

SOUTH AFRICA / JUDGMENT

Nkosi v Passenger Rail Agency of South Africa Soc Ltd (J1031/2023) [2025] ZALCJHB 281 (26 April 2025) [2025] ZALCJHB 281

COURT

Labour Court Johannesburg

BEFORE

M. T. M. Phehane

CASE / FILE NUMBER

J1031/2023

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J1031/2023

In the matter between:

JABULANI NKOSI

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

SOC LTD (PRASA)

Respondent

Heard: 15 May 2025

Delivered: 15 May 2025

Reasons:

24 June 2025 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 24 June 2025.)

REASONS FOR ORDER

PHEHANE, J

Introduction

- [1] This is an application by the applicant (Mr Nkosi) to compel the respondent, the Passenger Rail Agency of South Africa Soc Ltd (PRASA), to reinstate him in terms of a judgment by the Labour Appeal Court (LAC) dated 21 November 2017.
- [2] PRASA opposed this application on the basis that it has complied with the LAC judgment, which ordered it to reinstate its former employees, including Mr Nkosi, retrospectively to the date of their dismissal; however, Mr Nkosi failed to report for duty. In the circumstances, PRASA submitted that the application ought to be dismissed with costs.
- [3] On 15 May 2025, after hearing oral argument, this Court issued an order condoning the late filing of the respondent's heads of argument and dismissing the application to compel the applicant's reinstatement with no order as to costs.
- [4] The reasons for the order follow below.

Relevant timeline and factual background

- [5] The relevant timeline of the factual background pertaining to this dispute is as follows:

5.1 Mr Nkosi and further former employees were dismissed from the employ of PRASA in February 2013.

5.2 Following dispute resolution processes concluded in terms of the Labour Relations Act[1] (LRA) on 21 November 2017, the LAC ordered the reinstatement of the employees retrospectively with backpay. At the time of the LAC judgment and order, Mr Nkosi had been incarcerated as he was sentenced during April 2017 for a murder conviction.

5.3 On 31 January 2018, the Constitutional Court dismissed PRASA's application for leave to appeal, thus confirming the LAC order.

5.4 On 3 September 2018, PRASA informed the former employees to return to work. Mr Nkosi contends that he was not aware of the specified date to report for duty to render services.

5.5 On 11 October 2019, in an application for contempt of the LAC judgment of 21 November 2017, this Court, per Whitcher J, ordered PRASA to effect payment of the backpay owed to the employees in two tranches, in November 2019 and January 2020. Mr. Nkosi was accordingly paid backpay from February 2013 to August 2018 and while he was incarcerated, unbeknownst to PRASA at the time. PRASA only discovered during August 2018, upon commissioning an enquiry as to the whereabouts of Mr Nkosi, that he had been incarcerated since April 2017. He was visited in prison during the investigation. According to PRASA, Mr Nkosi did not inform the investigators that he was in the process of appealing his conviction.

5.6 On 17 December 2019, Mr Nkosi was released from prison on bail pending an appeal.

5.7 On 18 December 2019, Mr Nkosi presented himself for duty, but PRASA refused to reinstate him.

5.8 Mr Nkosi launched this present application in July 2023, approximately three years later, to compel PRASA to reinstate him.

Condonation

[6] PRASA brought an application for condonation for the late filing of its heads of argument. The application was unopposed. Good was shown cause for the late filing of the heads of argument. In the circumstances, condonation was granted.

Argument

[7] Mr Nkosi contends that he was not aware of the date of 3 September 2018 as being the date on which he was due to report for duty. He complains that when the investigators visited him in prison, they did not inform him that he was required to report for duty.

[8] On the day after he was released on bail, that is, 18 December 2019, he presented himself to render his services, but PRASA refused to reinstate him. He contends that he could not have reported for duty as he did not know he was to report for duty on 3 September 2018.

[9] Mr Nkosi contends that another fellow employee, namely, Mr Nyathu, reported for work in October 2019, well beyond the deadline of 3 September 2018, but he was allowed to resume his duties.

[10] PRASA contends that Mr Nkosi has delayed in launching this present application, and in any event, it has no legal duty to reinstate Mr Nkosi, as he was required to report for duty on 3 September 2018 but failed to do so. Further, Mr Nkosi was not entitled to the backpay as he failed to report for duty. Alternatively, Mr Nkosi's incarceration was a supervening impossibility that prevented him from reporting for duty, and therefore, his employment was terminated. In the circumstances, his remedy lies in the unfair dismissal dispensation in terms provisions of section 191 of the LRA. In the further alternative, PRASA contends that Mr Nkosi should bring an application to hold it in contempt of the LAC order.

