



**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN DURBAN)**

Case No: D 788/2019
Reportable/Not Reportable

In the matter between:

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION obo JOSEPH MANDLA FAKUDE
& 211 OTHERS**

Applicant

and

NI-DA TRANSPORT (PTY) LTD

First Respondent

NI-DA TRANSPORT KZN CC

Second Respondent

NI-DA COAL (PTY) LTD

Third Respondent

NI-DA COMMODITIES (PTY) LTD

Fourth Respondent

NI-DA EQUIPMENT (PTY) LTD

Fifth Respondent

NI-DA KLIP VERKOPE CC

Sixth Respondent

Ni-DA LOGISTICS (PTY) LTD

Seventh Respondent

NI-DA LOGISTICS SOLUTIONS (PTY) LTD	Eighth Respondent
NI-DA TRANSPORT CC	Ninth Respondent
NI-DA TRANSPORT (CAPE) (PTY) LTD	Tenth Respondent
NI-DA TRANSPORT (CROSS BORDER) CC	Eleventh Respondent
NI-DA TRANSPORT EASTERN (CAPE) CC	Twelfth Respondent
NI-DA TRANSPORT (GAUTENG) CC	Thirteenth Respondent
NI-DA TRANSPORT (GAUTENG) (PTY) LTD	Fourteenth Respondent
NI-DA VERKOPE (PTY) LTD	Fifteenth Respondent
JACOBUS NICOLAAS OOSTHUIZEN	Sixteenth Respondent

Heard: 26 November 2024
 Judgment delivered: 19 May 2025

JUDGMENT

WHITCHER J

Introduction

[1] This is an application in which the applicants seek to have the 16th respondent held in contempt of a certified award issued by a bargaining council on 20 March 2019. The notice of motion originally sought additional relief in the form of

reinstatement and the payments of certain amounts. The Applicant correctly conceded that these orders are not part of this application.

Background

[2] The further applicants were dismissed in 2016. After lengthy CCMA proceedings, a commissioner issued an arbitration on 6 March 2019 finding that the dismissals were substantively and procedurally unfair.

[3] The award, among things, ordered reinstatement and backpay. The award also directed that: “The applicants are to tender their services to the respondent within 10 days of the award being served on the parties”.

[4] The award was served on the first applicant on 20 March 2019.¹ At least some of the further applicants attended the first respondent’s premises after the award was issued. The first applicant claims this was on 29 March 2019 to tender their services within the ten-day period stipulated in the award. The first respondent concedes that one of its managers, Mr. Lamprecht, interacted with employees who tendered their services in the company of a union official after the award was issued. These employees were not taken back into service on that date.

[5] On 1 May 2019, the first respondent launched a review application in the Labour Court.²

[6] On 17 March 2020 the CCMA award was certified. The applicants’ legal representatives addressed correspondence to the first respondent demanding compliance with the certified CCMA award.

[7] The opposed review application was ultimately dismissed on 25 May 2022. On the same day, the applicant trade union advised the first respondent that further applicants would tender their services on 1 June 2022.

¹ The applicants proved this.

² And filed a supplementary affidavit on 30 September 2019. The applicant answered by 9 December 2019 and the first respondent replied on 27 January 2020. The first respondent sought to further supplement its papers on 23 July 2020.

[8] Although there is a dispute about whether all the further applicants tendered their services on 1 June 2022, at least some did. The first respondent declined to permit these applicants to enter the premises.

[9] On 3 June 2022, the first respondent's lawyers advised the applicants' lawyers that the first respondent was to apply for leave to appeal the Labour Court decision in the review application. On 7 June 2022, the applicants' lawyers again demanded that first respondent accept the further applicants' tender of services.

[10] On 26 June 2022, the applicants issued their contempt of court application. The matter was set down for 29 July 2022 but adjourned to 26 August 2022 to allow the *dies* to pass in which the respondents were to file an application for leave to appeal. On 1 August 2022 an application for leave to appeal was filed.

