based on s 9 of the Constitution.

[52] I agree that the comparison does not prove discrimination based on race especially where Ms Thlagale, a black woman negotiated favourable contracts. The comparison based on the different juristic entities having regard only to the race of the negotiators ignores factors such as the remuneration secured, when commissions were paid and circumstances where the intermediary received the full commission even after an employee resigned in the middle of the contract period. Comparison of

the different agreements do not lead to the conclusion that the agreements are unfair and unreasonable to TSM based on race or gender considering the first defendant is a juristic entity. The comparison does not serve the purpose intended by the defendants where the amounts paid differed when compared to other intermediary companies and the terms of payment differed. TSM was paid a substantially higher amount in commission than the two companies introduced by way of comparison and the amount was paid upfront. Where commission was paid upfront to the other intermediaries the evidence did not indicate that the circumstances were the same. The comparison is incomplete where it is limited to only the race of the directors of the other intermediaries.

[53] In addition to Mr Mosimane's increased income, TSM secured a commission of 10% in comparison with the Prosport International, which received a commission which equated to 5% of the gross annual remuneration of the second assistant coach. The difference in comparison appears to be to Mr Mosimane's and TSM's benefit in terms of the commission. TSM's bargaining ability, as demonstrated by the significantly higher gross annual remuneration over the 48 - month term offer secured for Mr Mosimane, reflects a strong rather than a weak bargaining position. It is not possible to draw a conclusion that TSM was treated differently based on race and gender to its detriment compared to other intermediaries. It is apparent from the comparison that both the commission and the remuneration secured were favourable to both defendants compared to what was secured by other intermediaries.

Fairness of recovery of monies in terms of clawback clauses

[54] I now turn to considering the clauses the defendants aver are unreasonable and unfair.

[55] The initial versions of the plea indicate that clauses 1.1.3 of the intermediary agreement and 6.5 of Mr Mosimane's agreement with the Sundowns are unenforceable because they require TSM, in respect of 1.1.3, to undertake an obligation to ensure that Mr Mosimane remains employed by Sundowns regardless of the circumstances. In respect of clause 6.5, it requires Mr Mosimane to assume liability

for repayment of a portion of the commission paid in terms of an agreement he was not a party to, the agreement concluded between TSM and Sundowns.

[56] A useful starting point in considering the unreasonableness of the clauses is to consider the view expressed in *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust & others*¹⁰ where the Court said:

[81] The rule of law requires that the law be clear and ascertainable. ..The application of the common-law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This is what the rule of law, a foundational constitutional value, requires. The enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the 'idiosyncratic inferences of a few judicial minds'. This would introduce an unacceptable degree of uncertainty into our law of contract. The resultant uncertainty would be inimical to the rule of law.

[57] In considering the agreements, the principle “pacta sunt servanda” is applicable to the agreements. Where parties enter into agreements voluntarily these must be honoured. In *Beadica*¹¹, the Court stated the following about the principle and its relationship to constitutional values:

“This Court has emphasised that the principle of pacta sunt servanda gives effect to the “central constitutional values of freedom and dignity”. It has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. Pacta sunt servanda is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control

¹⁰ *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust & others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 81

¹¹ *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust & others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 83.

of contracts through the instrument of public policy, as it gives expression to central constitutional values.”

[58] Whilst contracts must be honoured, the Court noted further in *Beadica*, that the principle *pacta sunt servanda* is not the most important principle to be considered when deciding to uphold or strike down contracts. A wide range of constitutional values inform public policy in determining where to enforce a contract or to strike it down. This requires a delicate balancing exercise.¹²

[59] The Court went on to discuss a second principle to be considered when considering whether to strike down an agreement entered freely. The principle of perceptive restraint, the Court noted “has been repeatedly espoused by the Supreme Court of Appeal.” This requires a court to exercise ‘perceptive restraint’ when considering whether to invalidate a contractual clause and should do so “sparingly, and only in the clearest cases.”¹³ The task of invalidating, or refusing to enforce, contractual terms is encapsulated in the view that a “court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases.” At para [90] the Court states:

“However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution. The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values. Accordingly, the ‘perceptive restraint’ principle should not be blithely invoked as a protective shield for contracts that undermine the very goals that our Constitution is designed to achieve. Moreover, the notion that there must be substantial and incontestable ‘harm to the public’ before a court may decline to enforce a contract on public policy grounds is alien to our law of contract. [footnote omitted]

¹² *Beadica* at para 87.

