CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 04/16

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	First Applicant
(on behalf of)	
MOSES FOHLISA & 41 OTHERS	Second to Further Applicants
and	
HENDOR MINING SUPPLIES (A DIVISION OF MARSCHALK BELEGGINGS (PTY) LIMITED)	Respondent

Neutral citation:	*National Union of Metalworkers of South Africa obo M Fohlisa and 41 Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9
Coram:	Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, and Zondo J
Judgments:	Madlanga J (first judgment): [1] to [58] Zondo J (second judgment): [59] to [204]
Heard on:	8 September 2016
Decided on:	30 March 2017
Summary:	Prescription Act, 1969 — Labour Relation Act, 1995 — dismissal dispute — judgment — section 193(1)(c) of the LRA

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Appeal Court and Labour Court are set aside and that of the Labour Court is substituted with the following:

"(a) The respondent is ordered to pay the employees, excluding the deceased employees—

(i) their weekly wages plus any other amount not forming part of the wages to which each employee would have been entitled for the period 1 January 2007 to 15 April 2007 together with interest thereon at 15.5% per annum calculated from 16 April 2007 to date of payment; and

(ii) their weekly wages plus any other amount not forming part of the wages to which each employee would have been entitled for the period 16 April 2007 to 28 September 2009 together with interest thereon at 15.5% per annum calculated from the dates on which the weekly wages and other amounts would have been due to date of payment.

(b) The respondent is ordered to pay the estates of the deceased employees against the production of letters of executorship or authority by the relevant executor or executrix—

(i) the deceased employees' weekly wages plus any other amount not forming part of the wages to which each deceased employee would have been entitled for the period 1 January 2007 to the date of death together with interest thereon at 15.5% per annum calculated from 16

April 2007 to date of payment, in respect of employees who died on or before 15 April 2007;

(ii) the deceased employees' weekly wages plus any other amount not forming part of the wages to which each deceased employee would have been entitled for the period 1 January 2007 to 15 April 2007 together with interest thereon at 15.5% per annum calculated from 16 April 2007 to date of payment, in respect of employees who died after 15 April 2007; and

(iii) the deceased employees' weekly wages plus any other amount not forming part of the wages to which each deceased employee would have been entitled for the period 16 April 2007 to the date of death together with interest thereon at 15.5% per annum calculated from the dates on which the weekly wages and other amounts would have been due to date of payment, in respect of employees who died during the period 16 April 2007 to 28 September 2009, both dates inclusive.

(c) Should the parties fail to reach agreement on any amount or amounts contemplated in this order, either party may seek relief from the Labour Court.

(d) The respondent is to pay the applicants' costs, including the costs of two counsel."

4. The respondent is to pay the applicants' costs in this Court and Labour Appeal Court, including the costs of two counsel.

JUDGMENT

MADLANGA J (Froneman J, Khampepe J and Mbha AJ concurring):

Introduction

[1] This matter arises from an employer's failure to reinstate its employees and pay their remuneration in the intervening period before eventually reinstating them. The reinstatement took place in terms of an order made by the Labour Court on 16 April 2007 (Cele AJ's order). The employees were to be reinstated with effect from 1 January 2007. The Labour Court also ordered the employees to report for duty on 23 April 2007. On that day, the employees reported for duty but the employer did not take them back. What it did instead was to engage in attempts to have the order overturned through appeal processes. It was only after these attempts had failed that the employees were able to return to work. That was on 29 September 2009. Payment of remuneration for the period 1 January 2007 to 28 September 2009 was not forthcoming. Litigation ensued. In the main,[1] at issue before us is whether the prescription period in respect of the unpaid remuneration is three or 30 years. The answer turns on whether the employees' claim is a judgment debt.

Background

[2] The respondent, Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Limited) (Hendor) dismissed 42 of its employees for participating in a strike. The National Union of Metalworkers of South Africa (NUMSA)[2] and the dismissed employees (employees)[3] challenged the fairness of the dismissals in the Labour Court.[4] Their success resulted in Cele AJ's order. The employees' reinstatement was in terms of section 193(1)(a)[5] of the Labour Relations Act.[6] Hendor rejected the

[1] There is also a question of substitution of executrixes and executors of estates of deceased employees. I deal with that issue later.

[2] The first applicant.

[3] The further applicants totalling 42.

[4] Collectively NUMSA and the employees are the applicants.

[5] Section 193(1)(a) provides:

> "If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—

employees' tender of services. Instead it appealed, unsuccessfully, to the Labour Appeal Court. An application for leave to appeal to the Supreme Court of Appeal suffered a similar fate on 15 September 2009. Employees who could resumed duty on 29 September 2009.[7]

[3] Hendor ignored a letter from the employees' attorneys which demanded payment of remuneration for the period 1 January 2007 to 28 September 2009. At the instance of the employees, the Registrar of the Labour Court issued a writ of execution in respect of this arrear remuneration. Hendor successfully urged the Labour Court to set aside the writ. It held that Cele AJ's order did not sound in money. All this happened from 4 February 2010 to 23 June 2011.

[4] Three years four days from 15 September 2009[8] NUMSA and the employees sought a declarator from the Labour Court that Hendor was liable to pay the employees' remuneration from 1 January 2007 to 28 September 2009. Needless to say, those who had died before the date of resumption of duty were to be remunerated up to the date of death. In those proceedings the substitution of the executrixes and executors of the estates of the deceased employees (estate representatives) was sought. Hendor took a point that in terms of section 11(d) of the Prescription Act[9] the claims had prescribed.[10] It also challenged the procedure followed in seeking the

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(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal."

[6] 66 of 1995.

[7] Some employees could not as they had since passed away.

[8] On 19 September 2012.

[9] 68 of 1969.

[10] Section 11 of the Prescription Act provides:

"The periods of prescription of debts shall be the following:

(a) thirty years in respect of—

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

substitution. The Labour Court found for the employees both on substitution and the merits. It ordered back pay up to 28 September 2009 or the date of death of each employee who died before resumption of duty.[11] It took this view on the basis that the back pay was a judgment debt which – in terms of section 11(a)(ii) of the Prescription Act – prescribed after 30 years.

[5] The Labour Appeal Court reasoned in its judgment that the claim for back pay for 1 January to 22 April 2007[12] was a judgment debt.[13] This reasoning

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(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[11] The order reads:

"a) The respondent is ordered to pay the employees, excluding the deceased employees—

- back pay for the period 1 January 2007 to 28 September 2009, as indicated in the first part of the schedule attached hereto;
- interest thereon at the prescribed rate from 16 April 2007.

b) The respondent is ordered to pay the estates of the deceased employees – upon production of letters from the administrator or the Master of the High Court and provided that they were party to the Labour Court proceedings—

- back pay for the period 1 January 2007 to 28 September 2009, in the case of employees who were deceased after this date, as indicated in the first part of the schedule attached hereto;
- back pay for the period 1 January 2007 to the date of their deaths, in the case of employees who were deceased prior to 28 September 2009, calculated on the basis of the information provided by the applicants (in annexure A to the founding papers), in relation to those employees who are indicated in the second part of the schedule attached hereto;
- interest thereon at the prescribed rate from 16 April 2007.

c) The respondent to pay the costs of this application, including the cost of counsel."

[12] The first date being the retrospective date of reinstatement, and the second being the day before the date on which – in terms of Cele AJ's order – the employees were to have resumed their duties.

[13] *Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of South Africa* [2015] ZALAC 49; (2016) 37 *ILJ* 394 (LAC) at para 11.

notwithstanding, in its order the Labour Appeal Court dismissed the declaratory order sought by NUMSA and the employees in its entirety. That dismissal must be inclusive of back pay due in respect of the period 1 January to 22 April 2007. In its reasoning, the Labour Appeal Court held that the prescription period in respect of the claims for arrear wages for the period 23 April 2007 to 28 September 2009[14] was three years. As, from 15 September 2012,[15] that period had elapsed, these claims had prescribed. It reasoned that these claims did not arise from Cele AJ's order, but from the employment contract which had been reinstated. In view of its conclusion on prescription, it did not find it necessary to decide the question of substitution.

[6] NUMSA and the employees have now approached us for leave to appeal. In argument, they support the Labour Court's holding that the back pay arising from reinstatement constitutes a judgment debt and will only prescribe after 30 years in terms of section 11(a)(ii) of the Prescription Act. In the alternative, they argue that the earliest they could reasonably have come to know that Hendor would not pay the back-dated remuneration was on 29 September 2009 when they reported for duty. Reckoned from 15 September 2009,[16] that was a period less than three years. Understandably, Hendor supports what the Labour Appeal Court held.

Issues

[7] All this leads to the conclusion that the issues are—

(a) whether leave to appeal should be granted;

(b) whether the obligation to pay arrear remuneration for the period 1 January 2007 to 28 September 2009 constitutes a judgment debt;

(c) if not, whether prescription only started running from 29 September 2009; and

(d) a determination on the question of substitution of estate representatives.

[14] The day before actual reinstatement.

[15] The three year period is reckoned from 15 September 2009, the date of the Supreme Court of Appeal's order.

[16] That is the date on which the Supreme Court of Appeal dismissed the application for leave to appeal against the Labour Appeal Court's dismissal of the appeal against Cele AJ's order.

Leave to appeal

[8] At the centre of this matter is prescription. A holding that a claim has prescribed implicates the right of access to courts.[17] That is a quintessential constitutional issue.[18] This application also requires a determination of the effect of retrospective reinstatement in terms of section 193(1)(a) of the Labour Relations Act and the resultant need to pay arrear remuneration. This too is a constitutional issue.[19] That is so because the Labour Relations Act was promulgated to give effect to the constitutional right to fair labour practices. So, we have jurisdiction. But that is not enough: do the interests of justice dictate that leave be granted?[20] As I will demonstrate shortly, there are reasonable prospects of success on both issues. Both are of some import. Leave to appeal must be granted.

The obligation to pay arrear remuneration

[9] For this debate, it makes sense to quote Cele AJ's order. This is it:

> "(a) [Hendor] is ordered to reinstate the [employees] in the same or not less favourable positions as they had at the time of their dismissal.
>
> (b) The reinstatement is to be with effect from 1 January 2007. Each [employee] is to report on duty on 23 April 2007 at 08h00."[21]

[17] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[18] See *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) at para 6; *Links v Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) at para 22; and *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 90-1.

[19] *Transport and Allied Workers Union of South Africa v PUTCO Ltd* [2016] ZACC 7; 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC) at para 28; and *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* [2015] ZACC 8; (2015) 36 *ILJ* 1423 (CC); 2015 (6) BCLR 660 (CC) at para 14.

[20] See *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 17.

[21] *National Union of Metal Workers v Hendor Mining Supplies(a Division of Marschalk Beleggings (Pty) Ltd*) [2007] ZALC 26 at para 40.

[10] Before taking another step forward, let me first deal with the implications of a reinstatement order. This is how Nkabinde J explained them in *Equity Aviation*:

> "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. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal . . . The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly."[22]

[11] In its fullest, what is the import of Cele AJ's order? It does not mention back pay. In *Finishing Touch* Mhlantla JA held:

> "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."[23]

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[22] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) (*Equity Aviation*) at para 36.

[23] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (*Finishing Touch*) at para 13. See also *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A); [1977] 4 All SA 600 (A), which was quoted with approval by this Court in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29.

[12] In *Ex parte Women's Legal Centre*, this Court held that the "[p]roper interpretation of an order of court also entails determining the legal context within which the words in the order were used".[24]

[13] What is that legal context in this matter? What *Equity Aviation* tells us is certainly central to that context. Reinstatement may be, but is not always, retrospective. To state the axiomatic, reinstatement means the resuscitation of the employment agreement with all the attendant reciprocal rights and obligations. Again to state the obvious, the element of retrospectivity in the reinstatement does not entail the rendering of services for the back-dated period of reinstatement. That is an impossibility. Perhaps that makes the very notion of "retrospective reinstatement" a bit of a misnomer, if not a legal fiction. What then is the practical value of retrospective reinstatement? It is the reinstatement of all the employee's benefits in terms of the contract of employment from the date specified in the order so as to "plac[e] an employee in the position he or she would have been but for the unfair dismissal".[25] Obviously, if the employer may be able to demonstrate that – for one reason or another[26] – an employee would not have been able to render services, the employee concerned would not be entitled to retrospective remuneration. That much is illustrated by the total obliteration or reduction of benefits in respect of employees who died either before 1 January 2007[27] or on or after that date but before the date of reinstatement.[28]

[14] Of the employee benefits payable retrospectively, the present proceedings concern remuneration. When Cele AJ ordered retrospective reinstatement, that required of Hendor to pay the employees' remuneration retrospectively from 1 January to 22 April 2007. Though not explicit, that much is implicit from a proper

[24] *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) at para 11.

[25] *Equity Aviation* above n 22.

[26] One example is death.

[27] The date from which reinstatement was retrospectively to have taken place.

[28] This I deal with later.

reading of the order. That, of course, was on the understanding that the employees would resume duties on 23 April 2007.

[15] It seems there should be no question that an obligation to pay emanating from a court order is a judgment debt and should prescribe only after 30 years. Not according to Hendor. It argues that the obligation we are about here is not a judgment debt. That is because one cannot issue a writ for its enforcement. "It is not executable without more," says the contention. And it is not immediately executable because the amount to be paid is not quantified.[29] This misses the point. The antecedent question is whether the obligation to make a retrospective payment of remuneration is a judgment debt. That must be answered by having recourse to what "debt" means in terms of the Prescription Act.

[16] This Act does not define the word. Although this Court in *Makate*[30] consciously eschewed delineating the exact meaning of "debt", it accepted the restrictive interpretation of that word by the Appellate Division in *Escom*.[31] Rejecting a wide interpretation by the Appellate Division in *Desai*,[32] Jafta J said:

> "In *Escom* the Appellate Division said that the word 'debt' in the Prescription Act should be given the meaning ascribed to it in the Shorter Oxford English Dictionary, namely:
>
> > '1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
> > 2. A liability or obligation to pay or render something; the condition of being so obligated.'"[33]

[29] In its written submissions Hendor conceded that the obligation to pay remuneration in respect of the period 1 January to 22 April 2007 was a judgment debt. In oral argument it withdrew this concession.

[30] *Makate* above n 18 at para 92.

[31] *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*) at 344E-G.

[32] *Desai NO v Desai* [1995] ZASCA 113; 1996 (1) SA 141 (A).

[33] *Makate* above n 18 at para 85.

[17] The obligation to pay back-dated remuneration fits both dictionary meanings in the quotation from the *Shorter Oxford English Dictionary*.[34]

[18] Also, there is nothing magical about an order being executable. The question should rather be whether the order is enforceable, thus giving rise to an obligation of the nature envisaged in *Escom*.[35] The mode of enforcement depends on the nature of the order. Payment in terms of some judgments may, because of their nature, be enforced in ways other than the issuing of a writ of execution. The implicit order to make a retrospective payment of remuneration effectively says to the employer, "Pay the remuneration – whatever the quantification – that is due from X date to Y date". Although, because of the requirement to pay money, one might be led to think that this is an order *ad pecuniam solvendam* (to pay money), in substance it is an order *ad factum praestandum* (to do something). This is especially so in this context because the implicit requirement to pay remuneration was inextricably bound with the express injunction to reinstate. Orders *ad factum praestandum* are enforced by contempt proceedings.

[19] Let me illustrate that, except perhaps in a broad generalised sense, an order for the retrospective payment of remuneration is not simply a matter of payment of money. Integral to the retrospective payment are certain deductions and contributions by the employer. Just two examples. Ordinarily when making a retrospective payment of remuneration, an employer deducts from it and transmits to the South African Revenue Service income tax commonly known as Pay As You Earn (PAYE).[36] In terms of the Unemployment Insurance Contributions Act (UIC Act)[37]

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[34] *Escom* above n 31.

[35] Id.

[36] This obligation arises from the Fourth Schedule of the Income Tax Act 58 of 1962. In terms of this schedule an employer is obliged to deduct PAYE from all amounts of remuneration paid to an employee. This is done in accordance with a table created in terms of section 5 of the Income Tax Act. The currently applicable table is:

Taxable income (R)	Rates of tax (R)
0 – 189 880	18% of taxable income
189 881 – 296 540	34 178 + 26% of taxable income above 189 880
296 541 – 410 460	61 910 + 31% of taxable income above 296 540
410 461 – 555 600	97 225 + 36% of taxable income above 410 460

an employer and employee[38] must, on a monthly basis, each contribute to the Unemployment Insurance Fund (UIF) one per cent of the employee's remuneration to the Unemployment Insurance Fund.[39] In practical terms the employer deducts the employee's one per cent contribution and remits it together with the employer's contribution to the UIF.

[20] Thus when a court orders retrospective payment of remuneration, it is simultaneously directing that necessary deductions from an employee's remuneration, contributions by the employer and remittal to relevant entities be made. That buttresses the view that the order is one *ad factum praestandum*. And the deductions, employer contributions and remittals to relevant entities are so closely linked to the actual payment to an employee that all four are inseparable.

[21] Do the facts that Cele AJ's order specified that reinstatement was to be with effect from 1 January 2007 and that the resumption of duty was to be on 23 April 2007 mean that only back pay for the period 1 January to 22 April 2007 can properly be regarded as constituting a judgment debt? I think not. Viewed from 29 September 2009, back pay both before 23 April 2007 and from 23 April 2007 is a direct consequence of Cele AJ's order. It is artificial to draw a line and say the one is a judgment debt and the other not. Let me make a short analysis of the order.