[11] On 26 August 2022, the *ex parte* contempt of court application was further adjourned to 21 October 2022, pending the Labour Court decision on leave to appeal. Leave was declined on 17 October 2022.

[12] On 21 October 2022, the *ex parte* contempt application was adjourned by consent to 25 November 2022 so that the respondents could petition the Labour Appeal Court for leave to appeal the review outcome. On 25 November, the *ex parte* contempt application was adjourned *sine die* awaiting the LAC's response to the respondent's petition.

[13] On 15 February 2023, the LAC issued an order dismissing the respondent's petition.

[14] On 6 March 2023, certain of the applicants and an AMCU organiser tendered their services. This tender was rejected. A company representative, however, made a copy of a list of those who attended the workplace.

[15] The first respondent applied for leave to appeal to the constitutional court. On 29 September 2023, the constitutional court refused the respondent's leave to appeal.

[16] The applicants allege that from 29 September 2023 they were engaged in settlement discussions with the respondents. On 7 February 2024 these discussions deadlocked. On 19 February 2024 the applicants' attorneys again demanded compliance with the certified award.

[17] On 9 March 2024 the applicants launched contempt proceedings against all the juristic respondents. It further cited one Jacobus Oosthuizen, the 16th respondent, on the basis that he was a director common to all the Ni-Da companies and had the power and authority to direct compliance with the certified award'.

[18] On 27 March 2024, the applicants filed a supplementary affidavit to proceed with the contempt proceedings.

[19] When the matter was argued before this court on 29 July 2024, the applicants sought leave to supplement their founding affidavit on the question of whether the further applicants had tendered their services within the period stipulated in the arbitration award.

[20] On 7 August 2024, the court directed that the applicants could either elect to apply for leave to deal with this factual issue by filing a supplementary affidavit or refer the matter to be dealt with through oral evidence. This would be strictly to cover the facts relating to the further applicants' tender of their services within 10 days of the service of the arbitration award, in compliance with this award.

[21] The applicants elected to apply for leave to deliver a supplementary affidavit and this application was granted on 9 October 2024.

[22] The essence of the supplementary affidavit was that 66 employees personally tendered their services on 29 March 2019 and further that a union official and the deponent, Mr. Dhlamini, had done so on behalf of the rest. Mr. Dhlamini put up a

hand-written list of 66 names of people who had tendered their services on 29 March 2019. The list also contained two further names of employees who arrived after the list was submitted to a manager for copying. A second union official provided a confirmatory affidavit corroborating Mr. Dhlamini's version.

[23] The first respondent disputed the veracity of the list. It pointed out that eight (8) of the names on the list were objectively not entitled to reinstatement. The first respondent further queried Mr. Dhlamini's credibility. This is because, in the replying affidavit, Mr. Dhlamini appeared to have claimed that all 127 further applicants had tendered their services on 29 March 2019 whereas his version in the supplementary affidavit was that only 66 had done so (or 68 if one counted the two late arrivals).

[24] The first respondent also pointed out that the respondent's manager, Mr. Lamprecht, (who had confirmed in an earlier affidavit that some employees reported for work after the award in March 2019), had at no time stated that the further applicants tendered their services specifically on 29 March 2019. The first respondent thereby kept alive the dispute about whether the further applicants had complied with the award, dated 6 March 20219, requiring a tender of services within 10 days of the award being served on the parties.

Analysis of Evidence and Argument

[25] The principles of the procedure for civil contempt are well established. The Supreme Court of Appeal, per Cameron JA, in *Fakie NO v CCII Systems (Pty) Ltd*³ found that an applicant is required to prove four requisites: the existence of an order; service or notice of the order; non-compliance; and wilfulness and *mala fides* in respect of this non-compliance. Once the applicant has proven the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*.