¹³ *Beadica* at para 88 see also *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA) ([2018] ZASCA 150) at para 27 and *Coral Lagoon v Capitec Bank* para 38.

[60] In *Beadica*,¹⁴ the Court, citing *Barkhuizen v Napier*¹⁵ determined that the fairness and reasonableness of a contractual provision involves a two-stage inquiry:

[36] The majority judgment held that determining fairness in this context involves a two-stage enquiry: 'The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.'

"[37] The first stage involves a consideration of the clause itself. The question is whether the clause is so unreasonable, on its face, as to be contrary to public policy. If the answer is in the affirmative, the court will strike down the clause. If, on the other hand, the clause is found to be reasonable, then the second stage of the enquiry will be embarked upon. The second stage involves an inquiry whether, in all the circumstances of the particular case, it would be contrary to public policy to enforce the clause. The onus is on the party seeking to avoid the enforcement of the clause to 'demonstrate why its enforcement would be unfair and unreasonable in the given circumstances'. The majority emphasised that particular regard must be had to the reason for non-compliance with the clause."

"The first stage involves consideration of the clause itself. The question is whether the clause is so unreasonable, on the face, as to be contrary to public policy. If the answer is in the affirmative, the court will strike down the clause. If, on the other hand, the clause is found to be reasonable, then the second stage of the inquiry will be embarked upon."

[61] I turn now to consider whether the defendants have discharged the onus of demonstrating that the enforcement of the clawback clauses will be contrary to public policy in the circumstances of this case. In seeking to avoid the enforcement of a contractual term the defendants must demonstrate good reason for failing to comply with the clauses in each agreement. The rationale for this is explained in *Barkhuizen v Napier*¹⁶, that it may be that they could have complied. To permit the defendants to

¹⁴ 2020 (5) SA p266; [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).

¹⁵ [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 23–30.

¹⁶ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (2007 (7) BCLR 691; [2007] ZACC 5)

avoid the consequences of the clauses may be contrary to the doctrine of pacta sunt servanda, visiting unfairness upon the plaintiff.

[62] Where the defendants put up a defence that recovery in terms of the clawback clauses would be contrary to public policy, the reasons advanced for their failure must be examined. The terms of the clawback clause are clear in both agreements. The defendants were aware of its presence as they initially objected to the clauses. However, upon considering Mr Mosimane's wishes, both contracts were signed. The defendants had access to legal advice and had consulted their legal representatives. Ms Thlagale signed on behalf of TSM having regard to Mr Mosimane's wish to proceed with the agreement. Whilst he was in dire need of a contract in 2012, and possibly wished to continue in view of the success achieved with Sundowns, the contracts negotiated in 2020 considering his positive performance and the lucrative contract signed attest to the strength the defendants had in negotiating the 2020 agreement. Even though there had been an earlier interest expressed by another club, he wished to proceed with the agreement concluded with Sundowns.

[63] In *Coral Lagoon Investments 194 (Pty) Ltd & another v Capitec Bank Holdings Limited*,¹⁷ the Court observed that "public policy is the basis on which courts may decline to enforce contractual terms where the terms or its enforcement would be contrary to public policy."

[64] The defendants' reliance upon the agreement being unfair is based on the employment contract and the intermediary contract being separate contracts. The defendants did not lead evidence to prove that clause 6.5 of the contract was repugnant, unfair, and unreasonable, that it is contrary to public policy instilled with constitutional values. The submission was made that it was unfair and unreasonable to expect Mr Mosimane to repay a portion of the commission in terms of the agreement concluded with TSM. Having regard to the principles that agreements freely entered into should be honoured and that the defendants had access to legal representation when concluding the agreement, the guidance afforded to them suggested that they had insight into the agreement and its consequences. Sundowns paid Mr Mosimane

¹⁷[2022] ZASCA 144; [2023] 1 All SA 1 (SCA) (24 October 2022) para 38.

a salary in regular payments. He was aware of his obligation to repay a portion of the commission. He freely and willingly entered into the agreement with Sundowns. The existence of a clawback clause is not foreign to contracts, especially where they find application in insurance settings. Sundowns took proper measures to mitigate a risk, before paying a huge commission and running the risk that the coach could desert them at anytime while the contract was still extant, without keeping the coach and his agent liable to pay back a portion of the commission. The return is proportional to the period left of the contract upon termination. I am not persuaded that the agreement is unreasonable and unfair as it finds application to Mr Mosimane.

