IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA10/19

In the matter between:

MHLUPHEKI WILLEM KUBEKA & OTHERS **Appellant**

and

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

Heard: **23 September 2020**

Delivered: **24 November 2020**

Coram: Coppin JA, Murphy AJA and Savage AJA

JUDGMENT

MURPHY AJA

[1] This is an appeal against a judgment of the Labour Court (Whitcher J) dated 31 January 2019 concerning a claim by the appellants for arrear wages (or back pay) consequent upon an order for reinstatement made by Gush J on 24 July 2013. The employees in respect of whom the claims are made were dismissed by the respondent more than 12 years ago in July – August 2008.

[2] The claim of the appellants is in terms of section 77(3) of the Basic Conditions of Employment Act[1] ("the BCEA") which provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. The claim is a contractual suit for arrear wages for the period from the date of the appellants' dismissal in 2008 until the order of Gush J became finally enforceable after the exhaustion of the appeals process in November 2014.

[3] Annexure A to the statement of claim is a schedule of 59 applicants. The appellants listed as numbers 1–10, 12, 14–20, 22, 25–29, 31–42, 44–47, 51 in Annexure A to the statement of claim are former employees of the respondent; and the appellants listed as numbers 52–57 and 59 in Annexure A to the statement of case represent the estates of former employees of the respondent who are deceased. The pre-trial minute agreed by the parties on 13 December 2017 records as common cause that the persons listed as numbers 11, 13, 21, 23, 24, 30, 43, 48, 49 and 58 in Annexure A to the statement of case were not on the agreed list of applicants in the original dispute determined by Gush J and are thus not party to the present dispute. It is accordingly common cause that these persons have no claim against the respondent and ought not to have been cited as applicants in the proceedings before the court *a quo*. The respondent annexed as Annexure A to its heads of argument a list of the 49 appellants properly before this court. Counsel for the appellants has offered no objection to that list. The parties also reached agreement on the respective dates of death of the employees whose estates are the 52nd to 59th applicants in Annexure A to the statement of claim.[2]

[4] Most of the facts in this matter are common cause and were agreed upon by the parties.

[5] The appellants were dismissed in 2008 for various acts of misconduct relating to speeding and participation in unprotected strike action. The Labour Court

[1] Act 75 of 1997.
[2] It was not possible to agree to the precise date of death of all the deceased employees. So the dates of death in relation to each deceased estate were agreed as follows: i) applicant 52 – in April 2017; ii) applicant 53 - 7 July 2010; iii) applicant 54 in early 2015; iv) applicant 55 - 11 June 2011; v) applicant 56 – in July 2009; vi) applicant 57 in July 2012; and vii) applicant 59 - in May 2009.

(Gush J) held that the dismissals were substantively and procedurally unfair and issued the following orders:

> ‘(a) The dismissals by the respondent of the applicants in case numbers D938 and 795/09 were both substantively and procedurally unfair;
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> (b) the respondent is ordered to reinstate the applicants in both matters retrospectively to the date upon which they were dismissed;
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> (c) the back pay due to the applicants is to be calculated in accordance with the minimum wages as determined by the Bargaining Council for the Road Freight Industry from time to time during the period from the dismissal to the date on which they are to report for duty;
>
> (d) the applicants are to report for duty within 14 days of the date of this judgment…’

[6] The respondent applied to Gush J for leave to appeal to the Labour Appeal Court (“the LAC”). Gush J refused the application on 7 August 2013. The respondent then petitioned the LAC. The petition was refused on 20 August 2014.The respondent then petitioned the Supreme Court of Appeal (“SCA”), which petition was refused on 18 November 2014. At the same time as petitioning the SCA, the respondent lodged an application for leave to appeal to the Constitutional Court, which was dismissed on 12 November 2014. The order of Gush J thus became enforceable on 18 November 2014 when the appeals process was exhausted.

[7] The appellants referred their claim under section 77(3) of the BCEA to the Labour Court on 30 May 2017. They maintain that the reinstatement order issued by Gush J, having become enforceable after 18 November 2014, entitles them to back pay or arrear wages with effect from the retrospective date of the reinstatement order until 18 November 2014. They did not seek prospective reinstatement, nor did they (after the dismissal of the petition to the SCA in November 2014) tender their services to the respondent.