[26] The standard of proof in matters of this nature is proof beyond reasonable doubt. The Constitutional Court in *Matjhabeng*, commenting on *Fakie*, stated:

³ 2006 (4) SA 326 (SCA) at para 42

“In summation, the majority affirmed the availability of civil contempt, and that it passes constitutional muster in the form of a motion court application adapted to constitutional requirements. It stated that the respondent is not an accused person but is entitled to analogous protections as are appropriate to motion proceedings. The majority held that an applicant in contempt proceedings must prove all the requisites of contempt beyond reasonable doubt. However, it stated that, “once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides”. Para 63 (emphasis added)

[27] The Court in *Matjhabeng* went on to find:

“The civil contempt remedies of committal or a fine have material consequences on an individual’s freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof — beyond a reasonable doubt — applies always.” (emphasis added) para 67

[28] The applicants seek the incarceration of the 16th respondent for contempt due to the Ni-Da entities’ refusal to comply with a certified bargaining council award. As a common director across these entities, the 16th respondent’s authority to enforce compliance is reasonably inferred from his position. This inference remains unchallenged on reasonable grounds.

[29] Critically, contempt liability arises from non-compliance with a *certified* award. The award was certified on 17 March 2020. Any refusal to reinstate employees prior to this date, however objectionable, cannot constitute contempt, as certification is a statutory prerequisite for enforcement of an award as if it were an order of the Labour Court.

[30] The further applicants’ obligation to tender services within ten days of the award’s service (20 March 2019) is central. Failure to meet this deadline would invalidate the tender and absolve the respondents of their reinstatement obligations.

The award's temporal condition is binding and was not challenged on review or varied on application. Compliance with the ten-day period is thus not discretionary⁴.

[31] The applicants' founding affidavit initially omitted critical allegations regarding timely tender. Only in reply did Mr. Dhlamini assert compliance with the ten-day window, when he stated that the "further applicants accompanied by myself tendered their services within the 10 (TEN) day period as stipulated in the Arbitration Award". The respondents rightly highlighted this defect. This court permitted supplementation to cure the omission, given Mr. Lamprecht's prior admission that some employees did in fact tender services in March 2019.

[32] Ordinarily the omission would have been the end of the matter. The bargaining council did not envisage an open-ended period within which the further applicants could tender their services. Setting a timeframe within which unfairly dismissed employees must indicate if they intend to resume work is reasonable and forms part of our law⁵.

[33] The supplementary affidavit however clarifies that 66 employees signed a register indicating their presence on 29 March 2019 to tender their services within the stipulated period. A handwritten list and a confirmatory affidavit from another union official corroborates Mr. Dhlamini's averments in this regard, though eight listed individuals were ineligible for reinstatement. The respondents' challenge to the list's authenticity is unpersuasive. The ineligible names do not negate the list. The court does not blame Mr. Dhlamini for failing to notice that 8 persons seeking the boon of reinstatement were not entitled to it on the day. The list appears authentic. The detail about the two employees who came late and whose identities are separately indicated on the list has the ring of veracity to it. If the list was a fabrication, there would have been no need to fabricate this detail. I accept the respondents' contention that 8 persons on the list were not entitled to reinstatement but have little hesitation finding that at least 58 former employees tendered their services in compliance with award.

⁴ Had the bargaining council award been silent on the timeframe within which the further applicants must tender services, a reasonable period would have applied.

⁵ *Khubeka & Others v Ni-Da Transport (Pty) Ltd* (2021) 42 ILJ 499 (LAC) at para 38

[34] The respondents' criticism of Mr. Dhlamini's credibility, based on inconsistent assertions about the number of employees who tendered services, is overstated. While his replying affidavit implied broader compliance, the supplementary affidavit's specificity (naming the 66 persons) rectifies this. Mr. Dhlamini's replying affidavit could be understood, more charitably, to say that a tender of services was made on behalf of all the employees, whether by those physically attending the respondent's premises or those on whose behalf Mr. Dhlamini imagined he was tendering services as their union official.

[35] Mr. Lamprecht's affidavit confirms that employees tendered services in March 2019, albeit without specifying the exact date. This corroborates the applicants' version. The ten-day deadline expired on 30 March 2019 (a Saturday), making 29 March 2019 the logical cutoff. The tender was thus timely.