[11] Mr Nkosi denied that he delayed in launching this application, as there was a series of correspondence between the parties after PRASA refused to reinstate him. He further denied that his employment was terminated, as he was never allowed to resume duties in the first place. In addition, he denied that he has an alternative remedy in contempt of court proceedings, as it is not possible for him to prove that PRASA's non-compliance is wilful – he would only be able to prove this after the grant of this application and where PRASA fails to comply with the order of this Court to reinstate him. The difficulty with this submission is that, as Mr Nkosi was not reinstated and thus was not entitled to the backpay he received, in addition, Mr Nkosi already has a court order in his favour, ordering his retrospective reinstatement. He is essentially asking this Court to issue an order that has already been issued. This, in my view, is an abuse of Court process. Contempt of court proceedings

against PRASA for non-compliance with the LAC order would not succeed, as PRASA has complied with the LAC order.

Evaluation

[12] In *National Union of Metalworkers of SA on behalf of Fohlisa and Others v Hendor Mining Supplies (A division of Marschalk Beleggings (Pty) Ltd)*[2] (Hendor), the Constitutional Court held that contracts of employment of unfairly dismissed employees are terminated by a dismissal and revived only when the former employees have tendered their services pursuant to a reinstatement order and the tender is accepted by the employer. The reinstatement order, therefore, does not in and of itself reinstate the contract of employment. Rather, it directs the employees to tender their services and the employer to accept that tender.

[13] In *Kubeka and Others v Ni-Da Transport (Pty) Ltd*[3] (Kubeka), the LAC followed the approach in Hendor and stated as follows regarding the restoration of the contract of employment and the payment of backpay:

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

[36] ...an employee granted retrospective reinstatement is not entitled to any of the contractual benefits of reinstatement, including back pay, without the contract being restored through actual reinstatement.

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

[14] Considering the relief sought in the notice of motion,[4] the present application is not an application to compel PRASA to accept Mr Nkosi's tender of his services on a specified date, placing all the necessary facts before this Court.

[15] In *South African Municipal Workers Union obo Koopman v City of Cape Town and Others*[5] (SAMWU) this court held as follows:

'The appellant's counsel conceded that there was no tender of services by Mr Koopman. Even if we were to find in the appellants' favour on prescription, the failure to tender services is fatal to their cause. Once an employee has an award or order granted in his favour, reinstating or re-employing him, the duty falls on the employee, not the employer to ensure that services are tendered. The right to fair labour practices also extends to employers. It would be unfair and unreasonable to expect them to wait for an employee who was unfairly dismissed and subsequently reinstated, to decide for themselves when they feel it appropriate to return to work and to tender their services, whenever they deem this appropriate at their own time.' (Own emphasis)

[16] Mr Nkosi was at all material times represented by a union, and he also had legal representation – yet, he failed to keep his employer informed about his whereabouts. It is not fair for PRASA to be expected to sit and wait for an extended period of time for a former employee armed with a reinstatement order to present himself to tender services when it suits him. It was incumbent upon Mr Nkosi to inform his employer of his incarceration and to inform the employer what his intentions were in challenging his conviction and or his sentence. The duty is not on the employer to ascertain the whereabouts or intentions of an employee who has a reinstatement order in their favour.

[17] Expedient resolution of disputes is a principle espoused by the LRA. In the present application, Mr Nkosi took a considerably long period of time to approach this Court for relief. It was clear to him in December 2019 that PRASA refused to reinstate him, but he did not present cogent reasons why he did not approach this Court timely for relief. On his own version, it was only in March 2021 when his attorney of record sent correspondence to PRASA's attorney of record seeking an undertaking that PRASA will reinstate Mr Nkosi. When no response was received, this application was not launched. This application was launched approximately two years later, and approximately four years after Mr Nkosi's tender of his services was not accepted.

[18] PRASA complied with the LAC order. Mr Nkosi failed to tender his services and failed to contact his employer to explain his situation. There is, therefore, no basis to compel PRASA to comply with an order it has already complied with. This application, therefore, cannot succeed.

[19] The facts surrounding the reinstatement of Mr Nyathu beyond 3 September 2018 were not placed before this Court. Therefore, noting further needs to be said in this regard.

Conclusion

[20] It is for the aforesaid reasons that the above order was made.

M. T. M. Phehane

Judge of the Labour Court of South Africa

[1] Act 66 of 1995, as amended.

[2]

(2017) 38 ILJ 1560 (CC).

[3]

[2021] 4 BLLR 352 (LAC) at paras [35] - [36] and [38].

[4] See: pleadings bundle, prayer 2 of the notice of motion on p 2. There is no dispute that Mr Nkosi was an applicant in the LAC

judgment; thus prayer 1 of the notice of motion falls away.

[5] (CA5/2023) [2025] ZALCCT 5 (22 January 2025) at para [16].

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