[22] 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

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555 601 – 708 310	149 475 + 39% of taxable income above 555 600
708 311 – 1 500 000	209 032 + 41% of taxable income above 708 310
1 500 001 and above	533 625 + 45% of taxable income above 1 500 000

[37] 4 of 2002.

[38] In terms of section 4 of the UIC Act, that Act does not apply to (a) employees working less than 24 hours a month for an employer; (b) learners; (c) public servants; (d) foreigners working on contract; (e) workers who get a monthly State (old age) pension; and (f) workers who only earn commission.

[39] Section 6 of the UIC Act.

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. On the authority of *Escom*,[40] which was accepted by this Court in *Makate*,[41] these obligations are each a judgment debt. As in all cases where a dispute is settled by adjudication, the judgment becomes the source of the debt, whether the judgment is viewed as strengthening the original underlying debt or novating it.[42] It is, in the plainest of terms, a judgment debt.

[23] 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. The order of reinstatement cannot be a contractual debt. It is true that once the employee has presented her- or himself for work and has been accepted back, prospectively from that date the reciprocal rights and obligations of the employer and employee will be purely contractual. And the employee cannot claim remuneration or other employment benefits if she or he stops working. 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.

[24] The mention of 23 April 2007[43] in paragraph (b) of the order does not alter the fact that it is Hendor that was ordered to reinstate the employees. All that this did was to indicate a date by which, *if reinstated by Hendor*, the employees were to resume duties. To suggest otherwise would be to read paragraph (b) without due regard to

[40] Above n 31.

[41] Above n 18.

[42] Compare *Swadif (Pty) Ltd v Dyke NO* 1978] 2 All SA 121 (A); 1978 (1) SA 928 (A) at 940F-944H.

[43] "Each [employee] is to report on duty on 23 April 2007 at 08h00."

paragraph (a) and not to see the order as one composite whole. Of course, as I have alluded to this, the employees could only get to know whether Hendor would reinstate them upon first presenting themselves for work.

[25] That being the case, here is something crucial in the factual scenario. Until after the Supreme Court of Appeal had refused leave on 15 September 2009, Hendor never reinstated the employees. It never complied with Cele AJ's order. For that entire period the contract was thus never reinstated. The employees were only reinstated pursuant to the refusal of leave to appeal by the Supreme Court Appeal. All this was as a result of Hendor's efforts at appealing Cele AJ's order. According to the principle articulated in *Bailey* the coming into operation and execution of Cele AJ's order was suspended pending a final decision on appeal.[44] It was only when no further appeal process was being pursued that this suspension came to end. Then *ex tunc* (with effect from the beginning) Cele AJ's order became fully operational and executable.

[26] But what exactly was the effect of this? It was not reinstatement of the employees by the order itself. It was still Hendor that had an obligation to reinstate. Once the suspension of the operation of Cele AJ's order had disappeared, this obligation existed *ex tunc and endured until complied with*. From 16 April 2007[45] until 28 September 2009[46] the order was never complied with. When Hendor eventually reinstated the employees with effect from 29 September 2009, that could only have been in terms of the continuing obligation stemming from Cele AJ's order. Throughout the period that Hendor resisted compliance with the order, the obligation arising from the order to pay remuneration and other benefits did not disappear. Borrowing from the words of Goldstone JA in *Performing Arts*, if anything, during that period Hendor "knowingly r[an] the risk of any prejudice which [might] be the

[44] *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v* Bailey [1988] ZASCA 73; [1988] 4 All SA 614 (AD).

[45] When the order was made.

[46] The day before the employees were reinstated.

consequence of delaying the implementation of the order".[47] The remuneration that would have been payable prospectively as a contractual obligation became back pay as a result of Hendor's actions. And that back pay was payable in terms of Cele AJ's order. Hendor's actions made reinstatement that would have resulted in prospective payments impossible.

[27] That leaves no room for carving up the period during which there was non-compliance with Cele AJ's order into separate periods that give rise to different legal consequences. Hendor had initially suggested that only back pay in respect of the period 1 January[48] to 22 April 2007 constituted a judgment debt. At the hearing, however, it submitted that the employees' claim was not a judgment debt. It thus went back on its earlier suggestion. It is now submitted that there was no distinction in the juristic nature, if not provenance, of the obligation in respect of the period 1 January to 22 April 2007 and the one in respect of the period 23 April 2007 to 28 September 2009. I agree. This change of tack did not mean that Hendor was conceding the case. Rather it now contended that for the entire period the debt arose from the reinstated contract, was thus purely contractual and prescribed after three years. That I do not agree with.

[28] It is inapt to disregard the fact that for the entire period 1 January 2007 to 28 September 2009 the employees had, in fact, not been reinstated. To suggest, without more, that for that period the obligation to pay remuneration arose from contract is to ignore reality. That reality is that the reinstatement that eventually took place on 29 September 2009 could only have been in terms of one thing; and that is the order of Cele AJ. Needless to say, the back pay that then arose was a judgment debt.

[47] *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union* [1993] ZASCA 201; 1994 (2) SA 204 (A). Of course, the words were expressed in a different context. They were quoted with approval in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* [2010] ZACC 3; (2010) 31 *ILJ* 273 (CC); 2010 (5) BCLR 422 (CC) at para 50.

[48] This is the retrospective date of reinstatement stipulated by Cele AJ.

[29] I should not be misunderstood. I do accept that the claims for back pay come about because of the reinstated contracts of employment. Here, by reinstated contracts I mean no more than what I have said above, which is that, insofar as the employees' obligations to render services are concerned, that is an impossibility. With this qualification in mind, the entitlement to back pay flows from the reinstated contracts.[49] But it does not follow that the employer's obligation in respect of back pay is not a judgment debt. The two are not mutually exclusive. To suggest otherwise, as does Hendor, is not apt.

[30] The sameness of the nature of the obligation to make a retrospective payment of remuneration in respect of the so-called two periods is best illustrated by changing the facts slightly. The employees were unsuccessful at first instance. They succeeded on appeal on 1 December 2008. The appellate court ordered resumption of duty on 2 January 2009, with reinstatement being retrospective to 1 January 2007. Resumption of duty indeed took place on 2 January 2009. Tweaking the facts once more, the employees succeeded at first instance. The court of first instance then ordered reinstatement with effect from 1 January 2007, with resumption of duty to take place on 23 April 2007. On 1 December 2008 the appellate court merely dismissed an appeal against that order. As a matter of practicality, the employees only resumed duty on 2 January 2009. Is there a difference in substance between these two scenarios? I see none at all.

[31] I have to deal very briefly with the judgment by my colleague Zondo J (second judgment). It refers to two periods. But these are different from the two periods that Hendor initially placed reliance on. The second judgment carves out the periods 1 January to 15 April 2007 and 16 April 2007 to 28 September 2009. According to the second judgment, back pay under the first period is a judgment debt and prescribes after 30 years. And back pay for the other period is not and prescribes after three years. However, on the facts, the second judgment holds that the claim for back pay has not prescribed. As I have said, I disagree with the notion that there are

[49] See *Equity Aviation* above n 22 at para 36.

two periods. All there is, is the period 1 January 2007 to 28 September 2009 during which Hendor had not reinstated the employees in compliance with Cele AJ's order. The injunction to reinstate contained in that order continued to exist – for that entire period – until complied with.

[32] For the meaning attached to "reinstate" in *Equity Aviation*[50] to become a reality, outstanding remuneration could not but accumulate for as long as the order was not complied with. For the entire intervening period before reinstatement, the obligation to reinstate and effect the concomitant payment could only have been a judgment debt. To shed light on this, I need only emphasise a point I made earlier. That is: the order itself did not reinstate; it is Hendor that was supposed to.

[33] On principle,[51] when reinstatement eventually took place with effect from 1 January 2007 as directed in Cele AJ's order, the accumulated remuneration was also reinstated. The practical and, indeed, legal reality dictated that it had to be paid as back pay. On a proper reading, that is the import of the *Equity Aviation* principle.[52] In the context of this type of order, I do not see why 16 April 2007 should alter this position. The relevance of this date is merely that it is the date of the order. Nowhere does the order say that the employees must be remunerated retrospectively from 1 January 2007 to 15 April 2007.

[34] Besides what I am going to say later, an immediate problem evinced by the second judgment's choice of the date of the order as the cut-off point is how that judgment treats the short period from 16 to 22 April 2007. And I see no answer to this problem in the second judgment. According to it, this period falls within the "second period" in respect of which unpaid remuneration is not a judgment debt. Here is the difficulty that I have. If Hendor had allowed the employees to resume their duties on

[50] *Equity Aviation* above n 22 at para 36.

[51] Id.

[52] Id.

23 April 2007,[53] surely remuneration for this short period would have been part of the back pay ordered by Cele AJ and envisaged in that order. How else could it not be? After all, reinstatement was retrospective from 1 January 2007. That entailed the retrospective payment of remuneration. That must include back pay for 16 to 22 April 2007. Just how could it not, if employees were expected to return to work only on 23 April 2007? Back pay for the period 16 to 22 April 2007 can only be a judgment debt. I fail to see how the second judgment distinguishes this from its treatment of the period 1 January to 15 April 2007. In fact, the distinction is odd. It demonstrates the artificiality, *in an order of this nature*,[54] of overemphasising the date on which the order was made.

[35] If anything, quite plainly it was not possible to implement the order instantaneously. That explains why – in terms of the order – the employees were to report back at work only on 23 April 2007. Surely, the order envisaged that – upon reporting for duties on 23 April 2007 – the employees would be entitled to back pay from 1 January to 22 April 2007.

[36] 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. *Equity Aviation* tells us that "'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".[55] Surely, that must mean the obligation to reinstate is not about only allowing employees to return to work. It is also about paying their remuneration. This – rolled in one – is the nature of the obligation. The obligation comprises two prongs which are bound inextricably and are thus not mutually exclusive. That is why, like the very

[53] This is the date by which, according to Cele AJ's order, they should have returned to work.

[54] I touch on the nature of the order shortly.

[55] *Equity Aviation* above n 22 at para 36.

obligation to reinstate, the duty to retrospectively fulfil contractual obligations (e.g. payment of remuneration) flows directly from the order and is a judgment debt. Here the two-pronged duty remained unfulfilled as at a millisecond before reinstatement on 29 September 2009.

[37] The question then is: at that point, i.e. just before reinstatement, could the second judgment 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. How and when then could that prong of this obligation, which required that remuneration be paid, mutate to a contractual obligation? It escapes me how. And this must put paid to the entire lengthy discourse in the second judgment.

[38] Relatedly, the second judgment seems to look at the problem from a time after reinstatement. It forgets the provenance of the obligation to pay remuneration, which is the order to reinstate. Yes, once there has been reinstatement, from that point onwards obligations owed by each party to the contract of employment are purely contractual. But that does not alter the nature of the pre-existing obligation to reinstate, including the concomitant obligation of paying remuneration for the period 1 January 2007 to 28 September 2009. If, for whatever reason, the employer fails to allow the employees to return to work, the obligation to allow them back endures and so does the attendant need to remunerate for the entire period the employees are not accepted back at work. So, for each day that the employer refuses to reinstate, there is a correlating increase in the remuneration payable. It would be absurd for the obligation to reinstate to persist whilst the corresponding obligation to remunerate were frozen as at the date of the court order. Until satisfied, each is a judgment debt owed to the employees.

[39] I am not suggesting that, upon reinstatement, payment of remuneration for this period is not in accordance with the employment contract. It is. After all, it is the

employment relationship that retrospectively comes back to life. Therefore, everything capable of retrospective performance, like payment of remuneration, must be done in terms of the contract. But the obligation to pay remuneration for this period retains its essential character.

[40] If, on whatever basis, the employer were to be entitled – in terms of the contract – to take whatever action (e.g. not paying remuneration) against a particular employee in respect of the period under discussion, nothing in the approach that I adopt prevents the employer from taking that action. The second judgment suggests that this is not competent on my approach. The reason given is that "an order would already have been made that Hendor pay the [employees] their remuneration for the second period without Hendor having been able to defend itself against that claim".[56] The second judgment then says Hendor would have no forum at which to raise its entitlement to take the action.[57] What this misses is that the effect of the order was to reinstate the employees *on the same terms and conditions*.[58] Axiomatically, the terms and conditions of an employment contract are binding on both employee and employer. If – for some reason – those terms and conditions entitled Hendor to withhold payment of remuneration, it would be open to it to do so. When sued for the remuneration, it would be at liberty to raise as a defence the basis for its action.

[41] I do not agree that there would have been no forum to do this. The question whether Hendor was entitled – in accordance with the *terms and conditions of the employment contract* – to withhold remuneration would not be *res judicata* (literally, a matter judged).[59] Indeed, before the Labour Court these very proceedings would have presented Hendor with a perfect opportunity to raise whatever defence it considered available. This cuts across all the examples about a retrenchment exercise, retirement

[56] Second judgment [153].

[57] Id.

[58] *Equity Aviation* above n 22 at para 36.

[59] The principle is that generally parties may not again litigate on the same matter once it has been determined on the merits. *Molaudzi v S* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) at para 14.

age, Mr A and Ms B. The perceived difficulties associated with them contained in the second judgment simply evaporate.

[42] So much for the startling proposition that my approach denies Hendor "an opportunity to be heard in regard to the period after Cele AJ's order" and infringes its right in terms of section 34 of the Constitution.[60]

[43] Let me deal with the *Jaguar Shoes*[61] and *Coca Cola*[62] cases on which the second judgment places strong reliance. *Jaguar Shoes* does not support the view that an obligation to pay remuneration in respect of a period during which an employer resisted an order to reinstate employees is not a judgment debt. In that case the Industrial Court ordered the reinstatement of dismissed employees (appellants) in terms of section 43(4) of the old Labour Relations Act[63] (old LRA). If not extended, that order was to be valid for 90 days.[64] The Industrial Court sent a notice to the

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[60] Second judgment [145]-[146].

[61] *National Union of Textile Workers v Jaguar Shoes (Pty) Ltd* 1987 (1) SA 39 (N) (*Jaguar Shoes*).

[62] *Coca Cola Sabco (Pty) Limited v Van Wyk* [2015] ZALAC 15; (2015) 36 *ILJ* 2013; [2015] 8 BLLR 774 (LAC) (*Coca Cola*).

[63] 28 of 1956.

[64] Section 43 provided:

> "(2) Any party to a dispute [concerning an alleged unfair labour practice] who—
>
> refers the said dispute to an industrial council having jurisdiction in respect of the dispute; . . .
>
> . . .
>
> may within 10 days of the date of such reference or application apply by means of an affidavit to the industrial court for an order under subsection (4).
>
> (4)(a) Unless the industrial court on good cause shown decides otherwise, no order may be made under this subsection if the relevant application under subsection (2) was not made within 30 days of the date on which notice was given of the alleged unfair labour practice, or if no such notice was given, of the date on which the alleged unfair labour practice was introduced.
>
> (b) After considering—
>
> (i) whether the applicant has complied with the relevant provisions of this section;
>
> (ii) the facts set out in the application and the affidavits as contemplated in subsection (3) (b);
>
> (iii) any oral representations or evidence allowed by the industrial court;

appellants' attorneys advising the appellants of the order. This was very close to the expiry of the 90-day period. At that time the attorneys' offices were closed for the December holidays. Consequently, the appellants did not tender their services within the 90-day period. And the order had not been extended in terms of section 43(6) of the old LRA. The appellants subsequently brought an application before the Industrial Court claiming payment of remuneration from their respective dates of dismissal to a date 90 days after the date of the reinstatement order. The employer resisted this on the basis that the appellants had not tendered their services during the 90-day period, thus rendering it impossible for it to reinstate them. The Industrial Court dismissed the application on a technicality. The appellants appealed to the Natal Provincial Division of the then Supreme Court of South Africa (High Court).

[44] The High Court held that it was incumbent upon employees "to take reasonable steps to ensure that they should be in a position to render or tender their services as soon as is reasonably possible after a reinstatement order is made".[65] On the facts, it held that the appellants were "excused from rendering or tendering their services during the whole of the 90-day period".[66] This was, *inter alia*, because they had not received timeous notice of the order of reinstatement.[67] The High Court concluded that the appellants were entitled to payment.

[45] Describing "the effects . . . of a reinstatement order following upon termination of employment",[68] this being what it considered to be the main question in the appeal,[69] the Court had this to say:

> (iv) whether the applicant has in good faith endeavoured to settle the dispute by agreement or otherwise; and
>
> (v) whether it is expedient to grant an order in terms of this section,
>
> the industrial court may make such order as it deems reasonable in the circumstances: Provided that no party may be ordered to pay damages of whatever nature and the court may at any time, on the application of any party to the dispute, in respect of which application the provisions of subsection (3) shall apply, withdraw or vary any such order."

[65] *Jaguar Shoes* above n 61 at 46F-G.

[66] Id at 46H-I.

[67] Id.

[68] Id at 44B-D.

