



(1) Reportable: Yes
(2) Of interest to other Judges: Yes
(3) Revised

Signature

20/01/2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: 2025-217783

In the matter between:

GHIEM MOSES AND 10 OTHERS

Applicants

and

HEROTEL (PTY) LTD

First Respondent

FRANCOIS WESSELS

Second Respondent

Heard: 28 November 2025

Delivered: 20 January 2026

Summary: An urgent application to find the respondents in contempt of court for refusing and/or failing to pay the backpay and benefits due to the applicants following a reinstatement order and unsuccessful attempts to appeal it. In the alternative, the applicants seek declaratory orders finding the respondents liable for all backpay and benefits. The respondents require the applicants to account for all income earned from alternative employment in the intervening period.

JUDGMENT

GANDIDZE, J

Introduction

- [1] On 6 February 2024, the eleven applicants successfully challenged their dismissal by Herotel, the first respondent, and obtained from this court, per Rabkin-Naicker J, a retrospective reinstatement order with effect from 1 November 2020. Herotel's appeal to the Labour Appeal Court (LAC) was dismissed, and the Constitutional Court (CC) refused leave to appeal on 27 October 2025. As the CC was the last stop, Herotel instructed the applicants to report for duty on 3 November 2025, and they did. However, Herotel refused to pay the applicants any arrear remuneration until they had accounted for all income earned from alternative employment between 1 November 2020 and 2 November 2025. Nine of the eleven applicants resigned on 4 November 2025.
- [2] The applicants contend that Herotel and Francois Wessels (Wessels), the second respondent, a director and the Chief Financial Officer of Herotel, are in contempt of the Rabkin-Naicker J order, and seek an order directing the respondents, within seven (7) days of this Court's order, to calculate the arrear remuneration and benefits owed to each applicant, and to pay them, without deduction. Failing compliance, the applicants seek leave to approach the Court on the same papers, duly supplemented, for the imposition of an appropriate sanction.
- [3] In the alternative, the applicants seek a declaratory order that they are entitled to their full arrear remuneration and benefits (including increases, bonuses, and other payments) for the period from 1 November 2020 to 2 November 2025, without any deduction or "accounting" for earnings from alternative employment.
- [4] The respondents oppose the application, arguing that the applicants must account for all earnings from alternative employment. Once verified, the respondents will deduct those earnings from the arrear remuneration owed.

Is the application defective, and is the matter urgent?

- [5] The application was brought on an urgent basis, and the respondents contested the urgency, arguing that the applicants' claim is a money claim that can be determined in due course. The applicants dispute this, submitting that the relief sought is intended to enforce and vindicate an order of this court, not merely to collect a debt, and is therefore urgent. They also advance other reasons for urgency, which will be addressed below.
- [6] The primary relief sought is that the respondents be held in contempt of court for failing to pay the applicants the arrear remuneration due to them following the CC's dismissal of the application for leave to appeal against Rabkin-Naicker J's judgment. Rule 58 of the Rules regulating the conduct of the proceedings of the Labour Court, 2024¹, prescribes the procedure for contempt of court applications. Such applications must be brought *ex parte*, followed by an order directing the respondent to explain, on affidavit or on the hearing date, why they should not be found guilty of contempt of court. In this case, Rule 58 was not complied with, as the application was brought on notice to the respondents, rather than *ex parte*, as required.
- [7] The non-compliance with Rule 58 was raised in the respondents' heads of argument, not in its answering affidavit, which led to the filing of the condonation application. The respondents did not oppose the condonation but, in their heads of argument, submitted that Rule 58 was peremptory and therefore the applicants' application fell to be dismissed on that basis alone.
- [8] In the condonation application, the legal representatives accepted full responsibility for the non-compliance. They also tendered costs in respect of the condonation application. It was submitted that the non-compliance did not prejudice the respondents, as the *rule nisi* issued under Rule 58 warns a respondent that they are at risk of being found in contempt of court and of a sanction being imposed. In this case, the only order sought is that the respondents are in contempt of court, and the sanction to be imposed is reserved for later determination.

¹ Government Notice 4775B of 2024.

- [9] The Rules must be complied with, and an applicant who fails to comply risks the application being struck from the roll or even dismissed for that reason. However, dismissing this matter without considering the merits or striking it from the roll would have been followed by a fresh application, this time *ex parte*. The court seized with that application would, in all likelihood, have granted the *rule nisi*, setting a return date for the respondents to file an answering affidavit and appear in court. Therefore, the failure to bring the application *ex parte* did not prejudice the respondents, who filed answering papers, and the parties fully argued the matter on the hearing date.
- [10] A further consideration is that, as an alternative to an order holding the respondents in contempt of court, the applicants sought declaratory orders confirming their entitlement to their arrears of remuneration. Rule 58 does not apply to applications for declaratory relief.
- [11] On the facts, the applicants' failure to comply with Rule 58 in the contempt proceedings is condoned. The competence of the contempt proceedings is addressed later in the judgment.
- [12] Returning to the urgency point, in *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*², the court stated that a party bringing an application on an urgent basis must explain why the matter is urgent, why it cannot obtain substantial redress in due course, and that the urgency must not be self-created.
- [13] With reference to *Protea Holdings Ltd v Wriwt and Another*³, which was followed in *Victoria Park Ratepayers' Association v Greyvenouw CC and Others*⁴, the applicants submitted that contempt applications are inherently urgent given the public interest in the administration of justice and the vindication of the Constitution. They also submitted that they would suffer irreparable harm if the matter were not dealt with urgently, as the respondents would drag it out, as they had done in the dismissal dispute. In further

² 2011 JDR 1832 (GSJ).

³ 1978 (3) SA 865 (W).

⁴ [2004] 3 All SA 623 (SE).

explaining the irreparable and ongoing harm, the court was informed of the circumstances of two of the eleven applicants.