[8] Some of the appellants however tendered their services to the respondent on 29 July 2013 a few days after Gush J ordered their reinstatement. There is a

dispute about the number who did so. Three witnesses testified on behalf of the appellants regarding this issue. Mr Khubeka testified that "almost over a hundred" people tendered their services on that day; Mr Mlambo testified that "a lot" of people presented themselves; and Mr Sithole testified that "it was all of us" who presented themselves. The respondent's witness, Mr Maritz, testified that not more than 10 former employees tendered their services on 29 July 2013. The appellants failed to call the union representative, Mr Mbina, to give evidence, notwithstanding his presence on 29 July 2013 and the fact that it was he who spoke to Maritz. The respondent applied for leave to appeal after 29 July 2013, and in effect rejected any tender made on that day, and the order was suspended in terms of section 18 of the Superior Courts Act.[3] It is common cause that when the order once again became enforceable on 18 November 2014 the appellants did not make a second tender, were not reinstated and the respondent did not accept the tender of 29 July 2013.

[9] The parties without making any admissions sought further to limit the evidence by agreeing *quantum* in the event of the claim being upheld. Relying on the minimum wages as determined by the Bargaining Council of the Road Freight Industry for the relevant period, the parties agreed that the *quantum* of the appellants claim in respect of all of the appellants amounts to R19 949 719.05 from the date of their dismissal until 18 November 2014. This calculation takes account of the fact that the claims for appellants 52 to 59 are limited to the date on which the relevant employees died. Moreover, the parties also agreed that 15 of the dismissed employees (listed in Exhibit 2) were re-employed by the respondent and one of its associated companies, Warlock Investments CC ("Warlock"), between September 2008 and September 2013 – ("the re-employed appellants"). The parties agreed that if the re-employed appellants' claim is limited until the date of their re-employment, then the total *quantum* of the appellants' claim, set out in Exhibit 2, would be an amount of R14 591 499.05.[4]

[3] Act 10 of 2013.
[4] Exhibit 2 is a spread sheet setting out the back pay claimed by all of the appellants from the date of their dismissal until 18 November 2014. The claims for the 15 re-employed appellants are limited until the date on which they were re-employed by Warlock or the respondent.

[10] In a considered judgment, the Labour Court dismissed the appellants claim on the grounds that they had followed the wrong legal process to obtain redress for the failure of the respondent to comply with its obligation to reinstate them. It held that when the ruling of the SCA in effect exhausted all appeal options on 18 November 2014, the appellants ought to have launched contempt proceedings seeking retrospective reinstatement rather than a contractual claim for arrear wages in terms of section 77(3) of the BCEA. In reaching its decision, the Labour Court applied the reasoning of the Constitutional Court in *National Union of Mineworkers SA obo Fohlisa & others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)*[5] ("*Hendor*"). It concluded:

> 'Back pay 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….the judgment ordering reinstatement does not in and of itself reinstate the contract of employment; rather, it is an order directing 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.'

[11] The appellants contend that the Labour Court erred. They maintain that the employment contracts of the appellants were restored by the order of Gush J in July 2013 and their claim is for "arrear wages following the restoration of the employment contract". The respondent counters that the restoration of the employment contract could have occurred only if the appellants had tendered their services after the ruling of the SCA in November 2014 and the respondent accepted their tender.

[12] The key issues to be decided in this appeal, therefore, are whether the claim depends on the restoration of the contracts of employment and when were the contracts of employment restored, if at all.

[5] (2017) 38 ILJ 1560 (CC).

[13] The respondent relying on the decision of the Constitutional Court in *Hendor* contends that a reinstatement order does not restore the contract of employment. It is only restored when the employees pursuant to the reinstatement order return to work, tender their services and the employer accepts the tender. This construction, it argues, is confirmed by the wording of section 193(1)(a) of the Labour Relations Act[6] ("the LRA") which provides that if the Labour Court or an arbitrator appointed in terms of the LRA finds that a dismissal is unfair, the court or the arbitrator may "order the employer to reinstate the employee" from any date not earlier than the date of dismissal. This wording, the respondent submitted, makes it clear that the order of the court does not reinstate an employee. The court is merely empowered to order the employer to reinstate the employee; it is not itself empowered to reinstate the employee. It is the agreement of the employer to accept the tender of services that restores the contact not the order of the court.