[65] Mr Mosimane was held responsible for the return of the commission paid to the intermediary which constituted 10% of his remuneration package. The submission that it had nothing to do with the agreement between Sundowns and Mr Mosimane and it was not fair to impose on that agreement the repayment of monies paid in terms of another agreement, namely the intermediary agreement does not take account of the fact that the agreement was voluntarily entered into. This recognises “the public policy imperative to enforce contractual obligations that have been voluntarily undertaken [and] recognises the autonomy of the contracting parties and, in so doing, gives effect to the central constitutional values of freedom and dignity.”[footnote omitted] This imperative provides the requisite legal certainty to allow persons to arrange their affairs in reliance on the undertakings of the other parties to a contract, and to coordinate their conduct for their mutual benefit.¹⁸

[66] At the time the contract was signed, Mr Mosimane was aware of this clawback clause and elected to sign the agreement which afforded him an increased salary and benefits. The agreement was beneficial to him. He was aware of the consequences of signing the agreement and the rights and obligations it contained. In recognising the public policy imperative to enforce contracts willingly entered, Mr Mosimane has not discharged the onus resting on him having regard to the facts and circumstances of the case to show that the enforcement of the clause is contrary to public policy and is unfair.

¹⁸ *Beadica* above at para [92]

[67] In considering the clawback clause in the intermediary agreement, Ms Thlagale stated that she was not satisfied with the agreement and requested that the clawback clauses be removed. The agreement was signed at the behest of Mr Mosimane. The intermediary agreement was signed along with his contract of employment TSM had access to legal advice as Ms Thlagale was consulting with her legal advisors at the time. She requested time to consult. As with the employment contract, TSM was aware of the clawback clause. Sundowns agreed to pay the intermediary commission upfront. Whilst it was clear that they paid other intermediaries upfront, the amounts differed compared to the commission paid to the first defendant. Of the two contracts introduced by way of comparison, the second contract paid the commission at intervals. Whilst Ms Thlagale related the clawback clause to her gender and race, the clawback clause was applicable to both the intermediary and employment contract where it applied irrespective of gender. It is also noteworthy that the commission was paid to TSM a juristic company rather than to Ms Thlagale.

[68] Upon considering the clawback clause in both agreements, where the parties were aware of the clause in the intermediary and employment agreements and signed both agreements willingly, the parties' freedom of contract must be considered. It is not possible to conclude having regard to the facts and all the circumstances that the plaintiff treated the defendants differently except that the defendants secured a more lucrative commission and remuneration packages. Sundowns' intention to secure it resources in the event of an early termination of the contract is not unreasonable or unfair.

COSTS

[69] Regarding costs, Sundowns argued that both parties instructed their attorneys to employ two counsel. Counsel for the defendants agreed regarding the scale of costs and that the matter is important to both parties, notwithstanding that the amount was not substantial. The issue of constitutional rights raised by the defendants is important.

ORDER

[70] Consequently, I make the following order:

1. The defendants shall pay to the plaintiff, jointly and severally, the one paying the other to be absolved, the sum of R7 912 905.00.
2. The defendants are ordered to pay interest on the above amount at the rate of 7% per annum from 10 May 2021 to date of payment.
3. The defendants are ordered to pay the costs of the trial, including the costs of the application to compel, on Scale C of the amended Uniform Rules of Court and that such costs should include the costs of two counsel.

A handwritten signature in black ink, appearing to be 'S C MIA', is written over a black rectangular redaction box. The signature is fluid and cursive.

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the plaintiff	:	Adv V Maleka SC Adv T Seroto
Instructed by	:	Bowman Gillfillan Inc
On behalf of the defendants	:	Adv. T Ngcukaitobi SC Adv C Chanza Adv T Dewey
Instructed by	:	Mabuza Attorneys
Date of hearing	:	29-31 April 2024; 1,2,3 May 2024; 3-4 June 2024; 4-5 December 2024
Date of judgment	:	19 August 2025