> "Although decreed by statute and ordered by a court, the relationship which the employer *is to reinstate* is a contractual one; a contract of employment between himself and the employee. To order him to reinstate that relationship seems to me in effect to order him . . . to perform his obligations in terms of the contract of employment which existed prior to termination . . .". (Emphasis added)

[46] Crucially, the Court was addressing itself to the nature of the relationship that would come about *upon reinstatement.* This is plain from the reference to "the relationship which the employer is to reinstate". That says nothing about, and is a far cry from, the nature of (a) *the obligation* to reinstate and (b) the associated *obligation* to pay remuneration *before actual reinstatement*. This precedes actual reinstatement. Yes, upon reinstatement the relationship becomes contractual. In fact, what the High Court held is in line with the *Equity Aviation* principle and what I say in this judgment in that regard.

[47] In *Coca Cola* the Labour Appeal Court first held:

> "The back pay ordered by [a] commissioner [when ordering that an employee be reinstated] can . . . only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of implementation. The Labour Relations Act does not cater for such relief."[70]

[48] This is a narrow view of the power to reinstate in section 193(1)(a) of the Labour Relations Act. I cannot but repeat a refrain that I have asserted *ad nauseam* now: when a court orders an employer to reinstate an employee, it is ordering that the employee be put "back into the same job or position he or she occupied before the dismissal, on the same terms and conditions".[71] This means the court is ordering that the employee not only be taken back to her or his job, but that she or he be afforded

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[69] Id.

[70] *Coca Cola* above n 62 at para 17.

[71] *Equity Aviation* above n 22 at para 36.

her or his benefits under the contract. The benefits include payment of remuneration. Surely, that covers the period between the date of the reinstatement order and the date on which reinstatement actually takes place.

[49] In most cases, it will be impractical for employees to report for duty on the same day as the reinstatement order. Thus almost invariably, there will be a lapse of time between the date of the order and reinstatement. One thing is certain, and that is: once reinstatement has taken place, remuneration in respect of the intervening period is payable. On the Labour Appeal Court's approach, this must mean that it is the act of reinstatement that creates the entitlement to retrospective payment for this period. It escapes me how, "without more", the resuscitated contract is legally capable of having this retrospective effect. The Labour Appeal Court's judgment does not shed light on this. On the other hand, the obligation created by the reinstatement order endures until there has been compliance. It makes sense that, upon reinstatement, payment in respect of the intervening period is due under the order. Yes, that payment has to be in accordance with the terms of the employment contract.

[50] The quote that I have just dealt with seems to have set the scene for the Labour Appeal Court's later conclusion that—

> "if the employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders his/her labour he/she does so in terms of the employment contract. She/he is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one, wherein the employee would have to set out sufficient facts to justify the right or entitlement to judicial redress. The employee would *inter alia* have to prove that the contract of employment is extant; that she/he tendered his/her labour in terms thereof and that the employer refuses or is unwilling to pay him/her in terms of that contract. The employer on the other hand would have all the contractual defences at her/his disposal."[72]

[72] *Coca Cola* above n 62 at para 24.

[51] 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. I must conclude that the Labour Appeal Court's view to the contrary was wrong.

[52] Ultimately, I remain unswayed in my view that the obligation to settle the outstanding debt for back pay for the entire period 1 January 2007 to 28 September 2009 is a judgment debt. That debt prescribes after 30 years in terms of section 11(a)(ii) of the Prescription Act. It follows that the applicants were entitled to relief.

Prescription from 29 September 2009

[53] The conclusion that the employees' claims constitute judgment debts makes it unnecessary to deal with the applicants' alternative argument that prescription started running on 29 September 2009.

Substitution

[54] Above[73] I mentioned that some employees had since died and the substitution of their estate representatives was sought when proceedings were launched for the declarator that Hendor was liable to pay the employees' remuneration from 1 January 2007 to 28 September 2009. As indicated, the Labour Court allowed substitution. The Labour Appeal Court did not find it necessary to determine this issue. This was because of its decision on prescription. Now that this decision has

[73] Above [4] read with n 7.

been overturned, the Labour Court's decision stands. Hendor has not appealed against it. There being no appeal, that is the end of the matter.

[55] That said, a claim by each of the estate representatives can only be up to the date of death of the employee concerned or up to 28 September 2009.[74] The estates of employees who passed away before 1 January 2007 have no claim. The estates of Mr S Molefe,[75] Mr S M Dubazana[76] and Mr T J Khumalo[77] fall into this category. The estates of Mr C S Godi,[78] Mr K S Thango,[79] Mr M J Rantho,[80] and Mr M M Vilakazi,[81] are entitled to claim back pay for the full period, i.e. 1 January 2007 to 28 September 2009. The estates of Mr E T Dlamini,[82] Mr M D Maloka,[83] Mr B J Sibuyi,[84] Mr S M Madlopha,[85] and Mr B D Mlangeni,[86] have claims from 1 January 2007 until the date of death of the employee concerned.

Remedy

[56] The appeal must succeed. An order with permutations dictated by the debate in the preceding paragraph must be granted. The back pay that the employees are entitled to comprises weekly wages and other amounts like "leave pay" and "leave enhancement pay".[87] Hendor is liable for interest at 15.5 % per annum in respect of all that back pay.

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[74] 29 September 2009 is the date on which – after the appeal processes – the employees resumed duty.

[75] He died on 29 June 2004.

[76] He died on 5 February 2005.

[77] He died on 2 February 2006.

[78] He died on 23 October 2009.

[79] He died on 27 December 2010.

[80] He died on 18 March 2012.

[81] He died on 14 June 2012.

[82] He died on 13 February 2007.

[83] He died on 24 February 2007.

[84] He died on 21 February 2009.

[85] He died on 4 May 2009.

[86] He died on 21 August 2009.

[87] The "leave pay" and "leave enhancement pay" appear from calculations provided by the employees and Hendor.

Costs

[57] Ordinarily where there is a continuing employment relationship, the usual rule that costs must follow the result does not apply.[88] That is so because a costs order might not be in the best interests of the relationship.[89] In this matter Hendor did everything possible to frustrate the employees. Its conduct appears to have been calculated to wear them down. This is a case that calls for a departure from the rule just referred to.

Order

[58] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Appeal Court and Labour Court are set aside and that of the Labour Court is substituted with the following:

"(a) The respondent is ordered to pay the employees, excluding the deceased employees—

(i) their weekly wages plus any other amount not forming part of the wages to which each employee would have been entitled for the period 1 January 2007 to 15 April 2007 together with interest thereon at 15.5% per annum calculated from 16 April 2007 to date of payment; and

(ii) their weekly wages plus any other amount not forming part of the wages to which each employee would have been entitled for the period 16 April 2007 to 28 September 2009 together with interest thereon at 15.5% per annum calculated from the dates on which the weekly wages and other amounts would have been due to date of payment.

[88] *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 52.

[89] Id.

(b) The respondent is ordered to pay the estates of the deceased employees against the production of letters of executorship or authority by the relevant executor or executrix—

(i) the deceased employees' weekly wages plus any other amount not forming part of the wages to which each deceased employee would have been entitled for the period 1 January 2007 to the date of death together with interest thereon at 15.5% per annum calculated from 16 April 2007 to date of payment, in respect of employees who died on or before 15 April 2007;

(ii) the deceased employees' weekly wages plus any other amount not forming part of the wages to which each deceased employee would have been entitled for the period 1 January 2007 to 15 April 2007 together with interest thereon at 15.5% per annum calculated from 16 April 2007 to date of payment, in respect of employees who died after 15 April 2007; and

(iii) the deceased employees' weekly wages plus any other amount not forming part of the wages to which each deceased employee would have been entitled for the period 16 April 2007 to the date of death together with interest thereon at 15.5% per annum calculated from the dates on which the weekly wages and other amounts would have been due to date of payment, in respect of employees who died during the period 16 April 2007 to 28 September 2009, both dates inclusive.

(c) Should the parties fail to reach agreement on any amount or amounts contemplated in this order, either party may seek relief from the Labour Court.

(d) The respondent is to pay the applicants' costs, including the costs of two counsel."

4. The respondent is to pay the applicants' costs in this Court and Labour Appeal Court, including the costs of two counsel.

ZONDO J (Mogoeng CJ, Jafta J and Mhlantla J concurring):

Introduction

[59] The question for determination in this matter, if we grant the applicants leave to appeal, is this: where, after the Labour Court has granted an order that an employer "reinstate" a group of employees and the employer does not allow the employees to work pending its appeal or application for leave to appeal against that order but reinstates them when its appeal or application for leave to appeal is dismissed, is the employees' subsequent claim for the payment of wages for the period they did not work while the employer was pursuing its appeal or application for leave to appeal a judgment debt or a contractual claim?

[60] This question arises in the present case because, after the Labour Court had granted an order on 16 April 2007 that the respondent (Hendor) reinstate the second and further applicants in the positions they had occupied before dismissal with effect from 1 January 2007, Hendor did not allow the second and further applicants to work pending the outcome of its intended appeal against the order of the Labour Court. However, it reinstated them on 29 September 2009 after the Supreme Court of Appeal had dismissed its application for leave to appeal to it against the dismissal of its appeal by the Labour Appeal Court.

[61] After the second and further applicants had been reinstated, they demanded payment of their wages for the period from 1 January 2007 to September 2009 but Hendor was not prepared to pay them any wages for that period. This ultimately led to litigation that has gone as far as this Court. Hendor resisted the second and further applicants' claim for the payment of wages for the period in question mainly on the

basis that the claim had prescribed. Hendor contended that the claim is a contractual claim and the applicable prescription period of three years had lapsed before the applicants instituted the relevant legal proceedings. The second and further applicants contend that the claim is not a contractual claim but is a judgment debt. If the claim is a judgment debt, it has not prescribed because the applicable prescription period will be 30 years.[90] If it was a contractual claim, then it may or may not have prescribed.

[62] I have read the judgment by my Colleague, Madlanga J (first judgment). It concludes that the claim is a judgment debt and has, therefore, not prescribed. I am unable to agree with the conclusion that the whole claim is a judgment debt. One part of the claim, namely, the one for wages for the period 1 January 2007 to 15 April 2007 is a judgment debt but the other part, namely, the one for wages for the period 16 April 2007 to 28 September 2009 is a contractual debt and not a judgment debt. However, I agree that the claim has not prescribed. In regard to the first part of the claim, it has not prescribed because, being a judgment debt, the prescription period applicable to it is 30 years. The second part of the claim has also not prescribed but my reasons for this conclusion differ from those in the first judgment. My reasons for the conclusion that the second part of the claim is a contractual claim and that it has not prescribed are set out below.

Background

[63] The second and further applicants were employed by Hendor. Hendor dismissed them from its employ on 18 August 2003 for participating in an unprotected strike for about seven weeks preceding 18 August 2003. A dispute then arose between them and the National Union of Metal Workers of South Africa (union), on the one hand and, on the other, Hendor about the fairness or otherwise of the dismissal and whether, if the dismissal was unfair, they should be reinstated or granted some other remedy. The second and further applicants maintained that the dismissal was

[90] Section 11(a)(ii) of the Prescription Act 68 of 1969.

unfair and Hendor should reinstate them whereas Hendor took the position that the dismissal was fair and the second and further applicants were not entitled to any relief.

[64] The dispute was initially referred to the conciliation process in terms of section 191(1) of the Labour Relations Act (LRA).[91] When that process failed to produce a settlement, the dispute was referred to the Labour Court in terms of section 191(5) of the LRA for adjudication. In terms of section 191(5)(b) a dispute such as this dispute is referred to the Labour Court "for adjudication" if the employees allege that the reason for their dismissal is their participation in a strike that does not comply with the provisions of Chapter IV of the LRA.

[65] If, in adjudicating a dismissal dispute pursuant to the provisions of section 191(5) of the LRA, the Labour Court finds that the dismissal was unfair, it may grant any of the remedies provided for in section 193(1). This is subject to section 193(2) and, where applicable, section 194. Section 193(1) reads:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
>
> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
>
> (c) order the employer to pay compensation to the employee."

[66] The Labour Court found the dismissal of the second and further applicants substantively unfair. Exercising its power in terms of section 193(1)(a) of the LRA, the Labour Court, through Cele AJ, granted the following order on 16 April 2007:

[91] 66 of 1995.

> "(a) The respondent is ordered to reinstate the applicants in the same or not less favourable positions as they had at the time of their dismissal.
>
> (b) The reinstatement is to be with effect from 1 January 2007. Each applicant is to report on duty on 23 April 2007 at 08h00."[92]

This order covers three issues. The issue under paragraph (a) is reinstatement. Thereunder, Hendor was ordered to reinstate the second and further applicants. That is the only thing that Hendor was ordered to do under paragraph (a) of the order. Paragraph (b) deals with the date with effect from which the reinstatement order was to operate retrospectively. It was to be with retrospective effect from 1 January 2007. The third is the date on which the Court ordered the employees to report for duty. That was 23 April 2007. That falls under paragraph (b) as well.

[67] Between 16 and 23 April 2007 the second and further applicants did not report for duty or tender their services. This may have been because of the order Cele AJ made that they should report for duty on 23 April 2007. On 23 April 2007 the second and further applicants reported for duty but Hendor did not allow them to work. Hendor was not prepared to allow them to work because it still wanted to appeal to the Labour Appeal Court against Cele AJ's order. In effect, the second and further applicants were told to go back home and not return to work pending the outcome of the appeal that Hendor intended to pursue.

[68] Hendor lodged an application in the Labour Appeal Court for leave to appeal. The appeal to the Labour Appeal Court was heard on 21 May 2009. On 19 June 2009 the Labour Appeal Court handed down its judgment. It dismissed the appeal. Hendor then applied to the Supreme Court of Appeal for leave to appeal to that Court against the decision of the Labour Appeal Court. On 15 September 2009 the Supreme Court of Appeal dismissed Hendor's application for leave to appeal.

[92] I have quoted only the parts of Cele AJ's order that are relevant to the present matter. Although Cele AJ's actual order is numbered 1 to 3, I have numbered the relevant parts I have quoted as (a) and (b) for convenience.

[69] The union and the second and further applicants conceded that they learnt of the dismissal by the Supreme Court of Appeal of Hendor's application for leave to appeal on 15 September 2009. Between 15 and 28 September 2009 the second and further applicants did not report for duty or tender their services. They only did so on 29 September 2009. Hendor reinstated them on that day. However, it did not pay them any remuneration for the period between 1 January 2007 and 28 September 2009. The date of 1 January 2007 is the date with effect from which the Labour Court had ordered Hendor to reinstate the second and further applicants.

[70] By way of a letter dated 4 February 2010, the second and further applicants' attorney made a demand to Hendor for the payment of the second and further applicants' remuneration for the period from 1 January 2007 to 28 September 2009. Hendor did not comply with the demand. On 6 October 2010 the second and further applicants issued a writ of execution out of the Labour Court in an attempt to get their arrear wages from Hendor. On 23 June 2011 the Labour Court set the writ aside on Hendor's application on the basis that the claim did not sound in money.[93] It directed the second and further applicants to make an application for a declaratory order and to set out *the grounds of liability* and *specify the amounts claimed*.

Labour Court

[71] More than a year later – on 19 September 2012 – the applicants lodged an application in the Labour Court for the payment of the arrear wages for the second and further applicants in respect of the period from 1 January 2007 to 28 September 2009. Hendor opposed this application and filed an answering affidavit. The second and further applicants filed a replying affidavit. Through Gaibie AJ the Labour Court found in favour of the second and further applicants. It concluded that Hendor owed the second and further applicants a debt by way of remuneration for the period 1 January 2007 to 28 September 2009. It held that this was a judgment debt and, as such, the applicable prescription period was 30 years. Accordingly, it rejected

[93] It is noted that the Labour Appeal Court records that the writ was set aside on 23 July 2011. It was mistaken, the writ was set aside on 23 June 2011.

Hendor's contention that the claim had prescribed. The Court ordered Hendor to pay the second and further applicants' arrear wages and other benefits sounding in money for the period 1 January 2007 to 28 September 2009.

Labour Appeal Court

[72] Gaibie AJ dismissed Hendor's application for leave to appeal, but the Labour Appeal Court subsequently granted the required leave. Hendor appealed to the Labour Appeal Court. In a judgment by Savage AJA[94] that Court overturned the decision of the Labour Court. It held that, except for the claim relating to the payment of wages for the period 1 January 2007 to 22 April 2007, the claim had prescribed. The Labour Appeal Court held that the claim for the arrear wages for the period 1 January 2007 to 22 April 2007 constituted a judgment debt and, therefore, the applicable prescription period was 30 years. This meant that the claim for wages for that period had not prescribed. However, it held that the debt relating to the remuneration for the period 23 April 2007 to 28 September 2012 was not a judgment debt but a contractual debt. The Court held that the prescription period applicable to the arrear wages for this period was three years and that, therefore, the claim had prescribed. The Labour Appeal Court calculated the three year prescription period from 15 September 2009 when the Supreme Court of Appeal dismissed Hendor's application for leave to appeal. In taking the view that it took, the Labour Appeal Court relied upon its previous decision in *Coca Cola*[95] which is discussed later in this judgment.

In this Court

Jurisdiction

[73] The applicants then applied to this Court for leave to appeal against the decision of the Labour Appeal Court. This Court has jurisdiction in respect of this

[94] *Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of South Africa* [2015] ZALAC 49; (2016) 37 *ILJ* 386 (LAC) (LAC judgment). Tlaletsi DJP and Musi JA concurred in Savage AJA's judgment.