[14] There is, the respondent argued, a crucial difference between an order for reinstatement and actual reinstatement pursuant to the right to reinstatement which the reinstatement order grants to the employee. An employee who is the beneficiary of a reinstatement order can elect not to enforce it. If the employee does not enforce the order (by tendering services and seeking committal for contempt if the offer is declined) the employment contract is not restored and the relationship does not resume. There can be no legal basis for any contractual claim for arrear wages until such time as the contract is restored by the agreement of the employer to accept the tender of the employees in respect of future services. Rights to back pay flowing from the reinstatement order can only arise once the contract is restored. Prior to the employer agreeing to restore the contact pursuant to an order to do so, there is no contract in existence and thus no juridical basis for a claim for arrear wages.

[15] Before examining the implications of *Hendor*, it will help to reflect briefly on the history of the remedy of reinstatement in our law. For many years, our courts would usually not order specific performance of a contract of

[6] Act 66 of 1995.

employment.[7] This meant that an employee, in the event of a breach of contract by the employer in the form of wrongful termination of the contract, was restricted to a claim for damages to remedy the breach.[8] The alternative of enforcing the contract specifically (which would involve reinstatement) was generally not available. The rule was relaxed in *Stewart Wrightson (Pty) Ltd v Thorpe*[9] in which Jansen JA held that a fundamental breach of the contract of employment, as in other contracts, did not *per se* end the contract, but served only to vest the employee with an election either to stand by the contract or to terminate it. The election to opt for specific performance in the face of a wrongful termination (repudiation) thus meant that the contract of employment remained extant.

[16] In accordance with the general principles applying to reciprocal contracts, an employee claiming specific performance of a contract of employment is obliged to perform or to tender to perform. An employee's principal obligation under the contract of employment is to make his or her services available to the employer from the agreed date and for the duration of the contract.[10] The reciprocal duty of the employer to pay wages under an extant contract of employment depends therefore only on the tender of services. Where the performances of a reciprocal contract are divisible, the principle of reciprocity must be applied independently to each different part of a performance. A contract of employment for an indeterminate period is a divisible contract. Hence, a party who has fully performed a part of a divisible performance (for instance by making his or services available for the relevant period) is entitled to the corresponding part of the counter-performance (wages).[11] An employee who sues for specific performance under a contract of employment (which he or she has opted to keep alive) in effect tenders his or her services by making the claim.

[7] *Schierhout v Minister of Justice* 1926 AD 99
[8] Restricted to a claim of notice pay – being the positive interest, in that an employee's contract can usually be terminated lawfully on notice and thus that was the position he/she would have occupied had the contract been fully performed.
[9] 1977 (2) SA 943 (A) at 952
[10] *Potchefstroom Municipality v Bouwer NO* 1958 (4) SA 382 (T)
[11] Van der Merwe at al: *Contract – General Principles* (Juta 1998) page 281 and 285

[17] Specific performance in relation to past tendered services under a contract of employment (a divisible performance) consequently does not depend on a tender of future performance. The employee is entitled to it solely on the basis of the past tender of services, just as the landlord is entitled to arrear rental from a tenant who unlawfully terminated a lease. If the reinstated employee does not tender prospective services, the contract may be terminated by the employer for non-performance. Furthermore, there obviously can be no valid claim for prospective wages without a proper tendering of prospective services. Likewise, if the employer is able to demonstrate that an employee would not have been able to render past services (for reasons such as death or re-employment), the employee concerned would not be able to claim arrear wages for the relevant period.

[18] Where an employer fails to comply with an order for specific performance, the employee is not obliged at common law to institute proceedings for committal for contempt, but may rely on an alternative action for cancellation and damages,[12] which would include a contractual claim for arrear wages owing in respect of tendered services.[13]

[19] The narrow scope of protection to employees afforded by the common law of wrongful dismissal led to the introduction of statutory rights against unfair dismissal; first in 1980 through amendments to the Labour Relations Act 28 of 1956, introducing the unfair labour practice jurisdiction in section 46(9) and the status quo remedy (allowing for reinstatement) in section 43; and later by the enactment of Chapter VIII of the LRA in 1995.