- [14] The first is Jade Kruger (Kruger). She is one of the two applicants who were still employed by Herotel when the application was launched. She was pregnant when she was dismissed in 2020, and following her dismissal, her family downgraded their accommodation to a two-bedroom flat. Her twelve-year-old son had to move to Durban to live with his father, and she nearly lost custody of him due to her financial situation. She is keen for him to return to live with them. She also sold her vehicle and no longer has transport. She has since been blacklisted and is unable to obtain credit. Her other son, in Grade 1, is at risk of not being allowed to continue to Grade 2, presumably due to outstanding school fees.
- [15] The other applicant, whose personal circumstances were placed before the court, is Bernard Welff (Welff), whose daughter is a dietitian. Welff's daughter was informed in late November 2025 that she would be deployed to Boitumelo Regional Hospital in Bloemfontein for community service in 2026. Bernard requires the money Herotel owes him to cover his daughter's expenses in Bloemfontein.
- [16] As for the remaining applicants, it was submitted that their credit scores deteriorated after their dismissals and that they have exhausted all avenues to obtain voluntary compliance from the respondents.
- [17] Applications for contempt of court are intended to vindicate the court's honour and dignity. For this reason, Rule 58 ensures that such matters are prioritised on the court roll. However, by following the procedure they used rather than the procedure prescribed by Rule 58, the applicants were assigned a priority hearing date, effectively jumping the queue of all other contempt applications that had not yet been allocated a hearing date. Be that as it may, it is trite that this court has a wide discretion to determine the urgency with which applications should be treated.
- [18] In respect of Kruger, I am persuaded that her financial situation is such that the matter must be heard urgently. As one of the two applicants who

remained in the employment of Herotel when the application was brought, it can be inferred⁵ that she had no other job to return to, or that it was more favourable for her to return to Herotel than to remain where she was employed, if that was the case. Even if by the time the application was argued she would have received her November 2025, that is a drop in the ocean, considering the period between the date of dismissal and the date she was reinstated. The same assumption could be made in respect of the Bronwen De Pontes (De Pontes), the other applicant, who did not resign following her reinstatement by Herotel. However, no facts were placed before the court regarding her situation.

[19] In respect of Kruger, exceptional circumstances have been demonstrated, warranting a departure from the rule set out in *Hultzer v Standard Bank of SA (Pty) Ltd*⁶, which held that financial hardship is generally not a ground for urgency. I align myself with the decisions of this Court in *Harley v Bacarac Trading 39 (Pty) Ltd*⁷, as well as *HOSPERSA & Another v MEC for Health, Gauteng Provincial Government*⁸, where the court entertained monetary claims on an urgent basis because exceptional circumstances were demonstrated.

[20] With respect to the remaining applicants, including Welff, I was not satisfied that they could not obtain substantial redress in due course if their matters were struck from the roll for lack of urgency. However, as Mr Oosthuizen correctly pointed out in oral argument, there was a practical difficulty in splitting the applicants' case into two groups. It made no sense to bring an urgent application for some applicants and a separate application for the remaining applicants. Splitting the cases was also undesirable, as the applicants would likely have had to pool their resources to bring the current application.

⁵ The respondents argued that it must be inferred from the resignation of the nine applicants that they were gainfully employed elsewhere.

⁶ (1999) 20 ILJ 1806 (LC).

⁷ (2009) 30 ILJ 2085.

⁸ (2008) 29 ILJ 2769 (LC).

- [21] Having heard arguments on the merits, it made no sense to dispose of the case in respect of one applicant while striking the application from the roll in respect of the remaining applicants. The struck application would have been re-enrolled within weeks, with the risk of a different judge being called upon to decide the merits of a matter already determined by another judge. It is so that the ten applicants are piggybacking on Kruger's circumstances, but the limited resources of this Court must be utilised effectively and efficiently by hearing the case as an urgent matter for all the applicants.
- [22] A further reason the Court exercised its discretion to hear the matter urgently is that the respondents were accused of adopting the Stalingrad approach, dragging out the dismissal dispute for years, and seeking to wear the applicants down through protracted litigation. Having waited 4 years for a resolution of the dismissal dispute and another year while the respondents were appealing the Rabkin-Naicker J order, the dispute must now be resolved urgently and expeditiously.
- [23] The Constitutional Court dismissed the application for leave to appeal on 25 October 2025. Thereafter, correspondence was exchanged regarding the return to work and the claim for arrear remuneration. This application was launched on 13 November 2025, less than a week after the respondents made it clear they would not pay back pay unless the applicants accounted for earnings from alternative employment. Therefore, the applicants did not sit on their hands after it became clear that the respondents would not pay the arrear remuneration unless the court determined the dispute.
- [24] For all the reasons stated above, I am persuaded that the matter must be heard as urgent and disposed of on its merits, which I now address.

Parties' contentions on the claim for arrear remuneration

Applicant's submissions

- [25] The applicants provided the following background facts. On reporting for duty on 3 November 2025, a meeting was held with the respondent's Human Resources representatives. The issues raised included a lack of clarity about

the positions to which the applicants were being reinstated, undefined office and remote working arrangements, no work tools being issued to them, and no clarity about when the arrear remuneration would be paid. The applicants allege that, due to the uncertainty, frustration and disillusionment created by the respondents' conduct in instructing them to report for duty without any intention of complying with the reinstatement order, all the applicants except Kruger and Bronwen De Pontes (De Pontes) tendered their resignations between 4 and 6 November 2025. The resignations were accepted with immediate effect.