[95] *Coca Cola Sabco (Pty) Limited v Van Wyk* [2015] ZALAC 15; (2015) 36 *ILJ* 2013 (LAC) (*Coca Cola*).

matter on the bases that it raises a constitutional issue as well as an arguable point of law of general public importance that deserves the consideration of this Court. The question raised by this matter, as set out above, involves the interpretation of the LRA and an order of the Labour Court issued in terms of section 193 of the LRA.

Leave to appeal

[74] The issue that this matter raises is an important constitutional issue that affects not only the parties in this matter but also the labour law community at large. The issues have not been considered by this Court before. There are conflicting judgments of the Labour Court and Labour Appeal Court. The appeal has reasonable prospects of success. This Court should entertain this matter so that it may pronounce on these issues and, thus, bring about certainty in the law. It is in the interests of justice that leave to appeal be granted.

The appeal

[75] As a result of Hendor's concession[96] in regard to the claim relating to the period 1 January 2007 to 23 April 2007, the Labour Appeal Court focused only on the claim relating to the period 23 April 2007 to 18 September 2009 and decided the claim relating to that period. However, quite strangely, when the Labour Appeal Court made its order at the end of its judgment, it made an order that did not reflect the concession made in regard to the claim for the period from 1 January 2007 to 23 April 2007. It upheld the appeal as a whole, set aside the whole order of the Labour Court, replaced it with only an order declaring that the claim for wages for the period 23 April 2007 to 18 September 2009 had prescribed and an order dismissing the present applicants' application with no order as to costs. The result is that, although Hendor had made a concession which that Court had accepted, the order it made reflected a complete success for Hendor. This must have been oversight on the Labour Appeal Court's part.

[96] See the LAC judgment above n 94 at para 5 where Savage AJA states that the applicant "conceded that the arrear wages due for the period from 1 January 2007 until 23 April 2007 amounted to a judgment debt and that a claim for payment of such wages had not prescribed".

[76] During the hearing counsel for Hendor sought to withdraw the concession that he had made in the Labour Appeal Court in regard to the claim for the period 1 January 2007 to 23 April 2007. Since the concession is on a point of law, counsel was free to withdraw it. Counsel was in part mistaken to withdraw his earlier concession. That concession was well made in respect of the period 1 January 2007 to 15 April 2007 (first period). The claim for the payment of wages relating to that period is a judgment debt because of paragraph (b) of Cele AJ's order. Therefore, it has not prescribed because the applicable prescription period is 30 years.

[77] With regard to the period 16 to 22 April 2007 counsel erred in conceding that the claim for the payment of wages for that period was a judgment debt. Cele AJ's order did not require Hendor to pay wages for any period from 16 April 2007 and beyond. Paragraph (a) of Cele AJ's order required Hendor to reinstate the second and further applicants which, by operation of law, would automatically restore the contracts of employment which had previously governed the relationship between each employee applicant and Hendor. The claim for the period 16 April 2007 to 18 September 2009 – in fact up to 28 September 2009 – is one period (second period). As I have now disposed of the appeal relating to the first period, in the rest of this judgment I propose to deal with the appeal concerning the claim for wages relating to the second period.

[78] In the concession that counsel for Hendor made in the Labour Appeal Court he included the second and further applicants' claim for wages in regard to the period 16 to 22 April 2007 as also being a judgment debt just like the claim for wages for the first period (i.e. 1 January 2007 to 15 April 2007). This may have caused some confusion because the Labour Appeal Court regarded that claim as also being a judgment debt. This means that both counsel for Hendor and the Labour Appeal Court did not make a distinction between the claim for the remuneration falling into the period before Cele AJ's order and the claim for remuneration falling into the period after Cele AJ's order. That means in effect that the applicants' claims fell into

a pre-judgment period and a post-judgment period. The Labour Appeal Court should have divided the applicants' claims in this way. In failing to do so and including the period 16 to 22 April 2007 in the pre-judgment period, it erred. I accept that it may have erred in this way as a result of the concession made by counsel for Hendor. Nevertheless, I think that the Court ought to have realised that the claim for the period from 16 to 22 April 2007 falls into the post-judgment period. That error is perpetuated in the first judgment. The period 16 to 22 April 2007 is part of the post-judgment period and the claim relating to it is the same as the claim for the period 23 April 2007 to 28 September 2009 (the second period).

[79] The Labour Court also caused unnecessary confusion by specifying a date when the second and further applicants had to report for duty. Its duty was to order Hendor to reinstate the second and further applicants. Once it had made that order, it was incumbent upon the second and further applicants to report for duty as soon as reasonably possible. If any one of the second and further applicants unduly delayed in reporting for duty that would be a matter between employer and employee as Hendor would also have rights as employer. The circumstances of employees differ from one employee to another and how soon they learn of an order of reinstatement also differs from one employee to another. This is especially so when, as was the case here, the litigation had been going on for many years since the date of dismissal. Some employees may be living close to the employer's premises whereas others may be living very far, sometimes hundreds of kilometres away, from the employer's premises. The question of when the employees report for duty is a matter between themselves and their trade union, if there is one, on the one hand, and their employer, on the other. The Labour Court should have left that issue to the parties.

[80] The question before us, therefore, is whether the second and further applicants' claim for the period from 16 April 2007 to 28 September 2009 (i.e. the second period) is a judgment debt or a contractual debt. The main contention advanced by both the applicants' counsel and the first judgment in support of the proposition that the applicants' claim for wages for the period 16 April 2007 to 28 September 2009 is a

judgment debt is that paragraph (a) of Cele AJ's order was an order that Hendor reinstate the second and further applicants and Hendor did not comply with that order until 29 September 2009. Also, attention is drawn to the fact that, when the second and further applicants tendered their services on 23 April 2007, Hendor rejected that tender on the basis that it was going to appeal against Cele AJ's order. The result was that Hendor did not allow the second and further applicants to work until 29 September 2009 and, for that reason, Hendor was obliged to pay the second and further applicants their wages for the second period.

[81] In my view none of these factors necessarily supports the proposition that the whole claim is a judgment debt. As I have said, the only claim that is a judgment debt is the one relating to the first period. The claim for the second period is a contractual claim. The factors referred to in the preceding paragraph and relied upon by the first judgment support the conclusion that the claim for the second period is a contractual claim. When it is said that the claim is a judgment debt and that proposition is based on paragraph (a) of Cele AJ's order, it is necessarily implied that Cele AJ's judgment decided that Hendor is liable to pay the second and further applicants' wages or remuneration for the period from 16 April 2007 to 28 September 2009 or that by way of paragraph (a) of his order, Cele AJ ordered Hendor to pay the second and further applicants their wages for that period. If Cele AJ's judgment neither declared nor found Hendor liable for the payment of the wages for that period nor ordered Hendor to pay those wages, there can be no basis in law for the proposition that the claim for that period is a judgment debt. Therefore, it is going to be necessary to deal with the question whether Cele AJ's judgment held Hendor to be liable for the payment of the wages for the second period.

[82] In what follows I set out my reasons for the conclusion that the second and further applicants' claim for the second period is not a judgment debt but, to the extent that it may be a debt, it is a contractual debt. In doing so, I shall consider or deal with:

(a) whether Cele AJ's judgment held that Hendor was liable for the wages for the second period;

(b) the meaning of paragraph (a) of Cele AJ's order;

(c) the meaning of paragraph (b) of Cele AJ's order;

(d) different types of reinstatement orders;

(e) the meaning of a "judgment debt" or its features;

(f) the pertinent cases of *Coca Cola* and *Jaguar Shoes*;

(g) what if Hendor had not taken any appeal steps;

(h) whether any appeal step changed the position that would have obtained;

(i) avoiding inconsistency with the Constitution; and

(j) certain difficulties if the claim is a judgment debt.

Did Cele AJ's judgment decide that Hendor was liable?

[83] Cele AJ's judgment did not anywhere make a finding that Hendor was liable to pay the second and further applicants' wages for the second period. This is not surprising because whether or not Hendor was liable for the payment of those wages was not an issue before Cele AJ. Cele AJ, therefore, could not have made any finding on that issue. From the fact that Cele AJ did not make any finding that Hendor was liable for the payment of the wages in issue, it would follow that he could not, therefore, have made an order that Hendor pay the second and further applicants their wages for the second period. It would have been a gross irregularity for the Labour Court to have ordered Hendor to pay the second and further applicants' wages for that period without having first determined whether Hendor was liable for such payment. It had no jurisdiction to decide a dispute that had not even arisen. Therefore, to read Cele AJ's order as being an order in terms of which Hendor was required to pay the wages in issue would be to read Cele AJ's order as meaning that the Labour Court made an order it had no power to make. That is not something that one does lightly. Furthermore, how could Cele AJ have made an order that Hendor pay the second and further applicants wages that were for a period in the future when he did not even know which of the second and further applicants would be able to report for duty or tender their services and which ones would not be able to? Also, how could Cele AJ have ordered Hendor to pay wages which were yet to fall due? In this regard I point out that the first judgment accepts that the weekly wages or remuneration for the

period 16 April 2007 to 28 September 2009 only became due at the end of each week during that period. Therefore, those wages were not due when Cele AJ granted the order that he granted on 16 April 2007. A court cannot make an order for the payment of wages that are not due yet.

The meaning and effect of paragraph (a) of Cele AJ's order

[84] It is fundamental to understand what paragraphs (a) and (b) of Cele AJ's order meant or what obligations they placed upon Hendor. Ascertaining the meaning of each one of these orders will reveal whether anyone of them placed an obligation upon Hendor to pay the second and further applicants remuneration for any period after 16 April 2007. If none of the two orders placed this obligation on Hendor, then whatever debt Hendor may have later incurred towards the second and further applicants by way of remuneration for any period after 16 April 2007 cannot, in my view, constitute a judgment debt.

[85] Determining what obligations a court order placed upon the person to whom it was directed is a matter of construction. We must, therefore, construe paragraphs (a) and (b) of Cele AJ's order. In *Hyundai* this Court held that ". . . it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible".[97] I would extend this duty of a judicial officer or a court to a situation where a judicial officer or a court has to interpret an order of court. In my view, when a court has to ascertain the meaning of a court order, it should give the court order a meaning that is in conformity with the Constitution than one that is inconsistent with the Constitution if it is reasonably possible to do so or if that interpretation is not unduly strained.

[86] What is the meaning of the order by Cele AJ that Hendor reinstate the second and further applicants "in the same positions or not less favourable positions as they

[97] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai)* at para 24.

had at the time of their dismissal"? This hinges on the meaning of the word "reinstate". More than 30 years ago the then Appellate Division of the Supreme Court (now the Supreme Court of Appeal) had to consider the meaning of the word "reinstate" in section 43 of the Labour Relations Act[98] (1956 LRA) in *Consolidated Frame Cotton.*[99] After referring to *Hodge,*[100] *William Division,*[101] *Jacksons*[102] and *Bramdaw,*[103] the Court said:

> "It was said in those cases that the natural and ordinary meaning of 'reinstate', as applied to a person who has been dismissed, is to put him back into the same job or position which he occupied before the dismissal on the same terms and conditions."[104]

[87] In *Equity Aviation*[105] this Court, having taken note of the above meaning of "reinstate", said through Nkabinde J:

> "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 . . . . 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."[106]

Therefore, paragraph (a) of Cele AJ's order meant that Hendor had to put the second and further applicants back into the same positions which they occupied at the time of

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[98] 28 of 1956, as amended.

[99] *Consolidated Frame Cotton Corporation v President of the Industrial Court* [1986] ZASCA 65; 1986 (3) SA 786 (A) (*Consolidated Frame Cotton*).

[100] *Hodge v Ultra Electric Ltd* 1943 KB 462 at 465 and 466.

[101] *William Division Ltd v Patterson* 1943 SC 78 at 85, 92 and 95.

[102] *Jacksons v Fisher's Foils Ltd* [1944] 1 All ER 421 (KB).

[103] *Bramdaw v Union Government* 1931 NPD 57 at 78.

[104] *Consolidated Frame Cotton* above n 99 at 786B-D.

[105] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) (*Equity Aviation*).

[106] Id at para 36.

their dismissal or in positions not less favourable to them than those that they occupied at the time of their dismissal on the same terms and conditions of employment they enjoyed at the time of dismissal.

[88] If Hendor had put the second and further applicants back into their former positions on the same terms and conditions of employment on 17 April 2007, it would have fully complied with paragraph (a) of Cele AJ's order without having paid them any remuneration whatsoever. If I am correct that this is what paragraph (a) of Cele AJ's order meant, then it cannot be said that any debt in respect of the payment of remuneration that could have been owed by Hendor to the second and further applicants related to any obligation placed on Hendor by paragraph (a) of that order. I say this because paragraph (a) of Cele AJ's order could not have had one meaning on 16 or 17 April 2007 – which did not entail that Hendor should pay the second and further applicants any money – and another meaning from 15 September 2012 onwards – which entailed that Hendor had to pay the second and further applicants money. The meaning of paragraph (a) of the order could not change without the order having been amended.

[89] If Hendor did not put the second and further applicants back into the positions contemplated in paragraph (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 paragraph (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, paragraph (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.

The meaning of paragraph (b) of Cele AJ's order

[90] Paragraph (b) of Cele AJ's order meant that Hendor should pay the second and further applicants their remuneration for the period 1 January 2007 to 15 April 2007 (i.e. the first period). There is no dispute that this is what paragraph (b) of Cele AJ's order meant. This Court accepted in *Equity Aviation* that, when an order of reinstatement operates with retrospective effect from a date earlier than the date when the reinstatement order was granted, the retrospective part of the order means that the employer must pay backpay to the employee for the period between such earlier date and the date of the order of reinstatement.[107] Therefore, if, on 17 April 2007, Hendor had paid the second and further applicants their remuneration in respect of the first period, it would have fully complied with paragraph (b) of Cele AJ's order. It would not have continued to owe any remuneration to the second and further applicants under paragraph (b) of Cele AJ's order. Paragraph (b) did not relate to any remuneration for any period after 16 April 2007.

Different types of reinstatement orders

[91] The proposition that the second and further applicants' claim for remuneration for the second period is a judgment debt appears to be based upon the notion that paragraph (a) of Cele AJ's order was a prospective reinstatement order. Paragraph (a) of Cele AJ's order was not a prospective reinstatement order. It is, therefore, necessary to explain the different types of reinstatement orders.

[92] Under the 1956 LRA we had three types of reinstatement orders. The one was an ordinary reinstatement order. The Industrial Court had power to make this type of reinstatement order under section 46(9)(c) of the 1956 LRA. Then there was a retrospective order of reinstatement. The Industrial Court had power to grant this type of reinstatement order together with an ordinary reinstatement order under section 46(9)(c) of the 1956 LRA. The Industrial Court had power to grant this type of reinstatement order together with an ordinary reinstatement order which the

[107] Id at paras 41 and 42.

Industrial Court had power to grant under section 43 of the 1956 LRA. Under section 43 the Industrial Court could grant an order of reinstatement that was both retrospective and prospective but it would not grant an ordinary reinstatement under this section. Under section 46(9)(c) it could grant an order of ordinary reinstatement together with an order of retrospective reinstatement but not prospective reinstatement.

[93] In my view the difference between an ordinary reinstatement order and a prospective reinstatement order under sections 46(9)(c) and 43 of the 1956 LRA, respectively, was this: a prospective reinstatement order did not only order the employer to in effect take the employee back into his or her old position on the same terms and conditions (i.e. the meaning of "reinstatement"), but it in effect also required the employer to keep the employee in its employ or to keep the reinstated employee in its employ for a certain specified period in the future, e.g. 90 or 30 days. An ordinary reinstatement order does not require the employer to keep the employee in its employ for any period in the future.

[94] In terms of an ordinary reinstatement order what happens to the employee after the employer has taken him or her back into his or her old position on the same terms and conditions as before is governed by the contract of employment and relevant legislation. Where an employer has taken an employee back and given him his old position on the same terms and conditions – which means the employer has complied with the order of reinstatement – and the employer dismisses the employee two weeks or three weeks after reinstatement, the employer is not in breach of the ordinary reinstatement order previously granted in favour of the employee. The employee's remedy lies in the LRA and the contract of employment and not in the enforcement or execution of the reinstatement order.

[95] Under section 43 of the 1956 LRA, where a prospective reinstatement order had been granted in favour of an employee, the employer was obliged to keep the employee in its employ for the life of that prospective reinstatement order. In my

view, if the employer had reason to terminate the contract of employment for a new reason acceptable in law, it was obliged to approach the Industrial Court to seek a withdrawal or variation of the prospective reinstatement order. If an employer, without any reason whatsoever, terminated the contract of employment of the employee during the life of a prospective reinstatement order, its conduct could constitute contempt of court whereas contempt of court would not arise in the case of an employee who got dismissed after the employer had complied with an ordinary reinstatement order in so far as there was a new reason for dismissal. The new dismissal would simply be in breach of the LRA – not of a court order – and, may be also in breach of the contract of employment.

[96] Provisions that would have ensured that the Labour Court or another tribunal could grant the equivalent of a section 43 order and, therefore, a prospective reinstatement order, were not retained in the current LRA. The result is that the current LRA contemplates only an ordinary reinstatement order which may be granted with or without retrospective reinstatement. The reinstatement order that the Labour Court and arbitrators have power to grant under the current LRA is the type of reinstatement order that the Industrial Court had power to grant under section 46(9)(c) of the 1956 LRA. If the drafters of the LRA had intended to give the Labour Court and other tribunals that deal with unfair dismissal disputes under the LRA the power to grant a prospective order of reinstatement just like the power that the Industrial Court had under section 43 of the 1956 LRA, that power would probably have been included in section 193 of the LRA but it was not included. Therefore, in my view, under the current LRA there is no provision for a prospective reinstatement order and paragraph (a) of Cele AJ's order is not a prospective reinstatement order.