[20] Early on some employers argued that the power of the Industrial Court to determine unfair labour practices did not include a power of reinstatement or specific performance. In *SEAWUSA v Trident Steel*[14] (*Trident Steel*) the employer argued that it was not for the court to make a contract for the parties or to do what courts ordinarily did not do, grant an order for specific performance of an employment contract. The Industrial Court rejected the

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[12] *Custom Credit Corp (Pty) Ltd v Shembe* 1972 (3) SA 462 (A).
[13] *Leaman v Kieswetter* 1949 (4) SA 38 (C).
[14] (1986) 7 ILJ 418 (IC) at 437.

argument holding that the unfair labour practice jurisdiction permitted an order of reinstatement akin to specific performance. It held that the employer's argument "overlooks the fact that on reinstatement what is being done is to restore the original contract, not to make a new one, and that [the contract] contains all the ingredients of the original." These *dicta* were taken to mean that the unfair labour practice jurisdiction provided a statutory remedy of specific performance for the unfair (as opposed to wrongful) termination of a contract of employment and brought an end to the judicial reluctance to grant specific performance in employment disputes. A reinstatement order of the Industrial Court restored the original contract.

[21] Commenting on the employer's argument in *Trident Steel*, Martin Brassey suggested that the statutory rights did not equate precisely with the contractual right to specific performance. He said:

> 'One might add that it also overlooked the fact that even the ordinary courts now consider themselves entitled to order the specific performance of an employment contract in a proper case. And moreover, if reinstatement were not competent, the unfair labour practice jurisdiction would be all but negated…..The court's remarks about restoring the contract, not creating a new one, are not to be taken too literally. The court was simply emphasizing that the relationship being recreated was the one the parties had shaped for themselves. The order does not in fact operate in the realms of contract at all. It is an exercise of statutory power, and in the case of a reinstatement order, the reinstated employee's rights and duties are statutorily created."[15]

[22] Brassey's line of thought intimates that the referral of an unfair dismissal dispute seeking reinstatement is not akin to the common law remedy of electing to keep the contact of employment alive and demanding specific performance. It proceeds from the premise that an unfair dismissal terminates the contract (even where the termination was wrongful or unlawful) meaning there is no longer an existing contract of employment in place until it is restored by and in accordance with the pre-requisites of the exercise of the statutory power (now) in terms of section 193(1)(a) of the LRA. The definition

[15] Brassey et al: *The New Labour Law* (Juta 1987) 47-48

in the LRA of a dismissal,[16] a pre-condition to jurisdiction under the LRA, confirms that a dismissal means "an employer has terminated a contract of employment with or without notice" and section 193(1)(a) of the LRA does not permit an order resuscitating the contract but only an order directing the employer to reinstate the employee. The predicate of the statutory power of reinstatement is the resuscitation of a contract of employment that is no longer in existence by the employer accepting a tender of services. As such, a statutory reinstatement order differs from an order for specific performance in the narrow contractual sense.

[23] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[17] ("*Equity Aviation Services*") the Constitutional Court held:

> 'The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.'

[24] These *dicta* do not clearly affirm that the effect of a reinstatement order is merely to direct the employer to accept a tender of the employees' services and that no right to arrear wages arises until it elects to do so; though the "resuming" of employment implies that the contract of employment was not extant during the period of litigation. However, the *dicta* can be interpreted equally to mean that the reinstatement order itself "puts the employee back into the same job or position he or she occupied before the dismissal on the same terms and conditions". Likewise, the reinstatement order (not the employer's acceptance of the tender of services) "is aimed at placing an employee in the position he or she would have been but for the unfair dismissal."

[16] Section 186(1)(a) of the LRA.
[17] 2009 (1) SA 390 (CC) para 36.