- [26] The applicants' main contention is that, under the Labour Relations Act,⁹ they are entitled to arrear remuneration for the entire period between the dismissal date, which is also the retrospective reinstatement date of 1 November 2020, and the date of their factual reinstatement, 3 November 2025, without taking into account any remuneration earned from alternative employment. They also contend that the resignation of nine of them, following their reinstatement, and provoked by Herotel, does not affect their entitlement to arrear remuneration.
- [27] The applicants further contend that, following their dismissals, they had to find alternative sources of income while awaiting the outcome of the litigation against their employer. Such alternative income is a collateral benefit that is not deducted from the arrear remuneration owed to them upon their reinstatement. They rely on a decision of the Constitutional Court in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others*¹⁰ (*Billiton*), in which the Court held that dismissed employees have no duty to mitigate loss. They submit that the respondents' purported reliance on the principle of deduction or mitigation has no basis in law and that the respondents are seeking to reopen the settled issue of their entitlement to arrear remuneration.
- [28] The applicants also relied on the Constitutional Court decision in *Mavundla v Gotcha Security Services (Pty) Ltd*¹¹ (*Mavundla*). They contend that, following

⁹ Act 66 of 1995.

¹⁰ 2010 JDR 0106 (CC).

¹¹ 2025 (6) SA 25 (CC).

that decision, Herotel's refusal to pay the applicants their full back pay constitutes wilful and *mala fide* defiance of a binding court order, and, therefore, amounts to contempt of court.

- [29] In the event that the court is disinclined to find the respondents in contempt of court, the applicants seek a declaratory order under section 158(1)(a)(iv) of the LRA that they are entitled to their full remuneration and benefits for the period from 1 November 2020 to 2 November 2025. They submit that a declaratory order is required because the respondents are refusing to pay. They also contend that they cannot issue a writ of execution for the amounts without the respondents' co-operation, and that the Sheriff attending at Herotel's premises will be informed that liability for the amounts claimed is disputed.

Respondent's contentions

- [30] The respondents alleged practical difficulties in reinstating employees five years later and in placing them in specific positions, given that they were dismissed by an entity other than Herotel. Accordingly, the respondents deny that the applicants were understandably frustrated or disillusioned, or provoked into resigning.
- [31] According to the respondents, the resignation of nine of the eleven applicants immediately after their reinstatement indicates that they had no intention of returning to Herotel to work, and that they took leave on 3 November 2025 and then returned to their jobs.
- [32] The respondents' case was that it complied with the order directing it to reinstate the applicants, and that the issue of back pay is not explicitly addressed in the Rabkin-Naicker J order. Therefore, the claim for back pay is contractual rather than a judgment debt, and in the event of a dispute, the applicants were required to institute proceedings to resolve it and determine the extent of liability.
- [33] The respondents further submitted that, in calculating the back pay due to the applicants, any income earned by the applicants during the period of

dismissal and up to the date of reinstatement must be taken into account to avoid unjust enrichment, double recovery or double-dipping. The applicants were requested to furnish payslips, IRP5 forms, and affidavits confirming their earnings or unemployment during the period in question, but they refused to cooperate. Therefore, according to the respondents, there is a dispute over liability for back pay, including the amount, if any, owed to the applicants.

- [34] The respondents state that their position is based on legal advice. That advice is said to be based on an unreported judgment of this Court in *Samancor Chrome t/a Tubatse Ferrochrome v Dirk Willem Potgitier*¹² (*Samancor LC*). Therefore, even if their position is legally incorrect, they cannot be found in contempt of court, as wilfulness and *mala fides* will be absent.
- [35] The respondents further submit that contempt of court proceedings are, in any event, not competent in respect of backpay, and that the applicants were required to issue a writ of execution.
- [36] As regards declaratory relief, the respondents submit that the dispute concerning the applicants' entitlement to back pay is not amenable to a declaration of rights, on the basis that the applicants contend the law is clear on the issue.
- [37] In addressing the parties' contentions, I will refer to the case authorities cited by the parties, as well as other relevant authorities on the issues to be decided.

Reinstatement orders and income earned in the intervening period

- [38] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹³ (*Equity Aviation*), the CC explained the implications of a reinstatement order thus:

[36] 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

¹² JS532/18 (16 February 2021).

¹³ (2008) 29 ILJ 2507 (CC).

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... 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.'

[39] Therefore, a court that issues a reinstatement order aims to place the employee in the position they would have been in but for the dismissal. In determining the reinstatement date, the court considers several factors, including the fact that the dismissed employee was without income during the period of dismissal. By parity of reasoning, where an employee is fortunate enough to find other employment and earn an income, and this information is brought to the court's attention, it must be taken into account when determining the extent of the retrospectivity.

[40] That principle was clearly established by the CC in *Maroveke v Talane NO & Others*¹⁴. A commissioner was presented with information that the dismissed employee had found alternative work two months after the dismissal, yet still ordered payment of 12 months' back pay to the employee. This court reduced the back pay to two months, the period during which the employee was without employment. The CC agreed that the back pay payable must be limited to the two months during which the employee was without work, plus the difference between what he would have earned but for the dismissal and what he earned at the new employer, which was less.

[41] Thus, if a court is presented with information that an employee earned remuneration during the intervening period, that fact will be taken into account when determining the back pay payable to the reinstated employee.

[42] For the position that remuneration earned in the intervening period is not taken into account when calculating the arrear remuneration due to a reinstated employee, the applicants relied on a decision of the CC in

¹⁴ (2021) 42 ILJ 1871 (LC).

Mavundla. Like the applicants, the employee, Mr Mavundla, successfully challenged his dismissal and was reinstated in terms of an award. However, the employer imposed conditions for reinstatement, which delayed his factual reinstatement. Mavundla brought contempt proceedings, contending that the employer had failed to reinstate him as ordered, and was successful. The employer was ordered to reinstate him. Thereafter, he brought a claim for arrear remuneration for the period during which he ought to have been reinstated in terms of the arbitration award, and for the period when he was, in fact, reinstated.

[43] This court found that the order of reinstatement applied from the later date set in the contempt proceedings.

[44] The CC disagreed and interpreted *Hendor* as follows:

[30] This court was evenly split in *Hendor* on the characterisation of the debt due to an employee upon reinstatement for purposes of prescription. It was, however, unanimous in finding that, upon restoration of the contract of employment by factual reinstatement, an employee is entitled to the benefits (including remuneration) which they would have been entitled to but for the dismissal, unless limited by the terms of the reinstatement order... In *Hendor*, because of appellate proceedings, the employees were only factually reinstated on 28 September 2009, but the court was unanimous that by not later than 28 September 2009 the employees became entitled to their arrear remuneration for the period from 23 April 2007 (when the employer should factually have reinstated them) to 28 September 2009.'