[97] Another point that supports the proposition that paragraph (a) of Cele AJ's order is not a prospective reinstatement order is this. Outside of the LRA, if a court were to make an order that someone be reinstated in a certain position from which he or she had been unlawfully removed, that order would mean both that that person should be put back into the position he or she occupied before his or her removal, and,

that he or she should be paid whatever money or financial benefit he or she would have been entitled to during the intervening period had he or she not been removed from the position. This would be the meaning and effect of that reinstatement order without the court having to include a separate order to the effect that the order will operate with retrospective effect as is required in the case of an order of reinstatement under section 193 if the Labour Court or another appropriate tribunal wants to ensure that an employee does not, or employees do not, lose out on backpay or other benefits to which they would have been entitled in the intervening period had they not been dismissed.

[98] An order of ordinary reinstatement under section 193 does not entail payment of backpay. If the court wants such an order to include payment of backpay, it has to make the order operate with retrospective effect. If the drafters of the LRA had intended that the Labour Court should have the power to order prospective reinstatement in the same way that the Industrial Court could do under section 43 of the 1956 LRA, it would have been a simple thing to include appropriate provisions in section 193. They did not. Therefore, under the LRA there is no provision for prospective reinstatement such as was to be found in section 43 of the 1956 LRA. Accordingly, paragraph (a) of Cele AJ's order was not a prospective order of reinstatement.

Meaning of judgment debt or its features

[99] The next issue that arises is: what is a judgment debt and what are its features? In my view, for a debt to constitute a judgment debt, the obligation that constitutes the debt must be based on the terms of a judgment or order of court. If there is no judgment or order of court whose terms either expressly or by necessary implication say that a particular person must pay a certain amount or that obliges the debtor to pay or to do something, there can be no judgment debt.

[100] In *Kilroe-Daley*[108] the Appellate Division of the Supreme Court considered the meaning of the term "judgment debt" within the context of section 11(a)(ii) of the Prescription Act, 1943 the predecessor to the current Prescription Act. There, Galgut AJA, writing for a unanimous court, said:

> "Section 11(a)(ii) merely provides that the 'period of prescription of debts' shall be 'thirty years in respect of any judgment debt'.
>
> Having regard to the 1943 provisions it must be accepted that the words 'judgment debt' do not mean only a money debt. They would include judgments, eg, for the delivery of property or for specific performance. This also is the view of the learned authors (De Wet and Yeats) of *Kontraktereg en Handelsreg* 4th ed at 261 where in a footnote they say:
>
> > 'Artikel 11(a)(ii). Ook hierdie bepaling bring niks nuuts nie. 'n Vonnisskuld hoef natuurlik nie 'n geldskuld te wees nie.'
>
> That means that *judgment debt* in s 11(a)(ii) refers, in the case of *money,* to the *amount in respect of which execution can be levied by the judgment creditor*; that in the case of *any other debt steps can be taken by the judgment creditor* to *exact performance of the debt, ie delivery of the property or performance of the obligation.* A *further feature of a judgment debt* is that the *judgment* is *appealable.*"[109]

[101] Galgut AJA went on to say:

> "A judgment debt is the amount or subject-matter of the award in the judgment. Execution can be levied to recover the judgment debt. As will be seen later it cannot be suggested that the words in s 408, (the Master's) 'confirmation shall have the effect of a final judgment', enable a creditor whose claim has been proved and accepted, to levy execution for the amount of his proved claim or even for the dividend awarded to him in the confirmed account. In the present case the Bank could not have proceeded to execution for payment of the sum of R210 299 (less of course the dividend) nor could it so proceed in the future. I have not overlooked the fact that, if in terms of an account a creditor is liable to contribute and fails to pay the amount of his liability, the liquidator is empowered to issue a writ of execution. This

[108] *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A).

[109] Id at 624C-E.

> is only so because s 118 (1) of the Insolvency Act 24 of 1936 specially provides that this can be done. (It will be remembered that s 339 of the Companies Act provides that, in a winding up of a company unable to pay its debts, the provisions of the Insolvency Act shall apply *mutatis mutandis*.) The very fact that there is such a provision indicates that without it execution could not have been levied."[110]

[102] I would highlight the following features of a judgment debt as gathered from the *Kilroe-Daley* decision:

(a) in the case of money, the term "judgment debt" refers to the amount in respect of which execution may be levied by the judgment creditor;

(b) in the case of any other debts, the term "judgment debt" refers to debt in respect of which steps can be taken by the judgment creditor to exact performance of the obligation;

(c) a further feature of a judgment debt is that the judgment is appealable; and

(d) a judgment debt is the amount or subject-matter of the award in a judgment.

On the case argued by the applicants and advanced by the first judgment, the present case concerns a judgment debt that involves money. Therefore, on the applicants' case, the present case falls under paragraph (a) above.

[103] To the extent that execution may be said not to be confined to an order in respect of which a writ may be issued and to the extent that execution may be said to include contempt of court proceedings in respect of an order that requires someone to perform a certain act, then the meaning of paragraph (a) of Cele AJ's order becomes important. We already know that in this case the applicants have accepted the decision of the Labour Court that a writ of execution could not validly be issued in respect of paragraph (a) of Cele AJ's order because paragraph (a) is not an order sounding in money. The applicants must be taken to have accepted that decision of

[110] Id at 626C.

the Labour Court because they did not challenge it on appeal. Indeed, they accepted the Labour Court's "advice" that they should institute an application for a declaratory order and specify the grounds of liability and the amounts for which Hendor was liable. So, the order relied upon by the applicants to found the proposition that their claim for wages for the second period is a judgment debt could not be executed by way of a writ.

[104] The next question regarding execution is: could paragraph (a) of Cele AJ's order be executed by way of contempt of court proceedings after 29 September 2009? The significance of the date of 29 September 2009 in this question lies in the fact that that day was the day on which Hendor put the second and further applicants into the positions they had occupied in its employ before they were dismissed and did so on the same terms and conditions of employment as those they had enjoyed before their dismissal. Whether or not the applicants could, after that date, execute paragraph (a) of Cele AJ's order by way of contempt of court proceedings depends upon whether what Hendor did on 29 September 2009 as described in the preceding sentence constituted reinstating the second and further applicants.

[105] If what Hendor did on 29 September 2009 constituted the reinstatement of the second and further applicants, then the applicants could not execute paragraph (a) of Cele AJ's order because it would mean that Hendor had already complied with paragraph (a) of Cele AJ's order. If what Hendor did on 29 September 2009 did not constitute reinstating the second and further applicants, the next question would be whether paragraph (a) of Cele AJ's order meant that Hendor had to pay the second and further applicants their wages for the second period. If paragraph (a) of that order did not mean that, then the applicants could not bring contempt of court proceedings against Hendor for failing to comply with paragraph (a) by way of paying the second and further applicants their wages for the period in question.

[106] If paragraph (a) meant that Hendor had to pay the second and further applicants' wages for the period in question, then the applicants would have been able

to bring contempt of court proceedings against Hendor. However, the fact of the matter is that this Court has already authoritatively pronounced that an order that an employer reinstate an employee means that the employer must put that employee back in the position she or he had occupied before dismissal and on the same terms and conditions of employment as those she or he enjoyed before dismissal. Therefore, the suggestion implied in the approach of the first judgment that paragraph (a) of Cele AJ's order meant that Hendor had to pay the second and further applicants wages for the second period goes against the meaning of the word "reinstate" as given to that word by this Court in *Equity Aviation*. So, the requirement in *Kilroe-Daley* that, in the case of money, the term "judgment debt" refers "to the amount in respect of which execution may be levied by the judgment creditor" is absent in the present case as the second and further applicants' claim or debt could neither be executed by way of a writ nor by way of contempt of court proceedings.

[107] An important feature of a judgment debt, according to *Kilroe-Daley*, is that the judgment relating to the amount in issue must be appealable.[111] In this case let us say we take the second applicant. Let us further say that Hendor does not believe that the second applicant is entitled to be paid remuneration for the 12 months preceding the Supreme Court of Appeal's order dismissing Hendor's application for leave to appeal. To which court would Hendor be able to appeal the issue of the quantum of remuneration payable to the second applicant in respect of that period? The appeal to the Labour Appeal Court and the application for leave to appeal to the Supreme Court of Appeal that Hendor pursued could not have dealt with such quantum because they related to whether Cele AJ's order was correct and the remuneration for that period had not arisen as yet. The requirement that the judgment must be appealable, which, in my view, includes an appeal in respect of the amount, is absent. Therefore, there is no judgment debt.

[108] As I see it, the question whether or not such debt as Hendor may owe the workers by way of remuneration for the period 17 April 2007 to 28 September 2009 is

[111] See *Kilroe-Daley* above n 108.

a judgment debt requires us to establish whether there is a judgment or order of court whose terms include that Hendor should pay the workers remuneration for the period 17 April 2007 to 28 September 2009. If there is a judgment or order that includes such terms, then we can say that those claims are the subject of a judgment debt. If there is no judgment or order that includes such terms, the claims are not the subject of a judgment debt. In this case nobody has pointed out what judgment or order includes such terms. That is not surprising because there is no such judgment or order. Cele AJ's judgment or order cannot be said to include such terms. The Supreme Court of Appeal's order dismissing Hendor's application for leave to appeal also does not contain any such terms.

[109] If one says Hendor is obliged to pay the workers remuneration for the period 17 April 2007 to 15 September 2009 because of what the effect is of noting an appeal, then the obligation to pay the remuneration is not placed on Hendor by Cele AJ's order but it is placed upon Hendor by its conduct in noting an appeal and, thus, preventing the workers from working. That does not mean that those claims are the subject of a judgment debt. There would still be no judgment or order which includes terms that Hendor must pay remuneration for the period in question. It would simply mean that Hendor is contractually obliged to pay the remuneration on normal principles of contract since it prevented the workers from performing their contractual obligations.

Coca Cola

[110] Earlier on I said that in holding that the second and further applicants' claim is a contractual claim, the Labour Appeal Court was following its decision in *Coca Cola*. It is now appropriate to say more about that case. In that case a commissioner of the Commission for Conciliation Mediation and Arbitration (CCMA) found that the dismissal of the employee had been procedurally fair but substantively unfair. On 5 August 2004 he made a number of orders in an arbitration award. One of those orders was an order that the employer "reinstate [the] applicant retrospectively

without any loss of benefits to his former position and on terms that are no less favourable than prior to the dismissal".

[111] The employer launched a review application to have the arbitration award reviewed and set aside. That review application failed as did subsequent appeals or attempts to appeal. The employee was eventually reinstated on 2 March 2009. The main issue before the Labour Appeal Court was whether the reinstatement order made by the commissioner "required the payment for the full period up to and including the date of compliance" with the order. In a judgment by Musi JA[112] the Court put the issues before it thus:

> "The issues which we are called upon to decide are, firstly, whether an award of reinstatement automatically entitles an employee in whose favour such award was made to amounts post the date of the award until the implementation date of the award or whether the claim in respect of the amounts subsequent to the date of the award should be claimed separately and secondly, whether such amounts can be claimed by way of issuing a writ of execution accompanied by an affidavit setting out the amount of the claim."[113]

The first part of this passage reveals that the first issue that the Labour Appeal Court was called upon to decide was in principle, similar to the question that we are called upon to decide in this matter.

[112] In *Coca Cola* the Labour Appeal Court articulated the first issue for determination as—

> "whether an [arbitration] award of reinstatement automatically entitles an employee in whose favour such award was made to amounts post the date of the award until the implementation date [of the award] or whether the claim in respect of the amounts subsequent to the date of the award should be claimed separately. . . ."[114]

[112] With Murphy and Kathree-Setiloane AJJA concurring.

[113] *Coca Cola* above n 95 at para 14.

[114] Id.

In the present case the first judgment appears to take the view that, once the Labour Court had made the order of reinstatement reflected in paragraph (a) of Cele AJ's order and Hendor had failed to reinstate the second and further applicants because it was pursuing appeals against the order, the second and further applicants automatically became entitled to payment of the wages for the entire period without there having had to be a process and a forum where the dispute between the parties about liability or quantum could be ventilated if there was a dispute.

[113] After referring to the meaning of the word "reinstate" as given by this Court in *Equity Aviation*, the Labour Appeal Court said in *Coca Cola*:

> "The effect of a reinstatement order, therefore, is to revive the contract of employment which was terminated by a dismissal."[115]

Later, the Court added:

> "The reinstatement order – as stated above – only serves to revive the contract of employment. The rights and obligations of the parties would therefore, as in the beginning, again be governed by the contract of employment."[116]

[114] The Labour Appeal Court also held:

> "Therefore, if the employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders his/her labour he/she does so in terms of the employment contract. She/he [is] therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one, wherein the employee would have to set out sufficient facts to justify the right or entitlement to judicial redress."[117]

[115] Id at para 16.

[116] Id at para 22.

[117] Id at para 24.

The Labour Appeal Court went on to say:

> "When there is a delay in the implementation of the reinstatement award and the employer refuses to pay an employee money that may be due between the period of the award and the implementation thereof, the dispute between them has not been judicially resolved. *It is only after a contractual claim in the civil courts or under section 77 of the Basic Conditions of Employment Act has been instituted and pronounced upon that it can be said that the employer is a judgment debtor against whom a writ may be issued*."[118]

Jaguar Shoes

[115] The Labour Appeal Court may not have been aware of an important decision handed down by the Natal Provincial Division of the then Supreme Court more than 30 years ago in an issue similar to the one it had to deal with in *Coca Cola* and similar to the issue we have to deal with in this matter. Nevertheless, there is much in common in its decision and reasoning in *Coca Cola* and the decision and reasoning of the Natal Provincial Division in *Jaguar Shoes*.[119]

[116] *Jaguar Shoes* supports the proposition that an employee's claim for the payment of wages relating to the period after the grant of a reinstatement order is a contractual claim. *Jaguar Shoes* was decided under the 1956 LRA. Three of the individual applicants in *Jaguar Shoes* had been dismissed on 24 September 1984 while another had been dismissed on 25 September 1984. They brought an application in the Industrial Court for an interim order of reinstatement in terms of section 43 of the 1956 LRA. On 17 December 1984 the Industrial Court made an order in terms of which Jaguar Shoes was "required . . . to reinstate" the individual applicants. I pause here to draw attention to the fact that in essence paragraph (a) of Cele AJ's order also effectively required Hendor to "reinstate" the second and further applicants. Three of the individual applicants were reinstated retrospectively to

[118] Id at para 28.

[119] *National Union of Textile Workers & others v Jaguar Shoes (Pty) Ltd* 1987(1) SA 39 (N) (*Jaguar Shoes*), a judgment of Booysen J in which Kriek J concurred.

24 September 1984 and one of them from 25 September 1984. The order of reinstatement was both retrospective and prospective. It was also prospective in that, in addition to being retrospective as indicated, it also endured up to 23 December 1984. It did not endure beyond this latter date. For it to endure beyond that date, it would have had to be extended by the Industrial Court beyond that date in terms of section 43(6) of the 1956 LRA. That was not done.

[117] A dispute arose between Jaguar Shoes and the applicants in that case about the meaning and effect of a reinstatement order following upon termination of employment. The individual applicants in that case contended that, following upon the grant of the reinstatement order, Jaguar Shoes became obliged to pay them wages for the period September 1984 to 23 December 1984. Jaguar Shoes argued that it was not obliged to pay them any wages because they had not performed their duties or tendered their services. In response to this dispute, the National Union of Transport Workers and the individual applicants brought an application in the Industrial Court under section 17(11)(a) of the 1956 LRA for an order *inter alia* "[d]eclaring that, in consequence of the grant of" the order of interim reinstatement by the Industrial Court, the individual applicants had, with effect from their respective dates of dismissal, become "entitled to be paid such wages and be accorded such other benefits as they were entitled to prior to their dismissal on the dates aforesaid".

[118] There are certain common features between *Jaguar Shoes* and the present case. In both cases the employees had been dismissed. In both cases, the courts found the dismissals to have been unfair and the courts made reinstatement orders. In both cases, the employees did not perform their duties during the period for which they claimed wages. In both cases, when there was a dispute on whether the employer was obliged to pay them their wages for the time they had not worked, they brought applications to court for an order declaring that they were entitled to payment of those wages.

[119] The Industrial Court dismissed that application on the basis that it did not have jurisdiction. The matter was taken on appeal to the Natal Provincial Division of the Supreme Court. That Court saw the issue before it in this way:

> "The main question raised by this appeal is what the effects are of a reinstatement order following upon termination of the employment. What are the rights and duties of employer and employee after such an order?"[120]

[120] The Court had this to say about the effect of an order of reinstatement under section 43(4)(b)(i) of the 1956 LRA:

> "In terms of s 43(4)(b)(i), an employer is ordered to reinstate the person in question in his 'employ'."[121]

In the next paragraph, the Court said:

> "Although decreed by statute and ordered by a court, the relationship which the employer is to reinstate is a contractual one; a contract of employment between himself and the employee."[122]

It continued later in the same paragraph:

> "It follows that, where an employee claims payment of wages or, as in this case, a declaration that he is entitled thereto, the employer is entitled to raise the ordinary defences available to him in the law of contract save, of course, that the contract has been lawfully terminated."[123]

[121] What the Court said in the above passage in *Jaguar Shoes* is, quite clearly, that, when an employer has been ordered to reinstate an employee who had been dismissed, a contractual relationship is reinstated. The Court also said that "where an employee

[120] Id at 44B-C.

