IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Reportable

Case No: D 726-18

Case No: J 5386-17

In the matter between:

MHLUPHEKI WILLEM KUBEKA & OTHERS **Applicants**

and

NI-DA TRANSPORT (PTY) LTD **Respondent**

Heard: **18 to 22 June 2018**

Delivered: **31 January 2019**

Summary: **Backpay is only contractually owing upon the full restoration of the employment contract; Backpay becomes due only after the employer has reinstated the dismissed employees. A failure to reinstate and pay backpay should attract contempt proceedings as a response.**

JUDGMENT

WHITCHER J

[1] This case concerns a claim for arrear wages in terms of section 77 (3) of the Basic Conditions of Employment Act (BCEA).[1] The applicants contend they are entitled to this money after the Labour Court on 24 July 2013 found their dismissal related to a strike to have been substantively and procedurally unfair. It bears mention that the dismissals of the applicants took place five years earlier, in mid-2008.

[2] The respondent unsuccessfully sought leave to appeal the Labour Court judgment, per Gush J, and then approached every higher court for a reversal of this decision all the way up to the Constitutional Court which dismissed its application on 12 November 2014. The effective date on which the respondent's challenge to the Labour Court order was finally extinguished, however, was 18 November 2014 when the Supreme Court of Appeal (SCA) rejected a petition running in parallel to the Constitutional Court appeal.

[3] The original judgment of the Labour Court included an order that the respondent reinstate the applicants, retrospective to the date of their dismissal. The pertinent parts of the 24 July 2013 order of Gush, J, reads as follows:

> 1. "The respondent is ordered to reinstate the applicants in both matters retrospectively to the date upon which they were dismissed; and
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> 2. The applicants are to report for duty within 14 days of the date of this judgment"

[4] It is trite that such an order, among other things, meant that the applicants were in line for the wages they would have earned but for their unlawful dismissal back in 2008[2]. As already stated, the employer elected to take the judgment on appeal. This decision suspended the effect of the Labour Court's

[1] Act Number 75 of 1997, herein after referred to as the BCEA.
[2] See: *Equity Aviation Services (Pty) Ltd v CCMA and Others* (2008) 29 ILJ 2507 (CC) at para 36.

order as the matter wound its way through all the higher courts over the next sixteen months. By 18 November 2014, the employer had succeeded in none of its challenges. How, by what intricacy of fact or quirk of law, could it then be that the applicants end up receiving nothing in this application when an unappealable order of reinstatement was made in their favour which was meant to have placed them in the same position they would have been but for their employer's original unlawful action?

[5] Part of the answer proposed to this question by the respondent is that the applicants followed the wrong legal process to obtain redress for its failure to comply with its obligation to reinstate them. When the SCA's ruling against the respondent on 18 November 2014 finally extinguished all its appeals, the enforceability of the Labour Court's order revived. However, the applicants instituted a contractual claim for backpay, instead of mounting contempt of court proceedings for not being reinstated. In doing so the applicants missed the fact that what revived after the SCA's decision was the respondent's obligation to reinstate them upon their tender of services. What did not revive was an obligation to pay them backpay in isolation. Only if the respondent took the applicants back into its employ would their contracts be restored and backpay become owing.

[6] It is necessary for what follows below to note that the entitlement to backpay may be broken into two periods. The first is from the date of dismissals in mid-2008 to the date of Labour Court judgment ordering reinstatement on 24 July 2013 (the first period). The second is from the day after the Labour Court judgment, 25 July 2013[3] until the SCA's denial of the respondent's petition on 18 November 2014 (the second period).

[7] In its argument, the respondent relied on a doctrine clarified recently by the apex court. Although a split decision, both judgments by the constitutional

[3] It may be that the second period properly begins with the filing of an application for leave to appeal some days after the Labour Court's order, but nothing turns on this *in casu*.

court accepted the proposition drawn by Madlanga, J in *National Union of Metalworkers of SA obo Fohlisa and Others v Hendor Mining Supplies* that a reinstatement order covering the first period is an order *ad factum praestandum.* In other words, it is an order to do something as opposed to an order to pay something. An order *ad factum praestandum* may be enforced through contempt proceedings.[4] Consequently, a reinstatement order, at least in respect of backpay associated with the first period, constitutes a judgment debt. What this means is that a failure to reinstate and pay backpay for the first period should attract contempt proceedings as a response.