[45] Therefore, *Mavundla* reiterates that a dismissed employee whose contract of employment is restored by factual reinstatement is entitled to arrear remuneration from the reinstatement date as ordered in an award, or by the court, to the date of factual reinstatement.

[46] In the present matter, the issue is whether, when calculating the arrear remuneration due to a reinstated employee, that employee must account for income earned elsewhere so that an employer can deduct those amounts

from the arrear remuneration. *Mavundla* is silent on this issue. In fact, in that matter, there was no suggestion that Mr Mavundla had earned a salary elsewhere that ought to be taken into account when calculating the back pay due to him. I am therefore of the view that Mavundla does not advance the parties' debate.

[47] The applicants also placed great reliance on *Billiton* in support of their position. Having considered the judgment, it is my view that it is not authority for the proposition that income earned in the intervening period can never be taken into account when calculating the arrear remuneration due to an employee for the period between the reinstatement order date and the factual re-instatement date.

[48] In that matter, the employer sought to have a reinstatement order replaced with an order for compensation, based on information that was available but not presented to the commissioner who arbitrated the matter, as well as information that came to light after an award reinstating the employee was issued. The new information indicated that the dismissed employee had earned income during the intervening period. In resisting retrospective reinstatement, and hence the claim for full arrear remuneration, the employer argued that the dismissed employee bore the burden of mitigating his loss.

[49] The CC dismissed the appeal. It reasoned, *inter alia*, that the employer had promised but failed to present evidence to the commissioner that reinstatement was not an appropriate remedy. Regarding the new information that came to light after the award was issued, the court held that the employer could have applied to present it in the appeal to the LAC or the CC, but failed to do so.

[50] More relevant for present purposes was the employer's contention, relying on *Equity Aviation*, that full retrospective reinstatement was inappropriate, based on new information that emerged after judgment, because the employee had an obligation to mitigate their loss after dismissal, and that failing to take that information into account would lead to substantial unfairness between the parties.

[51] The court held that *Equity Aviation* did not involve or address mitigation or a burden to mitigate loss following dismissal, and stated the following:

[41] To talk in legal terms of a burden on an employee to mitigate loss in the context of an unfair dismissal strikes one as decidedly odd, if not somewhat perverse. In real life, dismissed employees will seek alternative means of income in order to sustain their own survival and that of their dependants. It requires little imagination to appreciate that for many people in South Africa obtaining employment is, at best, a very difficult task. Equitable considerations militate against transforming this practical necessity of life into a legal burden on employees to mitigate their loss in dismissal cases. To do so might even serve to undermine their claim to the primary statutory remedy of reinstatement available under the provisions of the LRA.'

[52] In my reading, the CC refused to lay down a principle that dismissed employees have an obligation to mitigate their loss by earning income in the intervening period. That is not the same as determining that remuneration earned in the intervening period is not taken into account when calculating the arrear remuneration due to an employee. The CC also held that the employer could have utilised the existing rules to adduce further evidence, but that the employer ignored or disregarded them. Therefore, employers are not precluded from raising the defence that an employee is not entitled to full arrear remuneration because they earned income from alternative employment in the intervening period.

[53] Also important to note is that *Billiton* was decided before *National Union of Metalworkers of SA on behalf of Fohlisa & others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)*¹⁵(*Hendor*), discussed below, and to the extent that *Billiton* might have been understood to mean that income earned in the intervening period can never be taken into account, *Hendor* clarified that, in respect of the period between the reinstatement date and factual reinstatement, an employer is permitted to raise defences to a claim for full arrear remuneration.

¹⁵ (2017) 38 ILJ 1560 (CC).

- [54] In my view, some of the issues already dealt with above, and the remaining issues regarding the applicants' claim for full arrear remuneration can be resolved by reference to the CC decision in *Hendor*.

The CC decision in *Hendor*

- [55] On 16 April 2007, this court ordered the reinstatement of the dismissed employees with effect from 1 January 2007 and directed them to report for duty on 23 April 2007. The employer's appeals failed, and on 29 September 2009, the employees were permitted to return to work. However, the employer refused to pay remuneration for the period from 1 January 2007 (the retrospective reinstatement date) to 29 September 2009 (the factual reinstatement date). This is the same position Herotel has taken in this case.
- [56] At the employees' instance, the Registrar of this court issued a writ of execution in respect of the arrear remuneration. That writ of execution was set aside by this court, which held that the order did not sound in money. The employees then approached this court, seeking a declaration that the employer was liable for the arrear remuneration for the period from 1 January 2007 to 28 September 2009. They were successful.
- [57] On appeal, the LAC held that the arrear remuneration for the period from 1 January 2007 (the reinstatement date) to 22 April 2022 (the day before the date of reporting for duty) constituted a judgment debt and therefore prescribed after 30 years, whereas the arrear remuneration for the period from 23 April 2007 to 28 September 2009 arose from the employment contract and prescribed after 3 years. In reaching that conclusion, the LAC relied on its earlier decision in *Coca-Cola Sabco (Pty) Ltd v Van Wyk*¹⁶ (*Coca Cola*).
- [58] When *Hendor* further appealed to the CC, the main debate was whether the employer's obligation to pay arrear remuneration for the entire period from the reinstatement date to the factual reinstatement date constituted a judgment

¹⁶ (2015) 36 ILJ 2013 (LAC).

debt that prescribed after 30 years, or whether it arose from the contract of employment and therefore prescribed after 3 years.