[121] Id at 44E-F.

[122] Id at 44F-G.

[123] Id at 44G-H.

claims payment of wages or, as in this case, a declaration that he is entitled thereto",[124] which is what the second and further applicants also said in their application for a declaratory order in the Labour Court in the present case, "the employer is entitled to raise the ordinary defences available to him in the law of contract . . .".[125] Of course, the Court would not have said that the employer was entitled to raise the ordinary defences available to him in the law of contract if the employee's claim for the payment of wages in that case was not a contractual claim. The fact that the Court said that the employer is entitled to raise defences that are available in the law of contract means that the Court saw the claim for wages as a contractual claim. That is what I say is the position here as well. One would have thought that the proposition that an employee's claim for payment of wages for the period coming after the grant of an order of reinstatement is a judgment debt would have better prospects where that period is covered by an order of prospective reinstatement as the period 17 to 23 December 1984 was in *Jaguar Shoes*. However, we see that even in that situation the Court in that case held that the claim was a contractual claim. The proposition that the claim for wages for the second period is a judgment debt is even weaker in the present case, where the order of reinstatement involved is an order for ordinary reinstatement and not prospective reinstatement.

[122] In *Jaguar Shoes* the Court went on to say that the defence of *exceptio non adimpleti contractus* would also be available to such an employer. This shows how big the difference is between the claim for wages falling under the pre-judgment period and the claim falling under the post-judgment period. In relation to the second and further applicants' claim for wages for the pre-judgment period, Hendor would not be entitled to raise the defence of *exceptio non adimpleti contractus* because payment was ordered by the Court already whereas in relation to the claim for payment of wages for the post-judgment period, Hendor would be entitled to raise that defence. The first judgment says that there is no distinction between the two periods.

[124] Id.

[125] Id at 44H.

[123] The first judgment concludes that there is no difference between the debt or claim for the arrear wages for the first period and the claim for arrear wages for the second period and that they all constitute a judgment debt. There is a distinction between the respective claims or debts for the arrear wages for the two periods. In respect of the arrear wages for the first period, there is an order of court for the payment to the second and further applicants by Hendor of the arrear wages. However, no court has made any order against Hendor to pay arrear wages to the second and further applicants in respect of the second period. That is why one can speak of a judgment debt in respect of the first period but cannot speak of a judgment debt in respect of the second period.

What would have happened if Hendor had not appealed?

[124] I have said that as at 16 or 17 April 2007 neither paragraph (a) nor (b) of Cele AJ's order can be said to have required Hendor to pay the second and further applicants any remuneration for any period between 17 April 2007 and 28 September 2009. Given this position, the most natural question to ask is: did this change at some stage? If so, when and what brought about the change? Was it the launching or service by Hendor of any application for leave to appeal to the Labour Appeal Court? Was it the noting of the appeal to the Labour Appeal Court or the Supreme Court of Appeal? Before considering whether any of these appeal steps caused any change, it is necessary to consider what the position would have been if Hendor had not taken any appeal steps.

[125] Under this heading I deal with this matter on the basis of what the position would have been if Hendor had not appealed Cele AJ's order. It is important to remember at this stage that in terms of that order the second and further applicants were reinstated "with effect from 1 January 2007" and "[e]ach applicant [was] to report for duty on 23 April 2007 at 08h00". I have stated what paragraphs (a) and (b) of Cele AJ's order meant on the day they were granted. Let us assume that Cele AJ had not in his order included an order that the second and further applicants report for duty on 23 April 2007 and that Hendor did not pursue appeals to the Labour Appeal

Court and Supreme Court of Appeal. In other words, let us assume that Cele AJ had granted the same order that he granted but less the reporting order and Hendor did not appeal. Let us also assume that the second and further applicants did not report for duty or tender their services for three months after the grant of the order and then one day they reported for duty.

[126] Would the second and further applicants have been entitled, by virtue of paragraph (a) of Cele AJ's order, to payment of any remuneration for the three months after Cele AJ's order? Quite obviously, the answer would be: No. They would not have been entitled to remuneration for that period. Part of the reason for that is that paragraph (a) of Cele AJ's order did not say anything about payment of any remuneration. It did not say that Hendor had to pay the second and further applicants on condition they reported for duty nor did it say that they had to be paid any money whatsoever. It only ordered Hendor to put the second and further applicants into the positions they had occupied at the time of dismissal and on the same terms and conditions of employment. The reason why it said nothing about payment of remuneration for any period after 23 April 2007 is that the statute is based on an appreciation that, what would happen after the reinstatement order had been made would be governed by the contract of employment because, once the employer had reinstated the employee, the contract would be restored.

[127] Another question is: would the second and further applicants have been entitled to payment of their remuneration for the first period if they had not reported for duty or tendered their services for any period, for example three months, after Cele AJ had made his order on 16 April 2007? The answer is: Yes, they would have been entitled. This would be so despite the fact that, for three months after the Labour Court would have granted the order, they would not have reported for duty or tendered their services.

[128] The next obvious question is: why is the answer to the first question in the negative but the one to the second question in the affirmative? The two different

answers to this question reveal that, indeed, there is a big difference between the first period and the second period. The answer to this question is this: in regard to the first period, there is an order of court and, in respect of the second period, there is no order of court. The second and further applicants' entitlement to payment of their remuneration for the first period is not dependent upon or subject to them reporting for duty. The reason why the failure of the second and further applicants to report for duty after Cele AJ's order had been made would disentitle them from payment of remuneration for that period is this. During that period the employment relationship is meant to be governed by the contracts of employment after the restoration thereof upon the reinstatement of the employees and in terms of the basic principles of contract.

[129] If an employee does not report for duty or does not tender his or services, he or she is not entitled to payment of wages. No work, no pay.[126] In respect of the first period, the second and further applicants would be entitled to payment of their arrear wages even if they resigned a day after they had been reinstated whereas they would not be paid anything under paragraph (a) of Cele AJ's order in respect of the second period if they did not want to go back to Hendor's employ and, therefore, rejected reinstatement. All that any one of the second and further applicants needs to show in order to qualify for payment of remuneration in respect of the first period is that he or she was one of the applicants referred to in the order. However, when it comes to the second period, different considerations apply.

[130] In regard to the second period, if Hendor did not pursue appeals, the second and further applicants could only have been entitled to remuneration for any day or any part of the second period if they either worked for that day or for that period or if at least they tendered their services for that day or for that period or if Hendor did not accept their tender or if Hendor prevented them from performing their duties or made it impossible for them to perform their duties. This is a basic principle of the law of contract, including the contract of employment. If one accepts that this principle

[126] *Jaguar Shoes* above n 119.

would have been applicable in regard to the second period if there had been no appeal in this matter, one must also accept that, in such a case, the second and further applicants' entitlement to remuneration for any day or number of days during the second period depended upon performance by them of their contractual obligations or upon the tender of their services.

[131] If the second and further applicants kept their part of the bargain, they would be entitled to remuneration. If they did not keep their part of the bargain, they would not be entitled to remuneration. Therefore, if there was a dispute on whether they were entitled to remuneration for any day or number of days during the second period, that would be a contractual dispute. Their claim would be a contractual claim. The debt that they would be seeking to enforce would be a contractual debt – and not a judgment debt whereas in regard to the first period it was simply a case of seeking to enforce an existing court order. The question that arises then is whether, if this is the position for the period after an order of reinstatement has been made when there is no appeal, the lodgement of an application for leave to appeal or the noting of an appeal or the dismissal of an application for leave to appeal or the dismissal of an appeal by a higher court changes this position.

Did any appeal steps change the position that would have been obtained if Hendor had not pursued appeals?

[132] If one says that, once the employer has taken certain appeal steps, this changes the position and the reinstatement order entitles the workers to payment of their remuneration for the period when the employer is pursuing its appeal, then one would have to say that it is the conduct of the employer in taking certain appellate steps to pursue an appeal that entitles the workers to payment of their remuneration for the period after the reinstatement order to the date of their actual reinstatement. That has to be so because the first judgment does not say that the second and further applicants would have been entitled to payment of their remuneration for the period in question if there was no appeal by Hendor and the second and further applicants did not report for duty days or weeks or months after the handing down of Cele AJ's judgment. The

launching or service of an application for leave to appeal or the noting of an appeal against a decision of the Labour Court – as is the case with a decision of any court – only has the effect of suspending the operation of the order sought to be appealed against. It does not in any way have the effect of amending the terms of that order.

[133] If the launch or service of an application for leave to appeal or the noting of an appeal does not have the effect of amending the order sought to be appealed against, then the only other "appeal step" that must be considered is the decision of the appellate court dismissing the application for leave to appeal or the appeal. A consideration of that question requires us to consider what an appeal court may or may not do in dealing with an application for leave to appeal or an appeal from a decision of the Labour Court to the Labour Appeal Court or an appeal from a decision of the Labour Appeal Court, previously, to the Supreme Court of Appeal or to this Court. That depends, to a large extent, on what the nature is of that appeal. In the case of an appeal against a decision of the Labour Court to the Labour Appeal Court or from a decision of the Labour Appeal Court, previously, to the Supreme Court of Appeal or to this Court, it will depend upon what type of an appeal is envisaged when the Labour Appeal Court or the Supreme Court of Appeal or this Court decides that appeal.

[134] In *Tikly*[127] it was said that there were three types of appeals. Trollip J said:

> "The word 'appeal' can have different connotations. In so far as is relevant to these proceedings it may mean:
>
> (i) an appeal in the wide sense, that is, *a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information* (*Golden Arrow Bus Services v Central Road Transportation Board,* 1948 (3) SA 918 (AD) at p. 924; *S.A. Broadcasting Corporation v Transvaal Townships Board and Others*; 1953 (4) SA 169 (T) at pp. 175-6; *Goldfields Investment Ltd v Johannesburg City Council*, 1938 T.P.D 551 at p. 554);

[127] *Tikly v Johannes NO* 1963 (2) SA 588 (T).

(ii) an appeal in the ordinary strict sense, that is, *a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong* (e.g. *Commercial Staffs (Cape) v Minister of Labour and Another*, 1946 CPD 632 at pp. 638-641);

(iii) a review, that is, *a limited re-hearing with or without additional evidence or information to determine, not whether or the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly* (e.g. *R v Keeves*, 1926 AD 410 at pp. 416-7; *Shenker v The Master*, 1936 AD 136 at pp. 146-7)."[128]

These three types of appeals have been affirmed in many cases.[129]

[135] From the above, it can be seen that the three types of appeals that may fall under the word "appeal" are an appeal in the wide sense, an appeal in the ordinary strict sense and a review. An appeal in the wide sense involves the appellate body or court having a complete re-hearing and making a fresh determination on the merits with or without additional evidence or information. Another type of appeal is an appeal in the ordinary strict sense. This type of appeal is a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given and in which the only determination is whether the decision was right or wrong. The third type of appeal is a review which is limited to a re-hearing with or without additional evidence or information to determine, not whether or not the decision under appeal was correct but whether the arbiters had exercised their powers and discretion honestly and properly. The questions that arise are: which type of appeal is an appeal from a decision of the Labour Court to the Labour Appeal Court? Which type of appeal was an appeal from the Labour Appeal Court to the Supreme Court of Appeal?

[128] Id at 590G-H.

[129] See, for example, *Kham v Electoral Commission* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC) at para 41; *MM v MN* [2013] ZACC 14; 2013 (4) SA 415 (CC) at para 114; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) at para 135; *Registrar of Pension Funds v Howie NO* [2015] ZASCA 203; [2016] 1 All SA 694 (SCA) at para 6.

[136] An appeal to the Labour Appeal Court against a decision of the Labour Court and an appeal from a decision of the Labour Appeal Court to this Court or, previously to the Supreme Court of Appeal, is not an appeal in the sense of a review. It is also not an appeal in the wide sense in which an appellate court determines the merits of the dispute afresh with or without additional information. An appeal to the Labour Appeal Court against a decision of the Labour Court is an appeal in the ordinary strict sense in which the appellate court is, generally, limited to the evidence on which the decision appealed against was based and in which the only question is whether the decision of the Labour Court was right or wrong.

[137] That an appeal to the Labour Appeal Court against a decision of the Labour Court is an appeal in the ordinary strict sense – the second category of appeal mentioned in *Tikly's* case – is supported by this Court's decision in *Equity Aviation*. In that case a commissioner of the CCMA had issued an arbitration award. An application was brought in the Labour Court to have the arbitration award reviewed and set aside. The Labour Court had made its decision in the review application. There was then an appeal to the Labour Appeal Court against the decision of the Labour Court. From the Labour Appeal Court there was an application to this Court for leave to appeal against the decision of the Labour Appeal Court.

[138] In *Equity Aviation,* this Court said that "[t]he Labour Appeal Court was required to determine whether the decision of the Labour Court in reviewing the award was correct. The appeal was thus limited to the evidence on which the decision of the Labour Court was granted".[130] A footnote linked to this sentence then reads:

> "This view is consistent with the remarks by the minority judgment in *Kroukam* at para 113 that generally, on appeal, the Labour Appeal Court makes such a decision as it thinks the Labour Court should have made on the evidence before it at the time it made its decision."[131]

[130] See *Equity Aviation* above n 105 at para 48.

[131] Id at footnote 63.

Referring to the Labour Appeal Court, this Court went on to say in *Equity Aviation*:

> "That Court decides appeals on the evidence placed before the Labour Court and may substitute the decision of the Labour Court."[132]

[139] In *Billiton Aluminium*[133] this Court had the following to say:

> "In general a court of appeal when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards. This is not an inflexible rule and after-the-fact evidence may be admitted in cases affecting children and in 'exceptional cases that cry out for the reception of post-judgment facts'."[134]

[140] In my view the above statements by this Court in *Equity Aviation* and *Billiton Aluminium* support the proposition that an appeal in the Labour Appeal Court against a decision of the Labour Court is an appeal in the ordinary strict sense as reflected in the second category of appeals in *Tikly*. The same is true of an appeal from a decision of any court to the Supreme Court of Appeal and to this Court.

[141] In *Billiton Aluminium* this Court referred to the provisions of sections 167(1) and 174 of the LRA which set out the powers of the Labour Appeal Court on appeal and the circumstances under which that court may receive new evidence. Froneman J, who wrote for a unanimous Court, said:

> "The provisions of section 174 of the LRA are not unique or exceptional in our law. Similar provisions exist in relation to ordinary civil appeals, appeals to this Court and applications for leave to appeal in criminal cases."[135]

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[132] Id at para 50.

[133] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* [2010] ZACC 3; (2010) 31 *ILJ* 273 (CC); 2010 (5) BCLR 422 (CC) (*Billiton Aluminium*).

[134] Id at para 35.

[135] Id at para 34.

[142] In the next paragraph the Court approached the matter on the basis that "[i]n general a court of appeal, when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards".[136] Accordingly, the decision of the Supreme Court of Appeal of 15 September 2009 dismissing Hendor's application for leave to appeal meant nothing more than simply that the orders of the Labour Court and of the Labour Appeal Court were correct. It, therefore, did not, and could not, have amended the terms of the order of Cele AJ of 16 April 2007. None of the appeal steps taken could conceivably alter or amend the terms and conditions of the order of the court of first instance.

[143] If the decision of the Supreme Court of Appeal did not and could not have altered or amended the terms of the order of the Labour Court, then we are forced to go back to paragraph (a) of Cele AJ's order and ask whether, after the order of the Supreme Court of Appeal, paragraph (a) still meant the same thing as it did when it was granted or which it would have meant if there had been no appeal. The answer is that paragraph (a) of Cele AJ's order was not amended or altered. Therefore, after the decision of the Supreme Court of Appeal, paragraph (a) still meant that Hendor should put the second and further applicants back into the positions they had occupied in its employ before dismissal and on the same terms and conditions or, as Cele AJ's order put it, in "not less favourable positions".

[144] The position is that, after the dismissal of Hendor's application for leave to appeal by the Supreme Court of Appeal on 15 September 2009, the meaning of paragraphs (a) and (b) of Cele AJ's order was still the same as before. It was still that Hendor had to put the second and further applicants in their former positions in its employ on the same terms and conditions of employment. It did not require Hendor to pay any money to the second and further applicants. Paragraph (b) of the order still meant that Hendor should pay the second and further applicants their wages for the

[136] Id at para 35.

first period. Paragraph (b) was the only part of Cele AJ's order that entailed that Hendor would pay money. It entailed payment of money to the second and further applicants in respect of the first period and not the second period.

Avoiding a meaning inconsistent with the Constitution

[145] As already indicated, an order of court should not be given a meaning that is inconsistent with the Constitution if there is one that is consistent with the Constitution that may be given without straining the language of the order. The proposition that paragraph (a) of Cele AJ's order required Hendor to pay the second and further applicants remuneration for the second period attaches to Cele AJ's order a meaning that is inconsistent with the Constitution. This is so because the meaning it attaches to the order is that Hendor is required to pay the second and further applicants remuneration in respect of the second period without having been given an opportunity to be heard in regard to the period after Cele AJ's order. No court could ever do that.