[8] Of course, what is needed as a prerequisite to reinstatement is a tender of services. The respondent also disputed that a proper tender of services occurred. I will deal with this matter later. However, viewed in its proper light, whether the unfairly dismissed employees tendered their services or not is irrelevant in the respondent's schema. Backpay is only contractually owing upon the full restoration of the employment contract. This required more than a tender of services by the unfairly dismissed employees. The employer should also have accepted those employees back into its employ. If the employer failed to do so, the correct legal path was to have forced it to restore the contract of employment by means of contempt proceedings. *Once an employer bends the knee in this regard, backpay becomes payable too*. Madlanga, J, explained that the judgment ordering reinstatement does not in and of itself reinstate the contract of employment; rather, it is an order directing the employee to tender services, and for the employer to accept those services. If the employer fails to do so, the remedy is to bring contempt proceedings to compel the employer to do so. [5]

[4] (2017) 38 ILJ 1560 (CC) at para 18.

[5] Madlanga, J, at para 22 and 23, stated: "Cele AJ's order did not itself reinstate the employees. Rather it ordered Hendor to do so. Although a reinstatement order places a primary obligation on the employer to reinstate, it creates an obligation in terms of which an employee must first present her- or himself for resumption of duties. The employer must then accept her or him back in employment. These are reciprocal obligations. The employee's obligation to present her- or himself for work and the corresponding obligation to accept her or him back to work flow from the court order. If the employee presents her or his self for work, but the employer refuses to accept her or him back, her or his remedy is not contractual. It is to bring the employer before court for contempt of court. What contempt? For not complying with the judgment debt embodied in the order to accept her or him back

[9] The judgment in *Hendor* made findings on the distinction between a judgment debt and contract debt in a matter that was concerned with prescription. The order the applicant sought to be enforced in *Hendor* also concerned a debt involving money and not performance by the losing party. That court was thus not confronted with an employer who, after its ultimate loss, continued to resist its obligation to take the employees back into its employ. Notwithstanding the difference in the facts giving rise to the conclusions drawn in *Hendor*, the procedural implications of the legal principle the constitutional court enunciated are unavoidable in the present matter.

[10] I earnestly considered whether the second opinion in *Hendor* might permit the applicants to take away at least some backpay in a matter where legal doctrine really did seem to favour the less virtuous party. The court in *Hendor* was evenly split on whether the debt incurred in respect of the second period defined in paragraph 6 above was not perhaps a contract debt. Madlanga J, viewed it as an artificial line to draw but Zondo, DCJ, writing the second judgment, found that, after the noting of an appeal and until all appeals are exhausted, the portion of backpay occasioned by such a delay constitutes a contractual debt.[6] One of Madlanga, J's criticisms of this approach of Zondo, DCJ, was that it carved up the period during which there was non-compliance with the Labour Court's order into separate periods that give rise to different legal consequences.

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into employment. The order of reinstatement cannot be a contractual debt. But the fact that the reciprocal rights and obligations are then governed by contractual principles does not mean that the original obligation to comply with the reinstatement order has also somehow morphed into a contractual debt. For as long as that obligation is not complied with it continues to maintain its essential nature of being a judgment debt."

[6] Zondo, DCJ at para 89 stated: "If Hendor did not put the second and further applicants back into the positions contemplated in para (a) of Cele AJ's order, the second and further applicants would have been able to bring contempt of court proceedings against Hendor. If the second and further applicants were asked which order required Hendor to take them back into the positions concerned, they would have been able to point to para (a) of Cele AJ's order. If they were asked to point out the order that required Hendor to pay them their remuneration in respect of the first period, they would also have been able to point it out, namely, para (b) of Cele AJ's order. However, if they were asked to point out the order which required Hendor to pay them their remuneration for the second period, they would not have been able to point it out. This shows that the debt relating to the first period is a judgment debt whereas the debt relating to the second period is not a judgment debt."

[11] The ability to generate separate legal consequences, with respect, recommended the approach of Zondo, DCJ, to me *in casu*. Accepting that an order in respect of the first period did not sound in money, could it not perhaps be that backpay associated with the second period, as a quantifiable contractual debt, did?

[12] It is important to record that this matter is not about whether the applicants were, at a colloquial level, *entitled* to the full amount of backpay for both the first and second periods. They plainly were. However, the respondent has taken the point that the applicants erred in not using the correct legal process to achieve the outcome which, barring the liquidation of the respondent, was otherwise theirs for the taking. I considered whether, if in terms of the second judgment in *Hendor*, claims for arrear wages for the second period were contractual debts, these amounts could not be claimed under section 77(3) of the BCEA.