[36] Regarding the remaining employees who did not physically attend, this court need not determine whether Mr. Dhlamini's collective tender was valid.⁶ Contempt is established if *any* employees properly tendered services, the award was certified and were later denied reinstatement.

[37] Once a valid tender occurs, employees need not repeat it during appeals. The employer's obligation crystallizes upon exhaustion of its legal remedies. Here, the 29 March 2019 tender sufficed. A subsequent refusal, or failure to take positive steps, to reinstate after certification *and* after appeals run out constitutes contempt.

[38] The respondents' post-certification refusals (1 June 2022 and 6 March 2023) occurred during ongoing appeals and thus cannot found contempt. However, after the Constitutional Court dismissed the respondents' appeal on 29 September 2023, their failure to take good faith and proactive steps to swiftly reinstate became indefensible.

⁶ See the Applicant's Supplementary Affidavit, p 216 – 217, paras 14 - 20

[39] Post-appeal, the respondents bore a positive duty to facilitate reinstatement without further demand. Employers cannot exploit procedural hurdles to evade certified awards. This would allow a party who has lost its case against reinstatement, in the process denying employees income and delaying their employment for years, to profit off the employees' disarray, dispersion and lack of procedural acumen. Imposing or inventing technical requirements such as further tenders of service, or letters of demand from the union, in my view, disturbs the balance undergirding sound and fair labour relations in South Africa. It opens the way to a whittling down of the number of employees who are finally reinstated, although this is not necessarily the impression this court has taken of the respondents' actions during their prolonged litigation in this matter. Having said that, the respondents' inaction in bringing reinstatement to bear, after their constitutional court appeal was rejected, despite knowing that at least some employees had properly tendered their services, demonstrates wilful non-compliance with a certified award.

[40] What should have happened *in casu* after the first respondent's legal challenges were exhausted in September 2023? Did the employees entitled to reinstatement have to re-tender their services? No. This event had already taken place in March 2019 at least in respect of 58 former employees and its legal effects endured. Did the union have to remind the employer of its obligations to reinstate employees under a certified award? In my view this is not a prerequisite in circumstances where it is clear to the employer that employees covered by a certified award have not abandoned their claim to reinstatement. The first respondent should have contacted the union representing those entitled to reinstatement and offered to honour the certified award. If a genuine dispute arose about the number or identity of employees to be reinstated, the first respondent would be free to refer such a dispute on this limited ground for adjudication in the appropriate forum. Given the proven facts *in casu*, at least 58 employees would have been reinstated at least in February 2024 while any dispute about the eligibility of the rest of the 127 further applicants played out.

[41] Settlement discussions (September 2023–February 2024) do not absolve the respondents. Once negotiations failed, their obligation to comply resumed

immediately. The 19 February 2024 demand letter underscored this duty, yet the respondents persisted in defiance.

[42] The 16th respondent, as director, failed to discharge his evidentiary burden to show that his non-compliance was neither wilful nor mala fide. His silence on steps taken to reinstate employees post-appeal is conspicuous.

[43] Contempt is proven beyond reasonable doubt. The 16th and the first respondent's conduct after 29 September 2023, knowing the award was final and binding, evinces deliberate disregard for the court's authority.

The Order

1. The sixteenth respondent with the first respondent is directed to purge the contempt of the certified award within 30 days of the date of this judgment,⁷ failing which the applicants may on an urgent basis approach this court for the further relief it sought in its notice of motion, namely the incarceration of the sixteenth respondent for such period as the Court deems appropriate or for the sixteenth respondent to be fined in an amount the Court deems appropriate together with an appropriate costs order and/or other appropriate relief.
2. The first respondent is directed to pay the first applicant's cost of suit in the contempt application. These costs shall exclude the costs associated with the hearing on 26 November 2024.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: WN Shapiro SC instructed by Futch & Poppesqu Incorporated

For the First Respondent: C Watt-Pringle SC with S Swiegers, instructed by TF Kruger Incorporated

⁷ 30 days is order given the obvious logistics in this matter.