[146] If, as the first judgment says, paragraph (a) of Cele AJ's order meant that Hendor had to pay the second and further applicants for the second period, then the Labour Court made that order without giving Hendor an opportunity to be heard on that issue and that conduct by the Labour Court would have been an infringement of Hendor's right "to have a dispute that can be resolved by the application of law decided in a fair public hearing before a Court" entrenched in section 34 of the Constitution.[137] Indeed, in *Mohamed NO* Ackermann J said that the observance of the *audi alteram partem* rule is "one of the main pillars of the section 34 fair hearing right".[138]

[137] Section 34 of the Constitution provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[138] *National Director of Public Prosecutions v Mohamed NO* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) (*Mohamed NO*) at para 36.

[147] The Labour Court could not have ordered Hendor to pay the second and further applicants remuneration for the second period because a dispute about such payment was not part of the dispute referred to the conciliation process and, therefore, to it. It was a new dispute or cause of action. The dispute was not part of the trial before Cele AJ since the remuneration we are talking about in respect of the second period was remuneration for a period in the future. At the time of the trial and oral argument before Cele AJ, the question of what would happen after Cele AJ had handed down his judgment was not before the Court and could not have been before the Court. Therefore, the Labour Court could not have dealt with remuneration for that time.

[148] The first judgment does not take issue with the proposition that, before Cele AJ could make the order that he made, Hendor was not, and, could not have been, afforded an opportunity to be heard on whether an order should be made that it pay the second and further applicants any wages for the period 23 April 2007 to 28 September 2009. This is remarkable because, if Cele AJ's order was to the effect that Hendor was required to pay the second and further applicants' wages for the period in question, which, according to the first judgment, is the effect of paragraph (a) of Cele AJ's order, then before the court could make such an order, it would have had to first determine whether Hendor was liable for those wages. It could not make such an order without having heard Hendor at that stage on whether it was liable.

[149] Not only does the first judgment not take issue with the proposition that Cele AJ could not have afforded, or, did not afford, Hendor an opportunity to be heard before he made the order that he made but it actually says that Hendor would have been heard by the Labour Court in other proceedings that it was not even contemplated at that stage would be instituted. This appears to be an acceptance by the first judgment that, in so far as Cele AJ's order can be said to have required Hendor to pay the second and further applicants their wages for the second period, Cele AJ would have made that order without having heard Hendor in regard to

whether it was liable to pay those wages. That is why the first judgment says that Hendor would have been heard in other proceedings.

[150] The approach adopted by the first judgment in this regard is one that contemplates that a court would first make an order adverse to a litigant without hearing that litigant and then have the litigant heard afterwards in other proceedings. The approach puts the proverbial cart before the horse. As a general rule, our legal system works on the basis that the court will first hear all parties before making an order and not on the basis that the court makes an adverse order against a party first and then that party gets heard later. I am of the view that the horse must be placed before the cart. How could a party against whom an order to pay has already been made be heard after that order had been made instead of being heard before that order was made? The approach adopted by the first judgment is one that is based upon an infringement of Hendor's right to a fair hearing entrenched in section 34 of the Constitution.

[151] The first judgment further says that Hendor would have been entitled, after 28 September 2009, to refuse to pay to any individual applicant remuneration relating to the period after Cele AJ's order if there was a contractual basis which entitled it to refuse to pay that applicant. This reasoning is difficult to follow because a court only makes an order against a litigant after it has satisfied itself that that litigant has no defence to the claim. It does not make an order against you first and you are then free to refuse to comply with the order on, for example, contractual grounds. Once a court has made an order, the party or person against whom the order has been made is bound by the order and is required to comply with it. Section 165(5) of the Constitution makes this clear: "An order or decision issued by a court binds all persons to whom and organs of states to which it applies". Once a court has made an order against you, the time for putting up a defence against the claim is past.

Certain difficulties if the claim is a judgment debt

[152] The position in the first judgment that paragraph (a) of Cele AJ's order meant that Hendor had to pay the second and further applicants remuneration for the second period gives rise to various difficulties. In this part of the judgment, I refer to a few. Let us say that Mr A, one of the second and further applicants, had been employed as a driver at the time of his dismissal and still had a valid driver's licence at the time Cele AJ granted the order of reinstatement. Further, let us say that, three months after Cele AJ's order, Mr A caused a terrible road accident while driving, was subsequently convicted and, as part of his sentence, his driver's licence was cancelled. The result would have been that from then onwards Mr A could not have lawfully driven a motor vehicle. Imagine also that this was still Mr A's position at the time of the order of the Supreme Court of Appeal on 15 September 2012 and on 28 September 2012.

[153] Let us say that Hendor became aware that, after Cele AJ's order, Mr A became disqualified to drive a motor vehicle. Then, when, in September 2012 and later the second and further applicants demanded that Hendor pay them, including Mr A, their remuneration for the whole second period, Hendor would have been entitled to raise the defence that Mr A would only be entitled to remuneration for the period of three months after Cele AJ's order and would not be entitled to any remuneration for any period thereafter. Hendor could say that Mr A would have worked for it only up to the end of the three months after Cele AJ's order because, thereafter, he would not have been able to continue in Hendor's employ as a driver as he no longer had a valid driver's licence. Therefore, he could not have continued to earn any remuneration from Hendor for the balance of the second period and can, therefore, not be entitled to remuneration for any period during which he would not have been able to perform his job as a driver.

[154] If it is said that there is a judgment debt relating to the second period, that would mean that Hendor has no forum in which to present its defence in regard to Mr A's claim. This would be so because an order would already have been made that Hendor pay the second and further applicants, including Mr A, their remuneration for

the second period without Hendor having been able to defend itself against that claim. Mr A's case is a good example that reveals that the construction of paragraph (a) of Cele AJ's order that the first judgment adopts is inconsistent with the Constitution.

[155] This is so because the interpretation inevitably means that the Labour Court made an order adverse to Hendor without having afforded Hendor the opportunity to lead evidence and to present argument as to why it might not have been liable at all or not liable for part of the period or not liable in respect of certain individual applicants in respect of part of the period. However, if one adopts the approach that Hendor's debt for the remuneration of the second and further applicants is not a judgment debt but a contractual debt, that means this is a new dispute or cause of action. It also means that, if Hendor disputes liability for the payment of the second and further applicants' remuneration or some of them, it will have an opportunity to contest the claim in a competent tribunal or court. Its right to have a dispute that can be decided by the application of law decided in a fair public hearing before a court which is entrenched in section 34 of the Constitution will be observed. That dispute or cause of action must be resolved by the application of law in an appropriate court or tribunal where Hendor and the relevant applicants can put their respective cases before the court or tribunal.

[156] The LRA does not provide for a dispute resolution procedure in regard to a dispute about arrear wages where such a dispute is not part of a dismissal dispute. That means that under the LRA neither the Labour Court nor the CCMA has jurisdiction in respect of such dispute. However, the normal civil courts may deal with such disputes or causes of action. Under section 77(3) of the Basic Conditions of Employment Act[139] (BCEA) the Labour Court may also deal with such claims. Under that provision the Labour Court exercises its civil jurisdiction in respect of matters under the BCEA.

[139] 75 of 1997.

[157] If Mr A had become disqualified from driving a motor vehicle prior to the trial in the Labour Court and Hendor had become aware of this, Hendor would have been able to place that evidence before the Labour Court. Consequently, the Labour Court would have had regard to Hendor's evidence or contentions in regard to Mr A before deciding whether Mr A should get backpay and, if so, for what period. If the Labour Court decided that Mr A should get backpay for the whole of the first period including the period after he would have become disqualified from working for Hendor as a driver, at least that decision would have been made after Hendor had been heard. If it was said that Hendor's debt in regard to the second period is a judgment debt and it includes a debt to Mr A in regard to the whole second period, the order that made such debt a judgment debt would have been made without Hendor having been given an opportunity to present its case in regard to Mr A's disqualification from continuing to work for it as a driver.

[158] Another example would be one where, three months after Cele AJ's order had been handed down, Hendor had a retrenchment exercise in terms of which some of the second and further applicants would have been retrenched on the basis that they had short service periods and did not have special skills. When it is said that Hendor owes the second and further applicants remuneration for the whole of the second period by way of a judgment debt, Hendor would have had no forum in which it could have contended that the particular employees would not have worked for Hendor for the whole of the second period because they would have stopped working for Hendor three months after Cele AJ's order. If the same retrenchment exercise had occurred before the trial in the Labour Court, or, in any event, before the judgment of the Labour Court was handed down, Hendor would have been able to lead evidence on the issue and present arguments before Cele AJ so that whatever order for the payment of backpay Cele AJ made would have been made after Hendor had been heard.

[159] A final example in support of the same principle is one involving retirement. Section 187(2)(a) of the LRA provides that, despite section 187(1)(f) "a dismissal based on age is fair if the employee has reached the normal or agreed retirement age

for persons employed in that capacity". This means that, if an employee has reached either a normal or an agreed retirement age, the employer may dismiss that employee on the basis of age and the dismissal would be fair. If Ms B were one of the second and further applicants and had reached her agreed retirement age before the trial in the Labour Court, Hendor would have been able to lead evidence to this effect and to argue not only that it would not be competent for the Labour Court to order her reinstatement but also that the Labour Court could not order that she be paid any backpay beyond the date when she would have retired. If, however, Ms B reached her agreed retirement age three months after Cele AJ's order and yet it was said that Hendor owed the second and further applicants (including Ms B) remuneration for the whole of the second period by way of a judgment debt, this would mean that such an order would have been made without Hendor having had a forum in which to put up its defence.

[160] If, however, the view taken was that the debt arising from Cele AJ's order was not a judgment debt but a contractual debt and Hendor disputed liability to pay Ms B for any period during which she would have been on retirement and Ms B insisted that she was entitled to be paid backpay for that period, a dispute would have arisen between the two which could be decided by a court of law after hearing both parties. That court would then make an order or give a judgment.

[161] If such an order or judgment was to the effect that Hendor pay Ms B remuneration for either part of the second period or for the whole of the second period, that debt would then be a judgment debt. Before there is such a judgment or order, any debt that Hendor may owe the second and further applicants including Ms B for the period 23 April 2007 to 15 September 2009 cannot be a judgment debt but is a contractual debt.

[162] The only basis upon which it could be said that Hendor owed the second and further applicants remuneration for the second period by way of a judgment debt would be, if an appeal from the Labour Court to the Labour Appeal Court or an appeal

from the Labour Appeal Court to the Supreme Court of Appeal was an appeal in the wide sense or the first category of an appeal mentioned in the *Tikly* case. That is an appeal which is a fresh hearing in which the Supreme Court of Appeal would have given a fresh determination on the merits of the dispute.[140]

[163] If it was an appeal in the wide sense and the Supreme Court of Appeal had issued a fresh determination on the merits of the case on 15 September 2009 in the form of a reinstatement order with retrospective effect from 1 January 2007, that order of reinstatement would have meant that the second and further applicants were entitled to payment of their remuneration for the period 1 January 2007 to 28 September 2009 on the basis of a judgment debt. Not the order granted by Cele AJ on 16 April 2007. However, that would not happen with an appeal in the ordinary strict sense.

[164] An order granted by an appellate court dealing with an appeal in the ordinary strict sense or granted by a court dealing with an appeal in the form of a review operates from the date when the court of first instance made its order or handed down its judgment. It does not operate from the date that the appellate court or review court hands down its judgment. That this is the position is supported by what this Court said in *Equity Aviation*. There this Court said: "The ordinary meaning of the word 'reinstate' means that the reinstatement will not run from a date after the arbitration award".[141] In a case where there has been an arbitration, the arbitral body is in the position of a court of first instance. Reinstatement will therefore run from but not after the date of the order of the court of first instance or from the date of the arbitration award.

[165] The view expressed in the first judgment that, if the Labour Court had dismissed the second and further applicants' claim for reinstatement and, in a subsequent appeal, the Supreme Court of Appeal had upheld the appeal and ordered reinstatement, that order of reinstatement would have meant that Hendor owed the

[140] See *Tikly* above n 127 at 590G-H.

[141] See *Equity Aviation* above n 105 at para 36.

second and further applicants remuneration for the second period on the basis of a judgment debt is mistaken.

[166] The view is based on the proposition that a reinstatement order made by the Supreme Court of Appeal in such a case would operate from the date on which it was issued or handed down by the Supreme Court of Appeal. That is not so when the appeal before an appellate court is an appeal in the ordinary strict sense. That would only happen if the appeal before an appellate court is an appeal in the wide sense. When an appellate court is dealing with an appeal in the ordinary strict sense, its function is, as Trollip J said in *Tikly*, to decide whether the decision of the court of first instance or lower court was right or wrong.[142]

[167] In *Performing Arts Council*[143] the Appellate Division of the Supreme Court, now the Supreme Court of Appeal, said through Goldstone JA:

> "Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the Industrial Court. If at that time it was appropriate it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order."[144]

What did Goldstone JA's statement in this passage that "an employer who appeals from [an order of reinstatement] knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order" relate to? It related to the prejudice that the employer's operations may suffer as a result of the fact that the employer may have to reinstate workers after a long time since the dismissal. It

[142] See *Tikly* above n 127 at 590G-H.

[143] *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union* [1993] ZASCA 201 (A); 1994 (2) SA 204 (A) (*Performing Arts Council*).

[144] Id at 213H-I.

also relates to the fact that, if, ultimately, the employer has to reinstate the workers, it would be contractually liable for the remuneration that the workers would have earned had the employer complied with the reinstatement order and not pursued appeals. These statements by the Appellate Division are also consistent with an appeal from a decision of the old Labour Appeal Court to the Appellate Division having been an appeal in the ordinary strict sense.

[168] In *Performing Arts Council*, the Industrial Court had granted the workers reinstatement. On appeal by the employer to the Appellate Division, that Court took the view that the appropriate relief that should have been granted by the Industrial Court on 16 September 1991 was reinstatement. Goldstone JA said:

> "In my judgment the appropriate relief which should have been granted to the employees by the Industrial Court was, as it correctly held, one of reinstatement."[145]

Later, he said:

> "It is now a little more than three years since the dismissal of the employees. The effective date of their reinstatement is 16 September 1991, viz the date of the determination of the Industrial Court."[146]

These statements, too, are consistent with an appeal from a decision of the Labour Appeal Court to the Supreme Court of Appeal having been an appeal in the ordinary strict sense.

[169] If an appellate court dealing with an appeal in the ordinary strict sense decides that the decision of the lower court was wrong, it sets that decision aside and replaces it with a decision that, in its view, the lower court should have made. The new decision or order is then deemed to have been made by that lower court on the date that the lower court made its decision that has been set aside. The new decision does

[145] Id at 220D-E.

[146] Id at 220H-I.

not operate from the date on which the appellate court handed down its judgment. It operates from the date when the lower court made its decision that will have been set aside.

[170] I am not sure on what date Hendor launched and served its application for leave to appeal to the Labour Appeal Court. That date is significant because that is the date with effect from which Hendor's obligation to reinstate the second and further applicants in terms of paragraph (a) of Cele AJ's order and to pay them backpay for the period 1 January 2007 to 16 April 2007 in terms of paragraph (b) of Cele AJ's order was suspended. However, it appears that that date was after 23 April 2007 when the second and further applicants reported for duty and were turned away. For six days from 16 to 23 April 2007 Hendor had carried the obligation to reinstate the second and further applicants and to pay them the backpay for 1 January 2007 to 16 April 2007. During that period of six days, that obligation was not suspended and was fully effective and operational.

[171] When Hendor launched and served its application for leave to appeal to the Labour Appeal Court, its obligations arising out of Cele AJ's order were suspended. When the Labour Appeal Court dismissed the appeal, the suspension was lifted and Hendor's obligation to reinstate the second and further applicants and to pay them their backpay for 1 January 2007 to 16 April 2007 was revived and became effective and operational again. When Hendor launched and served an application for leave to appeal to the Supreme Court of Appeal, Hendor's obligation to reinstate the second and further applicants was again suspended. When the Supreme Court of Appeal dismissed Hendor's application for leave to appeal on 15 September 2009, the operation of Hendor's obligation to reinstate the second and further applicants and to pay them their backpay for the first period (1 January 2007 to 16 April 2007) was revived. It is important to remember that Hendor's obligation to reinstate the second and further applicants was an obligation to put them back into their former positions in its employ on the same terms and conditions that governed their employment at the time of their dismissal. Hendor's obligations flowing from paragraph (b) of Cele AJ's

order was simply to pay the second and further applicants remuneration for the first period.

[172] Upon Hendor putting the second and further applicants back into the positions they had occupied before they were dismissed on the same terms and conditions of employment as they enjoyed at the time of their dismissal, the contract of employment of each one of the second and further applicants was restored. The contracts of employment were then deemed to have been in operation for the whole time since 16 April 2007 when Cele AJ handed down his judgment. Since Hendor did not accept the second and further applicants' tender of their services on 23 April 2007, Hendor would be contractually liable for the payment of the remuneration of the second and further applicants for the second period (23 April 2007 to 28 September 2009) in so far as each applicant would have worked for the whole period had he or she not been prevented by Hendor from performing his or her duties pending the outcome of the application for leave to appeal.