[13] If one scans Zondo, DCJ's views in the second judgment more widely, however, it appears that, for him too, contract debts in respect of the second period become due only after the employer has reinstated the dismissed employees. The learned judge states:

> "[174] When the Supreme Court of Appeal dismissed Hendor's application for leave to appeal, that did not necessarily restore the contracts of employment of the second and further applicants. The restoration of their contracts of employment was to occur by operation of law when the second and further applicants were actually reinstated. When the Supreme Court of Appeal dismissed Hendor's application for leave to appeal, the suspension of Cele AJ's order was, by operation of law, lifted. The lifting of that suspension revived Cele AJ's order and, thus, Hendor's obligations in terms of that order.

[175] This meant that in terms of paragraph (a) of Cele AJ's order, Hendor was again obliged to put the second and further applicants back into their former positions of its employ on the same terms and conditions of employment as they had before dismissal. In other words, the obligation to reinstate them. It was only upon complying with paragraph (a) of Cele AJ's order – that is taking them back and putting them into their old positions on the same terms and conditions of employment as before – that the contracts of employment were restored or reinstated and they were deemed to have been in place from the date of Cele AJ's order.

[176] Between 15 and 28 September 2009 Hendor did not have an obligation to pay the second and further applicants any remuneration for the period after Cele AJ's order. It had an obligation to reinstate them but, upon reinstating them, their contracts of employment would be restored and Hendor would then be obliged to pay the second and further applicants for the first period. The obligation to pay the second and further applicants their remuneration for any period after Cele AJ's order only arose once the contracts of employment which had existed between each employee and Hendor prior to dismissal were restored or reinstated."

[14] To my mind, there is simply no way of getting around it. The applicants used the wrong process to obtain the relief they sought.

[15] In my research, I came across the Labour Appeal Court case of *National Electronic Media Institute of South Africa v Nkanyison (*case JA19/03, unreported). Here Willis, JA, found that an employee whose dismissal in an internal hearing had been overturned by an in-house appeal and had had his subsequent tender of services refused by the employer could claim unpaid wages, essentially backpay. This matter is distinguishable on the facts as it rested in the main on a finding that the employee had not *validly* been dismissed. The contract thus persisted, entitling him to be paid. Even if the

facts were the same, the constitutional court in *Hendor* has come to another view.

[16] I turn now to deal with the factual matter of whether the applicants tendered their services, either in the time frame set by the Labour Court (within 14 days after 24 July 2013), and/or retendered their services after the SCA's order on 18 November 2014. I will also deal with the legal question of whether a retender of services after the SCA order of 18 November 2014 was necessary.

[17] I address questions that may seem redundant given my finding above. I do so in the event that I am wrong in my reasoning that the applicants are unable to pursue their claim for arrear wages under the BCEA unless reinstated. If I am wrong, it is only fair that I have also disposed of the remaining legal and factual questions standing between the applicants and the relief they seek.

[18] Three witnesses testified for the applicants that at least some workers presented themselves for work on 29 July 2013, well within the time-frame set by the Labour Court.

[19] The applicants' first witness, Mhlupheki Kubeka, stated that around 40 employees, accompanied by a SATAWU official, Edgar Mbina, presented themselves for work. Some of the names Kubeka mentioned could not logically have presented themselves and it appears he may have exaggerated the number of employees doing so. However, he testified that the respondent's manager, Louis Maritz, refused the tender of services stating that the company was not aware of the court judgment, Maritz further advised the applicants present to consult its (the respondent's) lawyers.

[20] The respondent pointed out serious problems with the evidence of 2nd witness, Samson Mlambo, who seemed confused between the strike itself

and the tender of services after the Labour Court judgment. I have discounted his evidence for this reason.

[21] The evidence of the applicants' third witness, Mbhekeni Sithole, on the identity of those tendering service, was also not very strong. He did however confirm that a union official of SATAWU, Edgar Mbina, accompanied the workers who did present themselves at the respondent's gates. He confirmed that the tender of service was refused by the respondent's manager, Maritz, on the grounds that the company was not aware of the judgment.

[22] The problems with the applicants' witnesses' evidence do however not matter very much. From the respondent's own witness, Louis Maritz, confirmation of the important features of the applicant's case emerged. This was that on 29 July 2013, the SATAWU official, Mbina, accompanied by about 10 workers, arrived at the respondent's premises. Mbina informed him that the applicants had been reinstated by an order of the Labour Court. By no stretch of the imagination (and probabilities) could this communication be anything other than a tender of work. Maritz further conceded, in effect, that this offer was refused on the grounds that the respondent did not have knowledge of the court order.

