



**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

- |     |                                    |
|-----|------------------------------------|
| (1) | REPORTABLE: [Y/N]                  |
| (2) | OF INTEREST TO OTHER JUDGES: [Y/N] |
| (3) | REVISED: [Y/N]                     |
| (4) | Signature: _____<br>Date: _____    |

**CASE NUMBER: 45342/21**

In the matter between:

**MANGALISO MAYIBUYE BABU**

**First Applicant**

**PATEKA NOMAPHELO MAKA**

**Second Applicant**

**SIBUSISO ANDREA MANDLAZI**

**Third Applicant**

and

**CECIL KHOSA (KHOSA)**

**First Respondent**

**CHIEF EXECUTIVE OFFICER, SADPMR**

**Respondent**

**THE CHAIRPERSON OF THE BOARD, SADPMR**

**THE SOUTH AFRICAN DIAMOND AND**

**Third Respondent**

**PRECIOUS METALS REGULATOR**

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**JUDGMENT**

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**ASL VAN WYK AJ**

[1] This application was set down for hearing before me to determine the relief sought by the First to Third Applicants and the issue as regards to costs.

[2] The question of law in this case relates to the Applicants – former employees of the Third Respondent- rights to claim the relief herein in circumstances where they instituted proceedings in this Court after they invoked their statutory remedies by instituting proceedings in the CCMA. In determining this matter and the appropriate scale of costs that should follow in this matter, it is important to briefly consider the facts of this matter.

[3] Initially the Applicants claimed the following relief in their notice of motion:

3.1 *“First Respondent is directed to convene an internal appeal process in respect of the dismissal of First, Second, and Third Applicants within 30 days of this order.”*

3.2 *“The Chairperson of the internal appeal to be a member of the Pretoria Bar with at least 15 years’ experience practicing Labour Law, selected through the auspices of the Pretoria Bar via a joint letter from the attorneys of the Applicants and Respondents.”*

3.3 *“Pending finalization of the internal appeal, Applicants are reinstated to their previous positions with full pay and employment benefits retrospective to the date of their dismissal, being 25 June 2021.”*

3.4 *“Costs of suit on attorney/client scale.”*

3.5 *“Further and or alternative relief.”*

[4] It is common cause that the First to Third Applicants were dismissed from their employment with the Third Respondent on the 25<sup>th</sup> of June 2021.

[5] It is common cause that the First to Third Applicants referred unfair dismissal disputes to the CCMA on 23 July 2021 and the matter was set down for conciliation/ arbitration on the 20<sup>th</sup> of August 2021.

The Third Respondent thereafter objected to the conciliation/ arbitration disputes in terms of Rule 17 of the CCMA Rules.

[6] Thereafter, the First to Third Applicants continued to participate in the CCMA proceedings and instituted an application for consolidation of their respective unfair dismissal disputes before the CCMA on 1 September 2021. The Third Respondent objected to the consolidation of the First to Third Applicants application on grounds which are not relevant in these proceedings.

[7] It seems that this application was issued on 8 September 2021 and served on the First to Third Respondents on 6 October 2021.

[8] After the First to Third Respondents served their answering affidavit on the Applicants attorney of record on 3 November 2021, the Applicants essentially distanced themselves from the relief claimed in the notice of motion.

[9] On 22 November 2021, the Applicants' attorney of record – L Mbanjwa Incorporated dispatched an email to the Respondents' attorneys of record- Nishlan Moodley Attorneys wherein the following was recorded:

9.1 *"We refer to the above urgent application and advise as follows: -*

9.1.1 *The CMA (sic) unfair consolidated case of our client will be heard on the 30<sup>th</sup> of November 2021.*

9.1.2 *In the circumstances the prayer for granting of an internal appeal will no longer be competent in the High Court and we give an undertaking that same will not be pursued.*

9.1.3 *The matter will therefore be set down mainly on costs and the competency of the declaratory sought will be relevant in so far as award of costs is concerned.*

9.1.4 *In the circumstances kindly confirm that your client is no longer proceeding with the urgent application not later than 11H00 today, the 22 November 2021, failing which we will proceed to draw our client's opposing affidavit.*

*We trust that you find the above in order and thank you."*

[10] During argument I was requested by Ms Mbanjwa to consider this matter in its entirety, notwithstanding the clear and unequivocal undertaking that Applicants will not pursue the relief claimed in the letter dated 22 November 2021. I decided to consider this matter as requested because the relief claimed by the Applicants remains alive.