[25] If the latter interpretation were to be accepted, the right to claim arrear wages to the retrospective date provided in the order would arise from the order itself and there would thus be no obligation on an employee to tender prospective services in order to claim arrear wages. The reinstated unfairly dismissed employee claiming the payment of arrear wages would then be in a similar position to an employee seeking specific performance at common law, where if the employer refuses to obey the court's order of specific performance the employee may cancel the contract and claim the arrear wages as damages. There would be no need for contempt proceedings. Besides the obvious advantage of avoiding another round of litigation requiring proof of *dolus* on the part of the employer, such an interpretation would be in accord with the presumptions of statutory interpretation that the legislature does not intend to alter the existing law (of specific performance) more than is necessary or to impose unreasonable burdens. This interpretation perhaps also would avoid the injustice of employees being denied arrear wages (owing under a contract that was unfairly and perhaps wrongfully repudiated) on account of firstly the delays of an unmeritorious appeal and secondly the need of the employees to find alternative means of survival (resulting in a prospective tender of services becoming impracticable) while the appeals process is dragged out inordinately.

[26] However, there is no denying that there is strong support for the respondent's position in the decision of the Constitutional Court in *Hendor*. In that case, several employees were dismissed for participating in a strike in August 2003. On 16 April 2007, the Labour Court held that these dismissals were unfair and ordered the reinstatement of the employees with effect from 1 January 2007. An appeal against the reinstatement order was dismissed by the Labour Appeal Court in June 2009 and by the Supreme Court of Appeal on 15 September 2009. The employees were reinstated on 29 September 2009, but the employer did not pay the arrear-wages from 1 January 2007 to 28 September 2009. The employees issued a writ of execution for the arrear-wages in October 2010. The writ was set aside by the Labour Court in June 2011on the basis that the reinstatement order was not a money-judgment. The employees were directed to file a declaration setting out the amounts

owed to each one of them. The employees then brought a further application on 19 September 2012 claiming the arrear-wages. The employer contended that the claim had prescribed because more than three years had elapsed from the date the Supreme Court of Appeal dismissed the employer's application for leave to appeal against the reinstatement order.

[27] The Labour Court held that the claim for arrear-wages for the period 1 January 2007 to 29 September 2009 (the date of reinstatement) constituted a judgment debt, and therefore would only prescribe after 30 years. The Labour Appeal Court overturned the decision of the Labour Court, holding that a claim for arrear-wages arising out of a reinstatement order is a debt under the reinstated employment contract, and would therefore prescribe after three years.

[28] The Constitutional Court was divided on the issue. The first judgment of Madlanga J (Froneman J, Khampepe J, and Mbha AJ concurring) held that there was no legal distinction between the period before the reinstatement order and the period thereafter. He held that the claim for arrear-wages arose from the reinstatement order. Consequently, the arrear-wages constituted a judgment debt and, as a result, the claim will prescribe after 30 years.

[29] The second judgment of Zondo J (Mogoeng CJ, Jafta J and Mhlantla J concurring) agreed that the claims had not prescribed, that the workers were entitled to payment of their wages for the entire period and that the appeal should be upheld. However, Zondo J disagreed with the reasons given in the first judgment for the conclusion that the claim has not prescribed. He held that the claim fell into two distinct periods: the one before the reinstatement order of 16 April 2007, namely from 1 January 2007 to 15 April 2007 (the first period); and the other being the period after the reinstatement order, namely, from 16 April 2007 to 28 September 2009 (the second period). Zondo J held that only the claim relating to the first period was a judgment debt and thus such claim had not prescribed for that reason. However, the claim in relation to the second period was different. It was a contractual debt, but one which on the facts had not prescribed.

[30] Zondo J reasoned that the claim for the second period was not a judgment debt as the reinstatement order did not order payment of any wages for the second period. The claim was a contractual debt which was to be dealt with in terms of the principles of the law of contract. The claim for the second period could not be a judgment debt because the Labour Court did not and could not have adjudicated upon the question of wages which had not fallen due for payment at the time it made the reinstatement order. The claims for remuneration for the second period were debts that only became due when the contracts of employment on which they were based were restored on 29 September 2009, being the day the tender of services by the employees was accepted by the employer. It was the actual reinstatement of the workers which resulted in the restoration of the contracts of employment of the workers. Prescription therefore could not have started running before the date of the restoration of the contracts as the employees could not institute legal proceedings to enforce contracts that were not in place yet. The result was that when the applicants instituted their application for a declaratory order on 19 September 2012 the prescription period of three years had not expired and the claims had not prescribed.