[173] What I have said in the preceding paragraph is that, when 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 and not on 15 September 2009 when the Supreme Court of Appeal issued its order dismissing Hendor's application for leave to appeal.

[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.

[177] 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. As Nkabinde J said in *Equity Aviation*: "[the reinstatement of the workers] safeguards workers' employment by restoring the employment contract".[147] So, as I have already said, the contracts of employment are restored when the workers get reinstated. In the present case, the second and further applicants were reinstated on

[147] See *Equity Aviation* above n 105 at para 36.

29 September 2009. Therefore, that is also the day on which the contracts of employment of the second and further applicants were restored.

[178] To the extent that the second and further applicants' claims for remuneration for the second period may be said to have been debts as contemplated in Chapter III of the Prescription Act, they could not have been due before the contracts of employment from which they arose were restored. Therefore, prescription could not have started running before the date of the restoration of the contracts. Could the second and further applicants have instituted legal proceedings against Hendor before 28 September 2009 for the payment of their remuneration for the second period? No. They could not have done so because their claims are contractual claims and the contracts on which they are based had not been restored as yet. They could not institute legal proceedings to enforce contracts that were not in place yet as the order of reinstatement in terms of which the second and further applicants were required to be reinstated was suspended during the period when Hendor was pursuing appeals.

[179] Could the second and further applicants have instituted legal proceedings for the payment of their remuneration for the second period between 15 and 28 September 2009? No, they could not have done so because the Supreme Court of Appeal's dismissal of Hendor's application for leave to appeal did not have the effect of restoring the contracts of employment of the second and further applicants. It only had the effect of lifting the suspension of the operation of Cele AJ's order. The result hereof was that Cele AJ's order was operational or effective again. This meant that Hendor's obligation to reinstate the second and further applicants in its employ was revived. It was only upon the reinstatement of the second and further applicants and, therefore, the restoration of their contracts of employment that they could institute the legal proceedings. This, therefore, means that, to the extent that the Prescription Act was applicable to the second and further applicants' claims, prescription only started running from 29 September 2009 and not from 15 September 2009.

[180] The result is 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. I, therefore, hold that the Labour Appeal Court erred in dealing with the matter on the basis that the debts in relation to the period 23 April 2007 to 15 September 2009 became due on 15 September 2009 and had, therefore, prescribed by 19 September 2012 when the applicants instituted the relevant proceedings. It should have dealt with the matter on the basis that they became due on 29 September 2009.

Remedy

[181] What is to be done now? Upon the restoration of the contracts of employment when workers get reinstated, the contracts of employment are deemed to have been in place for the whole period when appeals were being pursued or when applications for leave to appeal were pending. Once it is accepted that the contracts of employment of the second and further applicants are deemed to have been in place throughout the period when Hendor had told the second and further applicants not to report for duty and when Hendor was pursuing its appeals in the Labour Appeal Court and the Supreme Court of Appeal, then another question arises. That is, since we know that the second and further applicants were prevented by Hendor from performing their obligations in terms of their contracts of employment, and, therefore, Hendor cannot complain about them not having performed their duties, what about Hendor's obligations towards the second and further applicants in terms of their contracts of employment in respect of the same period?

[182] To find the answer to this question there are two important things to remember. The one is that a contract of employment is one of those contracts that provide for reciprocal obligations between the parties. The employee provides his or her labour to the employer and, in return, the employer provides wages to the employee. As a general rule the employee must first work before the employer will be obliged to pay him or her wages. The other is that one of the basic principles applicable to such contracts is that, where party A is obliged to perform his or her obligation towards

party B in return for which party B is required to perform his or her obligation to party A, party B will be obliged to perform his or her obligation to party A even though party A did not perform his or her prior obligation to party B if party A tendered to perform his or her obligation but party B did not accept the tender.

[183] The same principle applies if party A was prevented by party B from performing his or her prior obligation. In the context of a contract of employment this principle simply means that employees need not have actually performed their duties in terms of their contracts of employment before the employer will be obliged to pay their wages as long as the employees tendered their services and the employer did not accept the tender or where the employer prevented them from performing their duties.

[184] Subject to certain exceptions, in the present case the second and further applicants will be entitled to payment of their remuneration for the whole of the second period even though they did not work during that time. This is because they tendered their services but Hendor rejected their tender for the period during which it was pursuing its appeal or because Hendor prevented the second and further applicants from performing their duties in terms of their contracts of employment during that time. It must be remembered that the second and further applicants would have performed their duties had Hendor not rejected their tender or pursued its appeal.

[185] One of the exceptions is that Hendor would not be liable for payment of remuneration to an applicant for a period when that applicant would no longer have been in Hendor's employment anyway by reason of, for example, the employee having died by that time. Another exception would be in respect of a period when the employee would no longer have been in Hendor's employment because he or she would have retired by then or would have had his or her employment contract terminated fairly for the operational requirements of Hendor or would no longer have been able to perform his or her duties for one or other reason. The second and further applicants' entitlement to payment of their remuneration is based on their contracts of employment and the above principle and not on a judgment debt because Cele AJ's

judgment did not pronounce on whether or not the second and further applicants were entitled to remuneration for the period that was yet to come as at the time of the handing down of that judgment.

[186] In my view, the application that the applicants instituted in the Labour Court for a declaratory order was essentially an application for an order to resolve the issue of liability between the parties with regard to the remuneration for, in part, the period 23 April 2007 to 28 September 2009 and the amounts. It is not the kind of application which a person would institute if there was already a judgment in that person's favour on liability – hence a judgment debt. After all, there is, as a matter of fact, no existing judgment that has found that Hendor is liable for the payment of each one of the second and further applicants' remuneration for the second period.

[187] In terms of their notice of motion in that application the applicants sought an order:

> "1. Declaring that the respondent is liable to pay the individual applicants amounts set out in Schedule 'A' attached hereto.
> 2. Payment of interest thereon at the rate of 15.5% per annum from 1 January 2007 as set out in Schedule 'B' hereto."

If there was already an order obliging Hendor to pay the applicants their remuneration in respect of the period 23 April 2007 to 28 September 2009, why would the applicants have asked the Labour Court to grant a declaratory order that Hendor "is liable to pay them" that remuneration for that period? The answer is: there would have been no reason because the issue of whether Hendor is liable for the payment of their remuneration for that period would have been determined already.

[188] Furthermore, in the founding affidavit filed in support of the application for a declaratory order, the deponent, Mr Moses Fohlisa, who is the second applicant, articulated the purpose of the application in these terms:

> "The purpose of this application is to seek a declaratory order that the respondent is liable to pay the individual applicants amounts appearing in Schedule 'A' attached to the Notice of Motion with interest in respect of each claim as set out in Schedule 'B' to the Notice of Motion."

Again, I cannot see how else one would have described the purpose of an application for an order that would resolve the issue of liability for the payment of the second and further applicants' remuneration if one would not describe that purpose in the terms in which Mr Fohlisa described the purpose of the second and further applicants' application in the Labour Court.

[189] The averments that Mr Fohlisa made in the founding affidavit are the type of averments a claimant would make in proceedings where the court is asked to resolve the issue of liability and relief. He said that they were applicants in the dismissal matter, they had obtained a judgment handed down by Cele AJ on 16 April 2007 ordering Hendor to reinstate them, they tendered their services on 23 April 2007 but Hendor rejected their tender, that Hendor unsuccessfully appealed against Cele AJ's order and that Hendor ultimately reinstated the second and further applicants.

[190] That is enough to entitle the applicants to an order that Hendor is liable for the remuneration of the second and further applicants for the second period. Hendor wanted the second and further applicants to prove the contracts of employment. However, all parties know that they had contracts of employment before the dismissal. It is those contracts of employment that were reinstated on 29 September 2009. In my view the appeal must succeed and no order as to costs must be made.

[191] I have said above that Hendor would not be liable for the payment of wages to an applicant for a period that that applicant would no longer have been in its employ by reason of, for example, death, the fact that the particular applicant would have reached retirement age before that period or would have been fairly dismissed for Hendor's operational requirements or would have become disqualified from performing the duties he or she was obliged to perform in terms of this or her contract

of employment with Hendor. It is common cause that there are applicants who died on different dates between the date when Cele AJ's judgment was handed down i.e. 16 April 2007 and 29 September 2009 and between the latter date and 19 September 2012 when the application for a declaratory order was instituted in the Labour Court.

[192] In opposing the applicants' application for a declaratory order in the Labour Court, Hendor did not in its answering affidavit identify any applicants that it said would no longer have been in its employ from a certain date or certain dates to 29 September 2009 when reinstatement was effected. In other words, Hendor did not take the point that there were individual applicants for whose remuneration for certain periods between 16 April 2007 and 29 September 2009 it was not liable because they would not have remained in its employ beyond a certain date or certain dates. Obviously, Hendor cannot be liable for the payment of wages in respect of a period falling after the date of death of any applicant.

[193] Special attention needs to be drawn to the following admissions made by Hendor in the papers, namely that:

(a) in terms of Cele AJ's order of 16 April 2007 it (ie Hendor) was ordered to reinstate the second and further applicants;
(b) the second and further applicants tendered their services on 23 April 2007;
(c) Hendor rejected the second and further applicants' services and informed them not to report of duty pending the outcome of its intended appeal;
(d) its appeal to the Labour Appeal Court and its application to the Supreme Court of Appeal for leave to appeal failed; and
(e) it, thereafter, reinstated the second and further applicants in its employ on 29 September 2009.

These admissions mean that Hendor has admitted all that needed to be established to justify the conclusion that it is liable for the payment of the second and further applicants' wages for the period 23 April 2007 to 28 September 2009.

[194] Given the above admissions by Hendor, there was enough evidence for the Labour Court to issue a declaratory order that Hendor was liable for the payment of the wages of the second and further applicants for the period 23 April 2007 to 28 September 2009 save to the extent that this includes, in respect of any applicant, a period after the death of the particular employee. It was, therefore, in the proceedings concerning the application for a declaratory order that a judgment could have been given finding that Hendor was liable for the payment of the second and further applicants for any period after 16 April 2007. Prior to those proceedings, such an order could not have and, was not, made. It will, therefore, be appropriate to make such a declaratory order in this judgment. The next question for consideration is what the amounts are that Hendor should pay to each individual applicant.

Amounts (quantum)

[195] It was averred in the applicants' founding affidavit that Hendor owed the second and further applicants the amounts that appeared in Schedule A and in respect of each amount for each applicant, interest reflected in Schedule B to that affidavit. A perusal of schedule A gives one the impression that the amounts have been carefully and properly calculated. The applicants said in their founding affidavit that a Chartered Account, Mr David Douglas, calculated the amounts and interest for them. The amounts in Schedule A are calculated in respect of the weekly wages, "leave enhancement pay" and "leave pay" for each individual applicant on the basis of the periods 1 January 2007 to 31 December 2007, 1 January 2008 to 31 December 2008 and 1 January 2009 to 28 September 2009 and giving in respect of each individual applicant the amount due to him for that period on the basis of the rate of pay that was applicable to that period.

[196] Hendor's answering affidavit was deposed to by its attorney, Mr Johan Victor Dua. He said that he was deposing to Hendor's affidavit "on behalf of [Hendor] as the averments are not factual unless they are within my knowledge, and the primary basis of the opposition is on various legal issues". What Mr Dua was saying in this sentence was that Hendor's opposition was not based on facts but on legal issues. It is, therefore, no wonder that, when Mr Dua responded to an averment in the applicants' founding affidavit that the amounts due to the second and further applicants appeared in Schedule A under their respective names plus interest reflected in Schedule B, Mr Dua was content to only make a bare denial. All he said was: "The Schedules as annexed to the affidavit are disputed and I repeat what has been stated previously herein". That affidavit did not contain anything that disclosed the basis upon which Hendor could say that the amounts or calculations were wrong even if Hendor was liable for the payment of some amounts.

[197] Hendor had employed the second and further applicants before they were dismissed. It had also taken them back into its employ on 29 September 2009. Therefore, it knew what each one's rate of pay was before dismissal and what his or her rate of pay would have been for each year if he or she had remained in its employ in 2007, 2008 and up to September 2009. If Hendor intended to place the amounts in schedule A or the basis upon which they were calculated in serious dispute , it would have put up the amounts that it believed were correct. It did not do so. For that reason, with regard to the amounts the matter must be decided on the applicants' version of what those amounts are. Hendor's bare denial of the correctness of those amounts does not raise a genuine dispute of fact. Next to consider is the issue of interest on the amounts.

Interest

[198] The judgment of Cele AJ did not order payment of interest on the backpay that Hendor was ordered to pay to the second and further applicants in respect of the first period. The judgment of the Labour Court (ie Gaibie AJ's judgment) ordered that interest (at the prescribed rate) should run from 16 April 2007 in respect of the

amounts due to the second and further applicants. That is interest on amounts appearing in Schedule A to the applicants' founding affidavit in the Labour Court. Schedule A included both the amounts for the first and second periods. The Labour Court was correct in ordering interest to run from 16 April 2007 in respect of the amount for the first period. However, it was wrong in doing so in respect of the amounts for the second period. This is so because interest cannot be calculated, or, cannot run,from a date earlier than the date when the amount became due. The amounts for the second period were not due, and, could not have been due, to the second and further applicants by 16 April 2007. They only became due and owing by Hendor to the second and further applicants on different dates between 16 April 2007 and 29 September 2009. This means that some of the amounts became due and owing to the second and further applicants later in 2007, 2008 and 2009. How could interest in the amounts which became due only in 2008 and 2009 run from 16 April 2007? That cannot be correct.

Interest in respect of wages for 1 January 2007 to 15 April 2007

[199] I have already said above that in respect of the wages for the first period Gaibie AJ was correct in ordering that interest should run from 16 April 2007 to date of payment. Unlike the amounts relating to the second period, which became due at the end of each week when the second and further applicants were entitled to be paid their weekly wages, the amounts for the first period did not become due before Cele AJ's order. This is because payment of that backpay was ordered by Cele AJ in the exercise of his discretion and not because the second and further applicants were entitled to that backpay by reason of any contracts of employment. Accordingly, the backpay ordered by Cele AJ for the first period became due on the date of the order, namely, 16 April 2007. That is why, therefore, interest relating to the amounts relating to that period must run from 16 April 2007 to the date of payment.

Interest in respect of wages for 16 April 2007 to 28 September 2009

[200] Since the second and further applicants were paid weekly, their wages became due at the end of each week. It seems to me that each one of the second and further applicants is entitled to insist that in respect of each weekly wage interest should be calculated from when his or her wage became due to date of payment. That is a calculation that the applicants did not place before the Court. That calculation will be a rather cumbersome exercise. This Court will not undertake it. If the second and further applicants want interest calculated on that basis, they will have to calculate it themselves or get a professional such as an accountant to calculate it for them so as to produce the total amount due to each individual applicant. However, it is up to the applicants and Hendor to agree upon a different, and, less cumbersome, basis of calculating interest if they so wish. In my view, it will be enough for us to simply order that each one of the second and further applicants be paid his or her weekly wages for the second period plus interest calculated at the applicable rate from the date each weekly wage became due to date of payment.

[201] Should the applicants and Hendor fail to reach agreement on the amounts to be paid to each one of the second and further applicants (when interest is added), they should consider agreeing on the identity of a third party in whom they all have confidence who can calculate the amounts and his or her decision can be accepted by all concerned as final. If, however, they do not go that route either party may refer the issue of amounts to the Labour Court which should then decide the issue.

Costs

[202] Ordinarily, no costs order is made in labour matters. However, this is a case in which an order of costs should be made against Hendor. With effect from 16 September 2009 (i.e. the day after the Supreme Court of Appeal had issued its order) Hendor was obliged by an order of Cele AJ to pay the second and further applicants their wages for the first period. With effect from 29 September 2009 Hendor was contractually obliged to pay the second and further applicants their wages

for the second period. It knew its obligations in respect of the amounts relating to these two periods.

[203] As at 29 September 2009 all these amounts were due and Hendor had no defence or justification for not paying those amounts then. It knew that an order of reinstatement had been made by Cele AJ in favour of the second and further applicants and that they had tendered their services and it had rejected that tender. It knew that, had it not rejected that tender of services, the second and further applicants would have worked and earned their wages for the second period . At that time it was not, and, it could not have been, Hendor's case that the claims had prescribed. I do not lose sight of the fact that the applicants or their lawyers themselves took very long to institute the correct proceedings. Nevertheless, this does not detract from the fact that Hendor had no acceptable reason for not paying the second and further applicants all the wages for the relevant periods on 29 September 2009 or within a few days thereafter. Therefore, it is fair that Hendor be ordered to pay costs in all the courts.

[204] I agree with the order in the first judgment. That order accords with the approach taken in this judgment that there is a distinction between the claim for the period 1 January 2007 to 15 April 2007 and the claim for the period 16 April 2007 to 28 September 2009. The order contemplates that, in respect of the remuneration for the period 1 January 2007 to 15 April 2007, interest is to be calculated from one date, namely, 16 April 2007 (i.e. the date of Cele AJ's order), whereas, in respect of the remuneration for the period 16 April 2007 to 28 September 2009, interest is to be calculated from different dates.

For the Applicants:	G Malindi SC and B Lekokotla instructed by Ruth Edmonds Attorneys
For the Respondent:	C E Watt-Pringle SC and K S Mclean instructed by Fairbridges Wertheim Becker