[23] It also does not matter who or what number of employees tendered their services on that day. While the group of individual applicants may have been only ten, on the respondent's version, they were accompanied by a union official. Mbina was an agent for all the dismissed employees who were, in terms of the Labour Court order, entitled to reinstatement. It was as good as if the applicants' attorney had written to the respondent stating that his or her clients 'hereby' tendered their services to test the employer's attitude. It is not critical that the employees all personally arrived at the gate on the day. Whether in response to a lawyer's letter or on arrival at the gates in person, with 10 days still to spare, Mbina, an agent and representative of all the employees entitled to reinstatement, received the same negative answer. The

company representative declined to accept the tender to work stating that the company knew nothing about the court order.

[24] If the law of agency does not already provide for a union official tendering services on behalf of his members, there are compelling policy reasons to permit this instead of expecting all applicants to arrive for work only to be shown away for whatever reason, as they were *in casu*. It is notorious that workers in South Africa often have to travel significant distances at relatively high cost to attend work. It is to be expected in circumstances such as applied in this matter that at least some employees would wait for a union official to contact the employer or wait for others to first test the waters of reinstatement before incurring the wasted costs, especially after a period of prolonged unemployment, of being shown away. The difficulties workers experience reporting for duty at a given time after a reinstatement order is a matter that Zondo, DCJ, in *Hendor*, also recognized and lamented[7]. I am thus satisfied that in this matter, Mbina in all likelihood performed the general function of tendering the service not only of the employees physically around him but of all those entitled to reinstatement. I cannot imagine his attendance on 29 July 2013 as being only in respect of the employees whom he accompanied. Maritz himself accepted that Mbina was there because of a Labour Court order requiring the reinstatement of all the applicants.

[25] Mbina also received, on behalf of all the applicants entitled to reinstatement, news of the respondent's refusal to do so. Nothing turns on the fact that he did not arrive with court order in hand. Any responsible employer, unsure about the serious claims Mbina made, could have readily checked with their own attorneys and taken a decision that they considered wise. If such a decision could not be taken immediately, and the employer subsequently decided to abide by the Labour Court order, the duty would have rested on the respondent to contact the union and accept the tender of services it had provisionally declined a few days earlier. As it turns out, we know that the

[7] At para 79.

respondent in this matter was not deprived of an opportunity to accept any or all of the employees entitled to reinstatement because they may not have presented themselves at the gates on 29 July 2013. We know that the respondent resolved to resist the order by the fact that it launched the succession of appeals and petitions that it did.

[26] I also find that, after the SCA's order against the respondent on 18 November 2014, no new tender of service was required. This is because the effect of the SCA's order was to revive the enforceability of the Labour Court order. In a sense, the parties travelled back in time to the point they were at before the appeal process was started. By then, a tender of service had been made. To use the absence of a new, formal tender of service as a means to deny the applicants their due at this late stage of the game strikes me as artificial and technical to a degree that would frustrate the objects of labour law generally. If there were any quibbles about accepting certain of the employees who had originally tendered their services in 2013 into the respondent's employ in 2014, perhaps as a result of some new, disqualifying characteristic, this could be dealt with on a case by case basis. Those applicants who had already taken up employ with the respondent again before the SCA's ruling could similarly be identified and denied full back pay.

[27] That no new tender of services was required is obvious if one considers what would happen in respect of the claims on behalf of employees who died after the Labour Court order on 24 July 2013 but before the Supreme Court order on 18 November 2014. In my view, after contempt proceedings had achieved compliance with the original reinstatement order, the estates of these deceased employees would have been entitled to backpay equal to the time it would have been possible for such an employee to have worked. These employees however would obviously not have been able to re-tender their services after the SCA's 18 November 2014 decision and such an expectation, enveloped in law, would offend public morality.

[28] Should the respondent have acted in accordance with its revived obligation to reinstate after 18 November 2014, it would have contacted the union inviting those of the applicants who were still able to render services back into its employ, perhaps subject to a reasonable deadline and preceded by a sensible discussion as to their roles after six years of unemployment.

[29] The last question to be decided concerns the newly introduced claim against fourteen applicants as contained in Annexure B handed up in court on 18 June 2018. I find that this evidence is inadmissible.[8]

[30] In light of what I have stated above, it is with some reluctance that I find that the applicants have not made out a case for payment of arrear wages.

[31] On the subject of costs, a fairly abstract point of law, not as clearly stated at the time the applicants made their litigation decisions in this matter as it now is, favoured the respondents. Overall morality, I fear, does not.

Order

1. The application is dismissed.
2. There is no order as to costs.

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B Whitcher

Judge of the Labour Court of South Africa

[8] Reasons set out in para 18 of Applicants' Heads of Argument.

APPEARANCES:

For the Applicants:	T Tshabalala, with P Botha, instructed by Mashoana Mabena Mogane Inc
For the Respondent:	CE Watt-Pringle, SC with KS McLean, instructed by Grant & Swanepoel Attorneys