

Employment Law

ALERT | 15 September 2025



In this issue

SOUTH AFRICA

- Enforceability of clawback clauses in employment contracts
- The jurisdictional limitations of the Labour Court under section 77(3) of the BCEA



For more insight into our
expertise and services

Enforceability of clawback clauses in employment contracts

On 19 August 2025, the Johannesburg High Court delivered judgment on the enforceability of a clawback clause. This is a contractual term that makes provision for a company to recover certain monies, bonuses or other incentives that were paid to an employee under specific circumstances. This should be distinguished from a malus clause which requires repayment of unearned benefits or remuneration or commissions if an employment relationship ends prematurely. Both clawback and malus clauses require a “*trigger event*” before they can be invoked.

In the *Mamelodi Sundowns Football Club (Pty) Ltd v Moira Tlhagale Sport Marketing and Management (Pty) Ltd and Another* [2025] ZAGPJHC 844 (19 August 2025) judgment, the “*trigger event*” was the resignation of Sundowns’ former coach, Mr Pitso Mosimane four months into a 48-month contract. Sundowns sought repayment of almost R8 million from Mosimane, or his intermediary, TSM.

The sum represented the portion of the intermediary’s commission which was paid upfront, with both the employment contract and intermediary agreement containing clawback clauses obliging pro-rata repayment if the relationship ended early.

Clawback clauses are not out the ordinary in senior executive employment contracts.



Enforceability of clawback clauses in employment contracts

CONTINUED



Enforceability of clawback clauses

The key issue was whether clawback clauses – requiring repayment of commissions, benefits and remuneration – are valid and enforceable, particularly in the context of early termination of contract.



Key findings on clawback clauses

The court confirmed that clawback clauses are enforceable where they are clearly drafted, agreed to by the parties and not contrary to public policy. The court emphasised that contracts that are freely and voluntarily concluded must be honoured and highlighted that in this matter the clawback clauses in both the employment and intermediary agreements were negotiated at arm's length, with both parties having access to legal advice and understanding their implications.

The court rejected arguments that the clawback provisions were unreasonable, discriminatory or constitutionally unenforceable.

The court accepted that requiring pro-rata repayment of amounts paid is a legitimate risk-mitigation tool, especially where significant upfront payments are made.

The court emphasised that such provisions must be expressly included in the contract and that any waiver or variation must be in writing, in accordance with non-variation clauses.



Enforceability of clawback clauses in employment contracts

CONTINUED



Why does it matter?

This judgment provides important guidance for employers, intermediaries and employees on the enforceability of clawback clauses.

It confirms that these provisions will be upheld where they are clearly drafted, freely agreed to and not contrary to public policy. The decision also highlights the importance of written agreements and the need for clear contractual mechanisms to recover unearned amounts in the event of early termination.



Practical take-aways for drafting and enforcing clawback clauses

- **Draft clear clawback clauses:** Ensure that the clawback clause is unambiguous, sets out the formula for repayment, and is clearly included in the employment agreement or elsewhere.
- **Include robust non-variation clauses:** Require that any waiver or amendment of clawback clauses be in writing and signed by all parties.
- **Document all waivers or releases:** Do not rely on verbal agreements or public statements to alter contractual rights – ensure any release from clawback obligations is formally documented.
- **Assess risk and reward:** Use clawback clauses to balance the risk of upfront payments with the need to attract or even retain talent, ensuring that the employer is protected if the relationship ends prematurely.
- **Review for fairness and compliance:** Regularly review clawback clauses to ensure they are not unreasonable and are consistent with public policy.

EMPLOYMENT LAW
ALERTEnforceability of
clawback clauses
in employment
contracts

CONTINUED

**Bottom line**

The decision affirms that a long-standing commercial stance of including clawback clauses which will be enforced where they are clearly drafted, freely agreed to and not contrary to public policy.

Employers making substantial upfront payments should ensure their contracts contain robust, enforceable clawback clauses to protect against early termination and unearned benefits.

The same principles would apply to malus clauses.

Imraan Mahomed, Thato Maruapula and Ayesha Karjieker

**Chambers Global
2025 Results****Employment Law**

Chambers Global 2025 ranked our
Employment Law practice in:
Band 1: Employment.

Aadil Patel ranked by
Chambers Global 2024–2025 in
Band 1: Employment.