[31] While the judges of the Constitutional Court in *Hendor* disagreed about the nature of the debt arising from a reinstatement order and the reason for non-prescription, they were unanimous about the governing principle that the contracts of employment of unfairly dismissed employees are terminated by a dismissal and revive only when they tender their services pursuant to a reinstatement order and the tender is accepted by the employer. The judges also agreed that a reinstatement order is an order *ad factum praestandum* - an order to do something (as opposed to an order *ad pecuniam solvendam,* an order to pay something) which must be enforced through contempt proceedings.

[32] Madlanga J held that a reinstatement order does not in and of itself reinstate the contract of employment. It is rather an order directing the employees to tender their services, and for the employer to accept those services. Thus, he explained:

'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 himself 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 into employment…[18]

To expose a basic mistake made by the second judgment, let us look at this from a millisecond before reinstatement actually took place on 29 September 2009. At that point, did any contract of employment exist? Of course not. Still looking at this from the same time, if no contract existed as at that time, it follows that there was also no contractual obligation. The obligation that existed was to reinstate. ...The question then is: at that point, i.e. just before reinstatement, could [one] appropriately talk of remuneration that was due in terms of the employees' contracts of employment? Obviously not. The reason is plain: no contracts existed at that point. All that existed was an obligation to reinstate, with all that reinstatement entails. …[19]

I do not understand how an employee would be entitled to payment of remuneration in terms of an employment contract that is (a) still the subject of debate in review or appeal processes and (b) yet to be resuscitated. Until there has been reinstatement, there is no contract of employment. Until that has been done, one cannot talk of an "extant" contract of employment and payment of remuneration in terms of it. What exists at that stage is the twin-obligation to (a) reinstate and (b) pay remuneration in accordance with the employment contract. But, needless to say, remuneration is payable only after reinstatement. I repeat: the order does not reinstate; it orders the employer to do so. Indeed, section 193(1)(a) says as much".[20]

[18] *Hendor* paras 22-23.
[19] *Hendor* paras 36-37.
[20] *Hendor* para 51.

[33] Zondo J shared the view of Madlanga J regarding the effect of a reinstatement order. In reaching his *ratio decidendi* that prescription in relation to back pay for the second period only commenced to run once the employer accepted the employees' tender of services, he reasoned as follows:

> '[W]hen Hendor put the second and further applicants back into its employ in the positions which they had occupied before their dismissal and did so on the same terms and conditions of employment as those they had enjoyed before their dismissal, the contracts of employment which had existed between each one of the second and further applicants and Hendor before dismissal was restored. This means that the second and further applicants' contracts of employment were restored on 29 September 2009 (the date their tender of services was accepted by Hendor) and not on 15 September 2009 when the Supreme Court of Appeal issued its order dismissing Hendor's application for leave to appeal.
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> 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…. 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 ….
>
> 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….
>
> This means that, in so far as the second and further applicants' claims for remuneration for the second period were debts under the Prescription Act,

> they only became due when the contracts of employment on which they were based were restored.’[21]

[34] The finding of Zondo J that the claim had not prescribed thus rested squarely on the conclusion that it only became due upon actual reinstatement and not when the reinstatement order became enforceable.

[35] The decision of the Constitutional Court in *Hendor* therefore leaves little doubt that a reinstatement order does not restore the contract of employment and reinstate the unfairly dismissed employees. Rather, it is a court order directing the employees to tender their services and the employer to accept that tender. If the employee fails to tender his or her services or the employer refuses to accept the tender, there is no restoration of the employment contract. If the employer fails to accept the tender of services in accordance with the terms of the order, the employee’s remedy is to bring contempt proceedings to compel the employer to accept the tender of services and thereby to implement the court order.

[36] As the employees in *Hendor* in fact tendered their services and were reinstated, the Constitutional Court was not called upon to decide what the position would have been had the employees failed to take up reinstatement pursuant to the order. However, it follows plainly from the reasoning in both judgments that an employee granted retrospective reinstatement is not entitled to any of the contractual benefits of reinstatement, including back pay, without the contract being restored through actual reinstatement.

[37] As pointed out earlier, this seems at first glance to put an unfairly dismissed employee at a disadvantage when compared to an employee seeking specific performance at common law. That is not entirely true. The protective scope of the unfair dismissal jurisdiction is of course much wider. Specific performance is available only for unlawful termination, whereas a lawful dismissal may be held to be unfair under the LRA. But still, at common law, employees seeking specific performance are not required to tender prospective services to obtain arrear wages for which they have tendered services.