- [59] Madlanga J delivered one judgment, holding that while the entitlement to back pay for the entire period arises from the reinstated contracts of employment, the arrear remuneration constitutes a judgment debt, as it is a direct consequence of the court order reinstating the employees. He further found that the effect of a reinstatement order is two-pronged, requiring an employer to allow the employee to return to work and to pay the employee's concomitant arrear remuneration.¹⁷
- [60] Zondo J delivered the second judgment and held that arrear remuneration for the entire period do not constitute a judgment debt. He identified two distinct periods. The first runs from 1 January 2007 (the reinstatement date) to 15 April 2007 (the day preceding the judgment date), and the arrears for that period constitute a judgment debt. Accordingly, he agreed with Madlanga J that arrear remuneration for the period between the retrospective reinstatement date and the date of judgment constitutes a judgment debt. The consequences of this will be addressed later in the judgment.
- [61] According to Zondo J, the second period is the period between 16 April 2007 (the judgment date) and 28 September 2009 (the day before the factual reinstatement). He found that the arrear remuneration for that period were a contractual claim.
- [62] Both judgments upheld the employees' claim for arrear remuneration for the entire period, but those who died before the reinstatement date of 1 January 2007 received nothing, and those who died between 1 January 2007 and 28 September 2009 received arrear remuneration capped at the date of death.
- [63] Portions of the two judgments that are relevant to determining the issues in dispute in the current matter will now be considered.

Arrear remuneration for 1 November 2020 to 6 February 2024

¹⁷ Ibid at para 36 and 38.

[64] Rabkin-Naicker J reinstated the applicants on 6 February 2024, with retrospective effect from 1 November 2020. As I have already noted above, in *Hendor*, the CC was unanimous that the arrear remuneration for this period was a judgment debt.

[65] Madlanga J explained an employer's obligation to pay arrear remuneration as follows:

[13] ... 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 backdated 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.'

Obviously, if the employer may be able to demonstrate that — for one reason or another — 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 or on or after that date but before the date of reinstatement.

[66] From the above statement, it is evident that an employee's inability to render services during the period for which arrear remuneration is claimed is relevant to determining the extent of retrospectivity.

[67] In a separate judgment, Zondo J agreed with the principle. Relying on *Equity Aviation*, he held that an order of reinstatement does not entail payment of backpay, and that if any backpay is to be paid, the court must order that the reinstatement operate with retrospective effect.¹⁸ Because this court had

¹⁸ Ibid at para 98.

ordered reinstatement with retrospective effect, it follows that both the obligation to reinstate and the obligation to pay backpay constituted a judgment debt.

- [68] In respect of arrear remuneration constituting a judgment debt, Zondo J held that the consequences were:

‘[122] ... 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...’

- [69] Zondo J referred to the hypothetical example of Mr A, who was employed as a driver, dismissed, and later disqualified from driving a motor vehicle before the trial challenging his dismissal was finalised. Zondo J held that if *Hendor* had been aware of this, it would have placed that information before the trial court, which would have taken it into account in determining the extent of the retrospectivity of the reinstatement date. Zondo J also referred to the example of Ms B, who reached retirement age before the trial. The court found that an employer could have led that evidence and argued that reinstatement was inappropriate and that backpay could not be ordered beyond the retirement date.

- [70] Therefore, an employer who is aware of information that affects the extent of the reinstatement's retrospective effect must present that information to the trial court so it can be taken into account at that stage.

- [71] Zondo J also went on to say:

‘[129] ... 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... 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.’

[72] Therefore, a reinstated employee is entitled to all arrear remuneration for the period between the retrospective order date and the judgment date. This is because the trial court sets the retrospective order date after considering all the factors presented by the employer. Once the trial court has pronounced on the issue, it is not open to an employer to reopen it when sued for such arrear remuneration. The only possible exception, according to *Billiton*, is for an employer to seek to introduce new evidence during the appeal process. If Herotel had introduced any new evidence in the LAC or the CC, a decision would have been made.

[73] It is common cause that nine of the eleven applicants resigned a day or two after the factual reinstatement date. Zondo J stated that even if an employee resigns a day after their reinstatement, they are still entitled to their full arrear remuneration for the period between the retrospective reinstatement date and the reinstatement order date.¹⁹

[74] Consequently, Herotel cannot revisit the period between the date of dismissal and the date of the reinstatement order in these proceedings, as the Rabkin-Naicker J judgment pronounced on that issue. It follows that the applicants are entitled to their full arrear remuneration and benefits for the period from 1 November 2020 to 6 February 2024.

Arrear remuneration for the period 7 February 2024 to 2 November 2025.

[75] Notwithstanding the finding that the arrear remuneration for the entire period was a judgment debt, Madlanga J held that when an employer is sued for arrear remuneration in respect of the period between the judgment date and the factual reinstatement date, that employer is entitled to raise any defences it may have to the claim. He stated this:

‘[40] If, on whatever basis, the employer was to be entitled — in terms of the contract — to take whatever action (eg not paying remuneration)

¹⁹ Ibid at para 129.

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’. The second judgment then says Hendor would have no forum at which to raise its entitlement to take the action. What this misses is that the effect of the order was to reinstate the employees on the same terms and conditions. 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). 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 age, Mr A and Ms B...’

[76] Zondo J held that the arrear remuneration between the reinstatement order date and the factual reinstatement date constitute a contractual claim, rather than a judgment debt. He stated that this was a new dispute or cause of action²⁰, and that an employer sued for such arrear remuneration is at liberty to raise contractual defences in a competent tribunal or court. He also stated that such a claim may be pursued under section 77(3) of the Basic Conditions of Employment Act,²¹ (BCEA).

²⁰ Ibid at para 155.

²¹ Act 75 of 1997.

[77] With reference to a decision of the then Natal Provincial Division of the then Supreme Court of Appeal in *National Union of Textile Workers and others v Jaguar Shoes (Pty) Ltd*²² (*Jaguar Shoes*), Zondo stated this:

[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 claims payment of wages or, as in this case, a declaration that he is entitled thereto', 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'. ...That is what I say is the position here as well...

[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...

[123] ... 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.'

