REPUBLIC OF SOUTH AFRICA

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

CASE NO: 25792/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

14/4/2026 [redacted]

DATE: SIGNATURE

In the matter between:

MOIRA TLHAGALE SPORTS MARKETING AND MANAGEMENT (PTY) LTD	First Appellant
PITSO JOHNNY HAMILTON MOSIMANE	Second Appellant

AND

MAMELODI SUNDOWNS FOOTBALL CLUB (PTY) LTD	Respondent

JUDGMENT

Mia, J

Introduction

[1] This is an appeal against the judgment of the court a quo handed own on 19 August 2025, in which the appellants were ordered, jointly and severally, to pay the respondent the sum of R7 912 905, together with interest and costs.

[2] The test for leave to appeal, in terms of section 17(1)(a)(i) and (ii) of the Superior Courts Act is well established. The appellant must establish that that (i) there are reasonable prospects of success on appeal[1] or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments regarding the issues under consideration.[2]

[3] The appeal concerns the enforceability of "clawback clauses" contained in an employment agreement and a related intermediary agreement. The central question is whether those clauses are consistent with public policy as informed by the Constitution. A further ground of appeal was that the court a quo lacked jurisdiction.

Facts

[4] The material facts are common cause. The respondent employed the second appellant as head coach for a fixed period of 48 months. An intermediary agreement was concluded with the first appellant, in terms of which a commission of approximately R8.6 million was paid upfront. The agreements provided for repayment of a pro rata portion of that commission in the event of early termination. The employment relationship terminated after approximately four months. The respondent thereafter claimed repayment of R7.9 million.

Summary of grounds of appeal

[5] The appellants contend that the court a quo materially misdirected itself.

[6] In summary, it is submitted that the court:

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[1] section 17(1)(a)(i) of the Superior Courts Act 10 of 2013

[2] Id section 17(1)(a)(ii).

a) misconstrued the two-stage inquiry into reasonableness by failing to assess whether the clauses were contrary to public policy on their face.

b) failed to engage with the substance of the appellants' case that the clauses are punitive, disproportionate, and operate irrespective of fault.

c) applied incorrect principles by treating the clauses as analogous to breach-based penalty provisions.

d) failed properly to consider material evidence relating to the circumstances of termination.

e) misconceived the constitutional dimension of the case, including the relevance of equality considerations; and

f) failed to give adequate reasons on decisive issues.

g) the court lacked jurisdiction.

[7] The applicants contend that the court erred by misconstruing the nature of the inquiry into the reasonableness of the impugned "clawback clauses." Further, that the court erred in that it failed to find that the clawback clauses were so unreasonable on their face as to be contrary to public policy, which is the first stage of the reasonableness inquiry. The effect was that the Mamelodi Sundowns Football Club (Pty) Ltd ("Club") was able to benefit from the enforcement of the clause by effectively charging Mr Mosimane, its own employee, up to R8 623 260,00 for early termination and in doing so unfairly benefitting from the termination of employment. In essence, resulting in Mr Mosimane's labour being rendered for free. In addition, it rendered the compensation to Moira Thlagale Sports Management and Marketing ("TSM") for services rendered conditional on events outside of its control as there was no work which TSM could have done after the conclusion of Mr Mosimane's contract to keep Mr Mosimane in the position. It was submitted that the punitive, unfair, illogical and irrational nature of the

clauses, could never accord with public policy under the Constitution, and this was not considered by the court a quo.

Jurisdiction

[8] The position that the agreement was not employment related or covered in any of the sub articles in 23.2, is not capable of any other interpretation. In addition, the forum the appellants sought to refer the matter to, was not capable of deliberating on the constitutional issues raised which invoke this court's inherent jurisdiction. On this aspect another court will not reasonably come to a different conclusion.

[9] On the remainder of the grounds of appeal in relation to consideration of the enforceability of clawback clauses, the applicable principles are settled. In *Barkhuizen v Napier*[3] and *Beadica 231 CC v Trustees, Oregon Trust,*[4] the Constitutional Court confirmed that public policy, rooted in the Constitution, governs the enforceability of contractual terms. The inquiry proceeds in two stages:

9.1. whether the clause is contrary to public policy on its face; and

9.2. whether its enforcement would be contrary to public policy in the circumstances.

On this two-stage enquiry, the appellants contend that the court a quo erred in that it conflated the two-stage enquiry.