[11] I am of the view that the determining question in this matter is not whether this Court has jurisdiction to preside on the rights of affected parties flowing from the termination(s) of a contract(s) of employment but rather whether it would be competent for this Court to preside on this matter in circumstances where the Applicants unilaterally and effectively waived or relinquished their rights to an internal appeal process by referring their respective unfair dismissal disputes to the CCMA for determination.

[12] The First to Third Applicants referred their unfair dismissal disputes months before the institution of these proceedings. The determining question that I referred to in paragraph 11 *supra* has a direct and substantial impact and effect on the exercising of my discretion as regards to an award for costs and the scale occasioned thereby.

[13] I am however in agreement with Ms Mbanjwa – legal representative acting on instructions of the Applicants- that this Court may very well be vested with jurisdiction to consider enforcement of contractual claims flowing from the termination of a contract of employment. The aforesaid principle was determined and canvassed in the matter of ***Baloyi v Public Protector and Others 2021(2) BCLR 101 (CC)***. However, I am of the view that this is not the issue for determination before me.

[14] Irrespective of whether Applicants distanced themselves from the relief sought in their notice of motion on 22 November 2021, the relief claimed remains incompetent under the prevailing circumstances. I am of the view that the moment the First to Third Applicants instituted or commenced proceedings in the CCMA, *they at the very least waived or relinquished their rights to an internal appeal process* with the Third Respondent- which was afforded to them. I was informed during argument that the matter(s) before the CCMA concluded and the Applicant(s) instituted proceedings in the Labour Court.

[15] In paragraph 86 of the Respondents answering affidavit the following was said:

*“The Applicants have indeed waived any purported right to an appeal should it have existed when they lodged their disputes with the CCMA on 23 July 2021”.*

[16] As mentioned before, I concur with the Respondents that the Applicants waived their rights to demand or claim internal appeal hearings and/or commencement of such internal appeal proceedings as from 23 July 2021. Objectively viewed, I am satisfied that the Applicants at the very least through their conduct abandoned their respective rights to demand or claim internal appeal hearings under these circumstances.

[17] In the matter of **Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2004 (9) SA 529 (CC)** Kroon J held the following considering the question of waiver:

*“Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognizance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to abandon it, whether expressly or by conduct plainly consistent with the*

*intention to enforce it. Waiver is a question of fact and is difficult to establish.”*



[18] It follows that the institution of these proceedings in this Court was incompetent since inception thereof. The First to Third Applicants elected willingly to utilize the statutory remedies available to them under the Labour Relations Act 66 of 1995 and advanced and prosecuted their alleged unfair dismissal claim(s) within the framework and jurisdiction of the CCMA and Labour Court.

[19] Considering the facts of this matter and the approach adopted by the Applicants, I am of the view that special considerations exist to award a punitive costs order under these circumstances against them.

[20] In **Nel v Waterberg Landbouwers Kooperatiewe Vereeniging 1947 AD 597** at **607** the Appellate Division said:

*“The true explanation of awards of attorney client costs not expressly authorized by Statute seem to be that, by reason of special considerations arising from the circumstances which gave rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”*

[21] In consequence I make the following order:

21.1 The application is dismissed.

21.2 The First, Second, and Third Applicants are ordered to pay the costs of this application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

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**ASL VAN WYK**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

Appearances:

For the Applicant:           ADV O BEN-ZEEV

Instructed by:                NISHLAN MOODLEY ATTORNEYS

For the Respondent:        Ms L MBANJWA

Instructed by:                L. MBANJWA INCORPORATED ATTORNEYS

Date of Judgment:          16 February 2024