²² 1987 (1) SA 39 (N).

[78] In criticising the approach of the first judgment, which held that arrears of wages for the second period constituted a judgment debt, Zondo J stated this:

[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... 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, insofar 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...'

[79] The judgment goes on to say:

[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.'

[80] Zondo J also said:

[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) insofar 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.'

[81] Therefore, the employees' claim for arrear remuneration for the period between the reinstatement order date and the factual reinstatement date is subject to the employer's right to raise defences that the employees are not entitled to the arrear remuneration for the reasons the employer gives. In respect of this period, the applicants cannot rely on the Rabkin-Naicker J judgment, as doing so would be to read the judgment as ordering reinstatement for a future period without hearing Herotel. As Zondo puts it, this amounts to putting the proverbial cart before the horse.

[82] Zondo J concluded that the arrear remuneration for the post-judgment period had not prescribed, as the obligation to pay arose only on 29 September 2009, when Hendor reinstated the employees, and the employees brought their application for a declaratory order on 19 September 2012, within the three-year period.

[83] Therefore, although disagreeing on whether the arrear remuneration between the reinstatement order date and the factual reinstatement date constitutes a judgment debt or a contractual obligation, both judgments agreed that a reinstatement order requires the employer to pay the employee the remuneration they would have earned between the reinstatement order date and the factual reinstatement date. Importantly, both judgments agreed that

an employer sought to be held liable for the arrears of wages between the reinstatement order date and the factual reinstatement date is not precluded from raising defences to such a claim, if it has such defences. If such an employer demonstrates that the employee would not have rendered services because the employee was employed elsewhere, that fact will be taken into account in calculating the back pay due to the employee.

- [84] Examples include an employee who would not have rendered services because they became disqualified from performing the duties of the position they previously held, an employee who reached retirement age, or an employee who would have been terminated due to an employer's operational requirements. Another example is where an employee dies in the intervening period.
- [85] I see no reason why an employee who worked for another employer during the intervening period, and therefore would not have worked, cannot be a defence to a claim for full arrears of remuneration. This is the defence raised by the respondents. The question that remains is whether the defence must be upheld, an issue addressed later in the judgment.
- [86] For completeness, I proceed to address the other cases relied on by the parties.

Is Coca-Cola still good law?

- [87] The respondents submit that the *Samancor LC* judgment, which relied on *Coca Cola Sabco (Pty) Ltd v Van Wyk*²³ (*Coca-Cola*), remains good law, and that the applicants are required to disclose income earned from alternative employment during the intervening period, so that it can be taken into account when calculating the arrear remuneration due to them.
- [88] In *Coca-Cola*, an employee obtained an award that his dismissal was substantively unfair and that he be reinstated. The employee was reinstated only after attempts to review and appeal the award were unsuccessful. The

²³ (2015) 36 ILJ 2013 (LAC).

question before the LAC was whether the employee was entitled to arrear remuneration from the reinstatement order date to the factual reinstatement date. The LAC determined that where an employer refuses to pay the reinstated employee for the period between the reinstatement order date and the factual reinstatement date, the employee must pursue a contractual claim against the employer.

[89] In *Hendor*, Madlanga J had this to say about the decision of the LAC in *Coca - Cola*:

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

‘The backpay 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.’

[48] This is a narrow view of the power to reinstate in s 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’. 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 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.

...

[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, s193(1)(a) says as much. I must conclude that the Labour Appeal Court's view to the contrary was wrong.

[90] Madlanga J held that *Coca-Cola* was wrong to carve out two periods for the purpose of determining whether the arrear remuneration constituted a judgment debt. According to Madlanga J, all the arrear remuneration constitutes a judgment debt.

[91] It will be recalled from the discussion of *Hendor* above that Zondo J, however, agreed with *Coca-Cola* that the arrear remuneration for the period from the reinstatement order date to the factual reinstatement date constitutes a contractual claim, and that an employer is permitted to raise defences to it. He also held that this is the same principle laid down in *Jaguar Shoes*.

- [92] Notwithstanding that in *Hendor* the CC split on whether the arrear remuneration for the entire period constitute a judgment debt or a contractual debt, *Jaguar Shoes*, *Coca-Cola*, and both Madlanga J and Zondo J in *Hendor* agreed that when a dismissed employee seeks to recover arrears of remuneration for the period between the reinstatement order date and the factual reinstatement date, an employer is entitled to raise defences to that claim.
- [93] Therefore, *Coca-Cola* remains good law.
- [94] The *Samancor LC* judgment followed *Coca-Cola* and Zondo J in *Hendor*. Therefore, it is also good law.
- [95] The submission that in *Potgieter v Samancor Chrome Ltd t/a Tubatse Ferrochrome*²⁴, (*Samancor LAC*), the LAC refined the analysis and narrowed the ambit of the *Samancor LC* matter, must be mistaken, as it is a different LAC decision involving the same parties. *Samancor LAC* deals with the issue of prescription, whereas the *Samancor LC* judgment says nothing about prescription. I could not locate a judgment dealing with an appeal against the *Samancor LC* judgment.
- [96] I now turn to whether the applicants brought the wrong proceedings to claim the arrear remuneration.

Writ of execution or contempt proceedings?

- [97] The respondents submitted, with reference to a decision of this court in *Wenum v Masquassi Hills Local Municipality & another*²⁵ (*Wenum*), that monetary claims must be enforced by way of a writ of execution and not contempt proceedings.
- [98] The respondents also contend that in *Mashaba and Another v Telkom SOC Ltd*,²⁶ (*Mashaba*), the LAC, referring to the Madlanga J judgment in *Hendor*, held that an order to reinstate is also an order *ad factum praestandum* (to do

²⁴ (2025) 46 ILJ 1708 (LAC).

²⁵ (2016) 37 ILJ 1488 (LC).