[21] *Hendor* paras 172-177.

[38] A requirement that back pay is only due and payable on reinstatement is in keeping with the remedial scheme and purpose of section 193 of the LRA. As Mr Watt-Pringle SC, counsel for the respondents, correctly submitted, if an employee in receipt of a reinstatement order could on the strength of the order alone claim contractual payment for the retrospective part of the order without actually seeking reinstatement (tendering prospective services), it would convert a reinstatement remedy (which requires a tender of services) into a compensation award (which does not), in excess of the statutory limitation on compensation awards. Such an outcome would be inconsistent with the purpose of sections 193 and 194 of the LRA. An unfairly dismissed employee must elect his or her preferred remedy and if granted reinstatement must tender his or her services within a reasonable time of the order becoming enforceable. If reinstatement has become impracticable through the effluxion of time, for instance where the employee has found alternative employment, he or she should seek to amend his or her prayer for relief to one seeking compensation.

[39] It is common cause that the respondent did not accept the earlier tender (suspended by the appeals process) of the appellants (other than the re-employed appellants) after the reinstatement order became enforceable in November 2014. Consequently, their contracts of employment were not revived and they acquired no contractual right to back pay which could be claimed in terms of section 77(3) of the BCEA. As the Labour Court correctly held, in terms of *Hendor* they were required to bring contempt proceedings to compel the employer to accept their tender. Their appeals accordingly must be dismissed.

[40] Similarly, the claims of the deceased estates cannot be sustained. There is no contractual entitlement enforceable under section 77(3) of the BCEA. At the time of their death the deceased employees had no vested contractual right to reinstatement and back pay. Reinstatement became impracticable with their deaths and the only remedy available to their deceased estates was compensation in terms of section 193(1)(c) read with section 193(2)(c) of the

LRA. It was incumbent on the executors to apply to the Labour Court for the variation of the order or alternatively to file a cross-appeal.

[41] It is common cause that 15 of the re-employed appellants (two are since deceased) were re-employed by the respondent or Warlock at various dates after their dismissal. Warlock is a related entity (a closed corporation) which was established after the dismissal of a large number of drivers for participating in an unlawful strike in order to provide driving and other support services to the respondent. While the re-employed appellants employed by Warlock were paid by Warlock, they continued to drive the respondent's trucks and perform the same driving services for the respondent. These employees were in effect reinstated by the respondent at the different dates of their re-employment/reinstatement and remained employed in November 2018 when the reinstatement order became enforceable. It may be assumed that they tendered their prospective services which tender was accepted by the respondent. They accordingly have a contractual right to back pay enforceable in terms of section 77(3) of the BCEA. Their claim for back pay is however limited to the period from their dismissal up until their date of re-employment because after their date of re-employment, they were employed by the respondent and received their salaries. Their back pay is limited to the *quantum* set out in Exhibit 2.

[42] In the result, the appeal must be upheld in respect of the re-employed appellants and dismissed in respect of all the other appellants. Fairness dictates that there should be no order as to costs. Interest is payable on each wage owing from the dates the wage was due and payable until payment.[22]

[43] The following orders are made:

43.1 The appeals of the appellants listed as numbers 1–10, 14–15, 18, 22, 25–26, 32-33, 35-39, 42, 47, 51, 53, 55-57 and 59 in Annexure A to the statement of case are dismissed.

[22] *Hendor* paras 200-204.

43.2 The appeals of the appellants listed as numbers 12, 16, 17, 19, 27, 28, 29, 31, 34, 37, 38, 44, 50, 52 and 54 (the re-employed appellants) are upheld and the order of the Labour Court in relation to these appellants is varied and substituted with an order directing the respondent to pay them back pay in the individual amounts set out in Exhibit 2 annexed to the respondent's heads of argument, together with interest at the prescribed rate from the date the weekly/monthly wages were due and payable in terms of the contract of employment to the date of payment.

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JR Murphy

Acting Judge of Appeal

Coppin JA and Savage AJA concur in the judgment

APPEARANCES:

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