Fiona Leppan ranked by
Chambers Global 2018–2025 in
Band 2: Employment.

Imraan Mahomed ranked by
Chambers Global 2021–2025 in
Band 2: Employment.

The jurisdictional limitations of the Labour Court under section 77(3) of the BCEA

The Labour Appeal Court (LAC) in *Jansen van Vuuren v Heaven Sent Gold SA (Pty) Ltd and Another; Jansen van Vuuren v Heaven Sent Gold SA Property and Investment (Pty) Ltd and Another* [2025] 6 BLLR 569 (LAC) recently held that the Labour Court does not assume automatic jurisdiction to any matter “concerning a contract of employment”, in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

The Labour Court’s power to assume jurisdiction remains contingent upon the claimant enforcing contractual terms which relate to the employment relationship. Accordingly, the Labour Court does not possess the requisite jurisdictional power to adjudicate or enforce contractual terms which are akin to employment-related terms by mere inclusion of these within a document or an agreement that regulates a non-employment relationship.



Facts

Following the termination of their employment and their subsequent appointment as independent contractors, the appellants (former employees) each concluded “*Termination of Service and Settlement Agreement(s)*” (agreements) with their former employers and Heaven Sent Gold Business Trust (respondents). Their respective agreements sought to regulate payment terms relating to:

- outstanding remuneration and accrued leave as at the date of the termination of their employment;
- fees for services rendered as independent contractors; and
- medical aid contributions for a period of nine months following the termination of their employment.

Subsequent to concluding their respective agreements, the former employees approached the Labour Court in terms of section 77(3) of the BCEA seeking to enforce the entirety of the above payment terms. The former employees were of the view that the Labour Court had the jurisdiction to adjudicate the matter as the agreements constituted “*a matter concerning a contract of employment*” as contemplated in section 77(3). The respondents, however, contended that they had tendered the amounts which were reflected as “*service fee as an independent contractor*” in invoices submitted by the former employees. The respondents further contended that the amounts were unrelated to the employment relationship and thus the Labour Court lacked jurisdiction.

EMPLOYMENT LAW ALERT

The jurisdictional limitations of the Labour Court under section 77(3) of the BCEA

CONTINUED



Law

The key determination in this matter concerned the interpretation of section 77(3) of the BCEA in establishing the Labour Court's jurisdiction. This section provides that:

"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

In this regard, the LAC held that the determination of the Labour Court's jurisdiction is dependent on the facts and context of each matter. Thus, a purposive approach should be adopted when interpreting this section. Specifically, the LAC highlighted that this section is to be interpreted in a manner which confers the Labour Court with the necessary jurisdiction only in regard to those claims that are directly linked to the contract of employment. Thus, where an agreement deals with a number of distinct claims, employees may not approach the courts to enforce any ancillary items which do not concern a contract of employment, simply on the basis that they are included in the same agreement regulating employment-related terms.

Cliffe Dekker Hofmeyr

**Legal500
2025**

EMPLOYMENT
Tier 1 (South Africa)
Tier 3 (Kenya)

Hall of Fame:

Fiona Leppan

Leading Individuals:

Aadil Patel

Recommended Lawyers:

Anli Bezuidenhout | Imraan Mahomed

Phetheni Nkuna | Desmond Odhiambo

Njeri Wagacha | Kgodisho Phashe

Biron Madisa

EMPLOYMENT LAW ALERT

The jurisdictional limitations of the Labour Court under section 77(3) of the BCEA

CONTINUED



Application of the law to the facts

In adopting this purposive approach, the LAC held that, notwithstanding the fact that the terms of the agreements relating to the provision of services as independent contractors were concluded when agreeing to the formal terms of the termination of the contracts of employment, the substantive nature of these claims did not concern the employment relationship. Similarly, as the agreements were concluded after the respective employment relationships had ended and during the period that the former employees were tendering their services as independent contractors, this timing indicated that the claims relating to the payment of the medical aid benefits constituted separate contractual arrangements rather than those relating to ongoing employment. Simply put, these claims were not founded within the employment context but were contractual obligations distinct from employment terms. Accordingly, the LAC held that these claims fell outside the Labour Court's jurisdiction. As a result, the LAC held that on proper interpretation of section 77(3), the Labour Court had the power to adjudicate only those claims relating to the outstanding remuneration and leave pay as they were integral and directly linked to the contract of employment. The appeal was accordingly dismissed on these grounds.