²⁶ (2020) 41 ILJ 2437 (LAC).

something). They further submitted that “*in short, a debt to which there are no contractual defences*”. Importantly, the respondents submitted that the court’s statements in *Mashaba* are *obiter*. As I understand their position, they rely on *Wenum* to argue that a writ of execution ought to have been issued. At the same time, they point out that in *Mashaba*, the writ of execution was set aside.

[99] The respondents’ position is difficult to follow. They argue that an order to reinstate is an order to do something, while at the same time submitting that it can be enforced by a writ of execution. *Mashaba* did not determine that an order to reinstate retrospectively is a debt to which there are no contractual defences. Nor did Madlanga J say that in *Hendor*. In *Mashaba*, the LAC set aside a writ of execution issued in respect of interest on arrear remuneration, yet the respondents contend that a writ of execution is the correct means to enforce the applicants’ arrear remuneration claim.

[100] In *Hendor*, the employees initially obtained a writ of execution in respect of the arrear remuneration, and this court set aside that writ on the ground that it was not an order sounding in money, holding that a declaratory order was required.

[101] When the matter came before the CC, Madlanga J recorded that the employer argued that the obligation to pay arrear remuneration following a reinstatement order could not be enforced by a writ of execution because the amount due was not quantified. He commented on that proposition as follows:

[18] ...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...

[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.' (Own emphasis)

[102] Therefore, per Madlanga J, an order for arrear remuneration is enforceable by contempt of court proceedings, not by a writ of execution.

[103] When Zondo J weighed in on the issue, he stated the following:

'[103] ...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 para (a) of Cele AJ's order because para (a) is not an order sounding in money. The applicants must be taken to have accepted that decision of 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.' (Own emphasis)

[104] As the applicants had not challenged the LC decision setting aside the writ of execution, Zondo J did not expressly address whether a writ of execution was,

in any event, an appropriate means of enforcing a claim for arrears of remuneration. However, implicit in Zondo's judgment is that a writ of execution would be inappropriate in respect of a claim for arrear remuneration that an employer is entitled to defend.

[105] In *Hendor*, the court granted the sought declaratory orders. Zondo J stated the following:

'[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.'

[106] It follows that claims for arrear remuneration can be pursued either through contempt of court proceedings or by seeking declaratory orders, but not by a writ of execution. The applicants in this matter sought the primary relief of contempt of court, and, in the alternative, declaratory orders. That approach is supported by *Hendor*.

[107] In the *Wenum* judgment relied upon by the respondents, in December 2015, the court ordered the employer to continue paying the employee's salary until judgment was handed down. In January 2016, the employee was informed that he would not be remunerated on the applicable pay date. On 1 February 2016, the employee launched an urgent contempt of court application, which the court dismissed. The reasoning for the Court was as follows:

'[12] During argument I confirmed with Mr Scholtz that there is a court order that orders the payment of the applicant's salary until judgment is handed down, that judgment was not yet handed down and therefore his client's claim was one sounding in money. Mr Scholtz was unable to explain why he has approached this court, and that on an urgent

basis, for the payment of arrear remuneration and contempt when his client has a claim sounding in money.'

[108] The Court went further and stated the following:

'[16] If the judgment is one ad pecuniam solvendam, namely one in which C the court orders the debtor to pay a sum of money, it is appropriate to seek its enforcement by means of a writ of execution. When the judgment is one ad factum praestandum, namely an order to perform some act for example to pass transfer or vacate premises, the judgment creditor cannot seek its enforcement by the levying of a writ and his or her remedy lies in contempt proceedings. These are principles practitioners in this court should know and consider before applications are filed.'

[109] It is evident from the above that the claim was for the employee's January 2016 salary; therefore, it was a claim sounding in money. All that was required of the employer was to pay the employee's salary, and there was no further legal issue to be resolved for the court order to be implemented. The employer was not required to perform any act. This is very different from the facts of the present matter, where there is a dispute over the respondent's liability for the arrear remuneration.

[110] In *Mashaba*, after quoting what Madlanga J stated in *Hendor*, the court stated this:

'[21] Thus, the Constitutional Court has pronounced authoritatively that a retrospective reinstatement order is not an order for the payment of money simpliciter. It is rather an order to perform certain acts. As stated, when a judgment or order is one ad factum praestandum, the judgment creditor cannot seek its enforcement by the levying of a writ. The remedy for non-compliance with such an order is to apply for the committal of the judgment debtor (the employer) for contempt of court, normally by way of an urgent application for the issue of a rule nisi simultaneously affording the employer an opportunity to purge the contempt by making payment...*This judgment nonetheless provides an opportunity to offer litigants a salutary reminder of the execution procedure applicable to orders of retrospective reinstatement.*'

- [111] *Mashaba* followed *Hendor*, as per Madlanga J, that contempt of court proceedings are competent where reinstatement orders are not complied with. The submission that the majority in *Hendor* did not accept Madlanga J's findings on this issue is not supported by the findings of the 'majority' that are relied upon. In any event, there was no majority in *Hendor*, as the court split.
- [112] In addition, it is trite that a writ of execution is not competent where a *lis* has not been judicially resolved.²⁷
- [113] In the absence of agreement, the arrear remuneration payable to the applicants still needed to be determined, taking into account any defences Herotel raised.
- [114] In *Hendor*, the defences were raised when the employees sought a declaratory order that they were entitled to the arrear remuneration they claimed. The applicants were correct to proceed either by way of contempt proceedings or alternatively by seeking declaratory relief.
- [115] We also know that, as per Zondo J in *Hendor*, reinstated employees seeking their arrear remuneration may institute proceedings under section 77(3) of the BCEA.

Are the respondents in contempt of court?

- [116] For a respondent to be found in contempt of court, it must be established that there is a court order, that the respondent was served with or has knowledge of the order, and has not complied with it. Once these requirements are proved, wilfulness and *mala fides* will be presumed unless the respondent establishes reasonable doubt that the non-compliance was not deliberate or in bad faith. A respondent who fails to establish reasonable doubt will be guilty of contempt.²⁸
- [117] In my judgment, whether the respondents are in contempt must be determined by separating the arrear remuneration into two periods. The first

²⁷ *De Crespigny v De Crespigny* 1959 (1) SA 149 (N).