[10] That inquiry requires a balancing of contractual autonomy with fairness, reasonableness, and justice.[5]

The nature of the clauses

[11] The clawback clauses require repayment of commission already earned and paid. They are triggered irrespective of fault and operate even where the agent has fully performed. It is common cause that the first

[3] CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para [29] – [30].
[4] (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) para [16].
[5] *Barkhuizen v Napier* CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para [12],[70] and [87].

appellant's performance was complete upon conclusion of the employment contract.

First stage: facial validity

[12] The clauses render remuneration contingent upon the continuation of the employment relationship between Mamelodi Sundowns and Mr Mosimane. They permit recovery of payment for services already rendered by TSM. This creates an incoherence between the intermediary, TSM's performance and remuneration. Notwithstanding, the agreement was signed by the intermediary, it is possible that another court may find that the respondent's commercial justification does not justify recovery of remuneration for completed performance and or that the clauses operate, in substance, as a retrospective financial burden not linked to breach.

Second stage: enforcement

[13] The clauses must be assessed contextually. The first appellant did not breach the agreement. As an agent, performance was complete. The triggering event was outside the intermediary's control, she said as much that Mr Mosimane's decision to leave was after much deliberation. Another court may find that that the financial consequences are severe in the absence of her breach and despite the respondent enforcing a clause of the agreement signed by the appellants. This in effect deprived the first appellant of remuneration for services she rendered.

Structural inequality and context

[14] The appellants further contend that the position of the first appellant must be understood within its broader context. I understand this to be the broader socio-economic context. The first appellant is represented by a black female intermediary operating within a historically male-dominated and commercially powerful professional football environment. The clauses themselves are facially neutral. The enquiry into fairness under

Beadica is however not confined to formal equality.[6] This aspect was not fully considered. It required consideration of the broader context within which the agreement was concluded.

[15] In South Africa's constitutional setting, patterns of race and gender inequality remain relevant to questions of bargaining power, access, and vulnerability. These considerations do not, without more, invalidate contractual terms. However, they are relevant in assessing whether a clause is substantively unreasonable or unfair in its operation. In the context where the evidence indicated that the director of TSM was a black female and was the wife of the second appellant this it was argued resulted Mamelodi Sundowns treating her differently to the manner it treated other intermediaries. Dr Simelane's evidence was that they recognised Ms Thlagale as "the coach's wife". The issue can possibly be argued as viewing the issue of equality primarily through a formal lens, focusing on the absence of explicit discrimination. This raises the question whether the court a quo engaged with whether structural inequality may have informed the practical operation and effect of the clauses. This is not apparent from my judgment.

[16] In the present matter, the clawback provisions impose a significant financial burden disconnected from fault and operate to deprive the first appellant of remuneration for services already rendered. This was not the case with white male intermediaries. Their contracts did not have the same clauses. The structural position of the first appellant is a relevant contextual factor in assessing whether enforcement accords with the constitutional conception of public policy.

[17] When these considerations are taken together, there is a reasonable possibility that another court may come to a finding other than that of the court a quo and possibly find that the effect of the clause is substantively unfair and that it imposes a disproportionate financial burden on the first appellant. When viewed in the full context, including the structural setting

[6] *Beadica 231 CC v Trustees, Oregon Trust* op cit n 2 at paras [81] – [82] and [99] – [101].

in which the agreements were concluded, there is a reasonable argument to be made that enforcement would not accord with fairness and justice. Despite the first appellant's contractual autonomy, another court may conclude in the context of the above circumstances even where the contract was freely entered into that enforcement produces an unjust outcome.

[18] Having regard to the standard the applicant must satisfy to succeed I am persuaded that there are reasonable prospects of success that another court will come to a different conclusion. In view of the structural inequality consideration rooted in the constitutional enquiry and public policy there is a compelling reason why the appeal should be heard.

[19] In the result, I grant the following order:

1. The application for leave to appeal is granted to a Full Court of this Division with costs to be costs in the appeal.

[redacted]

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

Appearances:

On behalf of the appellants	:	Adv. T Ngcukaitobi
		Adv C Chanza
		Adv T Dewey
Instructed by	:	Mabuza Attorneys
On behalf of the respondents	:	Adv V Maleka SC
		Adv T Seroto
Instructed by	:	Bowman Gillfillan Inc
Date of hearing	:	14 January 2026
Date of judgment	:	14 April 2026