HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 25503/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 12 AUGUST 2021

SIGNATURE

In the matter between:

LOURENS CHRISTIAN MöLLER	First Applicant
MöLLER LCA (PTY) LTD	Second Applicant
and	
KRYPTON MINING (PTY) LTD	First Respondent
WILLEM HEINRICH BECKER	Second Respondent

J U D G M E N T (Leave to appeal)

This matter has been heard virtually and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

This is an application by the unsuccessful applicants in the main application. On 1 July 2021 this court refused the applicants' application for urgent relief and it is against that refusal that the applicants seek leave to appeal.

[2] The employment relief

2.1 At the hearing of the application for leave to appeal, counsel for the parties placed on record that, since the handing down of the abovementioned judgment, the first applicant has lodged a referral to the Council for Conciliation, Mediation and Arbitration (the CCMA) in terms of the provisions of the Labour Relations Act 66 of 1995 (the LRA) against his dismissal as employee of the first respondent (Krypton). The consequences hereof are threefold:

(1) The lodging of the referral implies a concession that the claim for "employment relief" (as it was referred to in the heads of argument in the main application and in the judgment) is indeed a dispute within the realm of the LRA.

(2) The lodging of the referral also confirms that the first applicant had alternative remedies available to him other than approaching the High Court on an urgent basis. This is contrary to his averments in the main application.

(3) The lodging of the referral furthermore raises the spectre of peremption, particularly in respect of the finding by this court relating

to the issue of jurisdiction in a labour relations dispute such as an alleged unfair dismissal of an employee.

2.2 In respect of the jurisdictional issue, the first applicant's counsel relied heavily on the judgment of the Constitutional Court in *Baloyi v Public Protector and Others* 2021 (2) BCLR 101 (CC), a case which was not relied on during argument of the main application, as foundation that this court's jurisdiction has not been ousted by the nature of the present dispute. What must immediately be pointed out, is that the case of *Baloyi* is distinguishable from that of the first applicant insofar as the first applicant in this matter did not raise the constitutional issue which Ms Baloyi had raised in her case, which entitled her to claim the exercise of this Court's jurisdiction. Secondly, and insofar as *Baloyi* has confirmed the principle of concurrent jurisdiction of this Court and the Labour Court embodied in section 77 (3) of the LRA in determining "*any matter concerning a contract of employment* ..." (at paragraph 28), the first applicant had not based his application on a breach of his contract of employment, but on an alleged breach of Krypton's MOI. The MOI constitutes an agreement between Krypton, its directors and its shareholders. The MOI is not the contract which governs employee relations. Any reliance thereon is therefore misplaced. Insofar as the MOI may be of relevance in respect of termination of a directorship, the first applicant was not removed as a director and is, in fact, still a director. The first applicant consequently did not, as Ms Baloyi did, rely of any breach of his contract of employment which might have resulted in the concurrent jurisdiction of this court and the "employment relief" sought by him, purely pertains to his alleged unfair dismissal. In respect of such relief, the LRA creates specific remedies, ousting this court's jurisdiction as indicated in paragraph 23 of the *Baloyi* judgment. The implied concession contained in the lodging of a referral to

the CCMA (correctly) confirms this. I see no prospect of another court reaching a different conclusion.

2.3 In respect of the second of the abovementioned consequences, namely that of alternative relief, it is apposite to note that the "consequential relief" claimed in paragraph 4.2 of the applicant's notice of motion in the main application (quoted in paragraph 2.2 of the judgment), was for an interdict against the first applicant's employer, whereby he sought to interdict the employer from "preventing the applicant to resume his day-to-day tasks". This "prevention" was alleged to be the consequence of the applicant's dismissal. For purposes of the interdictory relief, the applicant, in paragraph 62 of his founding affidavit, claimed he had no alternative but to approach this Court. Apart for the fact that the applicant had internal appeal procedures available to him, which had been pointed out in his dismissal letter, the cost-effective and simple remedies provided by the CCMA had also been available. The fact that the first applicant had now made use thereof, is a strong indication that his founding affidavit was not correct in this regard and that the finding of this court in paragraph 3.9 of the judgment was indeed correct. The first applicant is therefore not entitled to leave to appeal on this score.

2.4 The lodging of a referral to the CCMA, which was made subsequent to this Court's findings on jurisdiction and the availability of alternative relief in respect of the main application, indicates an acceptance of those findings. Counsel for the first applicant argued that it is not for this court to decide on the issue of peremption (or not) as this should be a finding of the court of appeal. I disagree. Peremption relates to conduct after judgment (as in this case) and directly impacts on the intention to either accept a finding or to appeal. See: *Blou v Lampert & Chipkin NNO* 1970 (2) SA 185 (T) at

199 and *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600. Whilst counsel's arguments were along the lines that the first applicant appeared to merely be hedging his bets and that his exploration of the CCMA process was merely procedural and does not amount to a waiver of his rights, counsel for the respondents were quick to point out that the first applicant's averments in support of his referral to the CCMA relating to an unfair dismissal of him as an employee, are at odds with his current argument, either jurisdictionally or factually relating to his directorship benefits and obligations. The first applicant impermissibly continues to conflate his directorship (which is still intact) with the termination of his employment (which he seeks to pursue in the CCMA). I agree with the respondents' submission but, moreover, even if the applicants are correct and this court has concurrent jurisdiction, such concurrent jurisdiction, as pointed out in *Baloyi*, might entitle a litigant to pursue his claims in either the High Court or by way of the mechanisms provided for in the LRA. He cannot do both. That is not what concurrence of jurisdiction means and where the first applicant has, after judgment, elected to pursue his claims in the CCMA, I find that his rights to pursue an appeal against this court's judgment in respect of jurisdiction have become perempted.

[3] Based on both the merits of the arguments provoked by the first applicant's conduct and by the consequences of the conduct itself, I find that there are insufficient prospects of success on appeal to merit the granting of the requisite leave to appeal.

[4] As to the "statutory relief". The applicants argued that, once they have delivered a notice to Krypton demanding a shareholders' meeting, they are entitled to a court order compelling a meeting to be held. This can surely

not be what the Companies Act contemplated. A court order can only be resorted to if a company fails or refuses to comply with such a notice. I am still of the view that the notice itself is not the "trigger event", but a refusal or failure is needed as a trigger event. To hold otherwise would lead to absurd consequences. I do not foresee reasonable prospects of success on appeal for a finding that a court order can summarily be claimed by a shareholder, even while a company still intends complying with such a notice.

[5] Conclusion

I therefore find on the various grounds as set out above, that the requirements for leave to appeal, contemplated in section 17 (1)(a)(i) of the Superior Courts Act, have not been met.

[6] Order

Leave to appeal is refused, with costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 5 August 2021

Judgment delivered: 12 August 2021

APPEARANCES:

For the Applicant:	Adv. F. J Labuschagne
Attorney for Applicant:	Cilliers & Reynders Attorneys, Centurion
For the Respondents:	Adv. N.G Louw
Attorney for Respondents:	Manley Inc, Pretoria