Band 1
Employment

Cliffe Dekker Hofmeyr

Legal500
2025

TIER 1
Employment

**EMPLOYMENT LAW
ALERT**

The jurisdictional limitations of the Labour Court under section 77(3) of the BCEA

CONTINUED



Key takeaways

- The LAC's decision reinforces a narrow interpretation of section 77(3), in terms of which the Labour Court is unlikely to adjudicate claims that are determined to be separate contractual arrangements and are collateral to the employment relationship. Parties seeking to enforce their rights in terms of section 77(3) cannot solely rely on the form or timing of the agreement but rather the claims must be founded in their substance on the employment relationship in order for the Labour Court's jurisdiction to be established. This should be borne in mind when drafting agreements that span both employment and post-employment obligations.
- To avoid any jurisdictional pitfalls and to ensure enforceability, best practice requires that separate agreements be concluded to govern the respective employment and post-termination of employment relationships.
- This judgment further underscores the importance of using precise contractual wording to clearly define the rights and obligations of each party to these agreements.

Yvonne Mkefa, Lynsey Foot and Thobeka Kalipa

Cliffe Dekker Hofmeyr

**Legal500
2025****TIER 1
Employment**

OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, please contact:

**Aadil Patel**

Practice Head & Director:
Employment Law
Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

**Anli Bezuidenhout**

Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

**Frieda Kishi**

Director:
Employment Law
T +26 (4)83 373 0100
E frieda.kishi@cdhlegal.com

**Fiona Leppan**

Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

**Imraan Mahomed**

Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

**Nadeem Mahomed**

Director:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

**Yvonne Mkefa**

Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com

**Phetheni Nkuna**

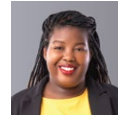
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

**Desmond Odhiambo**

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

**Njeri Wagacha**

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

**Jean Ewang**

Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com

**Thabang Rapuleng**

Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

**JJ van der Walt**

Counsel:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com

**Ebrahim Patel**

Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patel@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, please contact:

**Daniel Kiragu**

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E daniel.kiragu@cdhlegal.com

**Malesela Letwaba**

Senior Associate:
Employment Law
T +27 (0)11 562 1710
E malesela.letwaba@cdhlegal.com

**Lee Masuku**

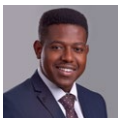
Senior Associate:
Employment Law
T +27 (0)11 562 1213
E lee.masuku@cdhlegal.com

**Leila Moosa**

Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com

**Christine Mugenyu**

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com

**Kgodisho Phashe**

Senior Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

**Taryn York**

Senior Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com

**Chantell De Gouveia**

Associate:
Employment Law
T +27 (0)11 562 1343
E chantell.degouveia@cdhlegal.com

**Ayesha Karjieker**

Associate:
Employment Law
T +27 (0)11 562 1568
E ayesha.karjieker@cdhlegal.com

**Biron Madisa**

Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

**Lynsey Foot**

Associate:
Employment Law
T +27 (0)11 562 1429
E lynsey.foot@cdhlegal.com

**Shemonné Isaacs**

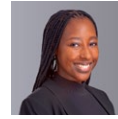
Associate:
Employment Law
T +27 (0)11 562 1831
E shemonne.isaacs@cdhlegal.com

**Thobeka Kalipa**

Associate:
Employment Law
T +27 (0)11 562 1238
E thobeka.kalipa@cdhlegal.com

**Kevin Kipchirchir**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E kevin.kipchirchir@cdhlegal.com

**Thato Makoaba**

Associate:
Employment Law
T +27 (0)11 562 1659
E thato.makoaba@cdhlegal.com

**Thato Maruapula**

Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com

**Sheilla Mokaya**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sheilla.mokaya@cdhlegal.com

**Sashin Naidoo**

Associate:
Employment Law
T +27 (0)11 562 1482
E sashin.aidoo@cdhlegal.com

**Billy Oloo**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E billy.oloo@cdhlegal.com

**Melisa Wekesa**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E melisa.wekesa@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

ONGWEDIVA

Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.

T +264 (0) 81 287 8330 E cdhnamibia@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

WINDHOEK

1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia.

PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020

T +264 833 730 100 E cdhnamibia@cdhlegal.com

©2025 15116/SEPT