²⁸ *Secretary, Judicial Commission of Inquiry Into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC) at para 37.

period is between the reinstatement date and the judgment date. The second period is between the judgment debt and the factual reinstatement date.

[118] In respect of the first period, the first two requirements for contempt of court have been met. There is the Rabkin-Naicker J order, issued on 6 February 2024, directing the respondents to retrospectively reinstate the applicants from 1 November 2020. The respondents are aware of the order.

[119] The next question is whether the respondents have complied with the order. The judgment required the respondents to pay the applicants their arrear remuneration for the period in question, and the respondents have failed to do so. Therefore, the respondents have not complied with the order.

[120] The respondents' submission that the Rabkin-Naicker J order is not explicit about the payment of back pay is without merit. That judgment specifically addresses arrear wages for the period from 1 November 2020 to 6 February 2024.

[121] Since the first three requirements have been met, wilfulness and *mala fides* are presumed unless the respondents raise reasonable doubt about whether the non-compliance is wilful and *mala fide*. The respondents' sole defence is that they have not paid any of the backpay on the basis of legal advice.

[122] Reliance on good-faith legal advice can be a defence to a contempt application, as it may negate the inference of *mala fides*, as per *Moyo v Old Mutual*.²⁹ However, the legal advice must be reasonable, otherwise, a respondent cannot demonstrate a reasonable doubt as to wilfulness and *mala fides*.

[123] Legal advice not to pay back pay for the first period, as ordered by Rabkin-Naicker J, was not reasonable. The respondents had an opportunity before Rabkin-Naicker J, to present a case for limited retrospective pay. They failed

²⁹ 2022 JDR 1248. See also *Samancor Chrome Ltd v Bila Civil Contractors (Pty) Ltd* 2022 JDR 3569 (SCA).

to present such a case, and Rabkin-Naicker J ordered full retrospective pay. That issue cannot be revisited in these proceedings.³⁰

[124] The *Samancor LC* judgment, on which the respondents relied to resist the claim for arrear remuneration for the first period, makes the same point that an employer is liable for arrear remuneration for the period between the reinstatement date and the reinstatement order date, limited only by the extent of the retrospectivity. Yet the respondents persist in refusing to pay the applicants the full arrear remuneration for this period. Therefore, in respect of that first period, I find that the respondents' non-compliance was wilful and *mala fide*. They are in contempt of court.

[125] However, in respect of the second period, I have already held that, where the arrear remuneration claim is disputed, the applicants must bring legal action, and the respondent may then raise any defences it wishes. Therefore, in respect of this period, the respondents cannot be found in contempt of court, as there was a genuine dispute about the applicant's entitlement to full remuneration. This judgment resolves that dispute between the parties.

[126] For completeness, I address the allegation that upon reinstatement, Herotel failed to reinstate De Pontes on the same or similar terms that applied prior to her dismissal, and that De Pontes was demoted. The details of the respects in which Herotel is alleged to have acted are set out in the replying affidavit, and Herotel did not respond thereto. The law is clear on what is required of Herotel in this regard, otherwise, it is in contempt of the court.

Declaratory relief

[127] The primary relief sought by the applicants was contempt of court, or, in the alternative, a declaratory order. I have found that contempt proceedings were competent in respect of the arrear wages for the period from 1 November 2020 to 6 February 2024, as this was a judgment debt based on the Rabkin-Naicker J judgment, which pronounced on Herotel's liability for those arrear

³⁰ See *Equity Aviation*.

wages. This is why I found Herotel in contempt of court for failing to pay the arrear wages for this period, as the legal advice not to pay was unreasonable.

[128] However, in respect of the period between 7 February 2024 and 3 November 2025, there was a dispute between the parties regarding Herotel's liability and the extent of that liability. That issue needed to be resolved by this court, after affording Herotel an opportunity to raise any defences it had to the claim. A declaratory order was required. In *Hendor*, Zondo J stated this:

'[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.'

[129] As the respondents correctly pointed out, relying on *Proxi Smart Services (Pty) Ltd v Law Society of South Africa*³¹, the two-fold requirements for declaratory relief are (a) an applicant has an interest in an existing, future or contingent right or obligation and (b) if the first requirement is met, whether declaratory relief must be granted.

[130] There is no question that the first requirement is satisfied. The applicants claim a right to the arrears of remuneration for the entire period, from the date of dismissal to the date of factual reinstatement. Part of that claim has already been determined above. Therefore, the applicants have an interest in the remaining claim and, accordingly, an existing right.

[131] The next issue to be determined is whether Herotel is also liable for the full arrear remuneration for the period from 6 February 2024 to 2 November 2025.

Have the respondents put up a defence to the applicants' claim for arrear wages?

[132] In *Hendor*, the CC held that the employees were entitled to their full remuneration for the entire period, except for the applicants who had died

³¹ [2018] 3 All SA 367 (GP) at paras 69-70.

during the intervening period. The reasoning was that these employees would not have been able to render services during that period.

[133] Madlanga J held that this was so because it was a judgment debt (although finding that the employer could have challenged the arrear remuneration claim for what Zondo referred to as the second period). Zondo J held that the employees were entitled to their full arrear remuneration for the second period, even though they did not work, because they tendered their services, which Hendor rejected. He also added that *“it must be remembered that the second and further applicants would have performed their duties had Hendor not rejected their tender or pursued the appeal”*.

[134] Therefore, where an employee would not have performed their duties because they were employed elsewhere, that fact should be taken into account when calculating the arrear remuneration due to them. However, where no such case is made, and it is common cause that there is an order for reinstatement, and the employees tendered services, and the employer rejected that tender pending the outcome of appeal proceedings, and then reinstates the employees after unsuccessful attempts to appeal, according to *Hendor*, that employer *“has admitted all that is needed to be established to justify the conclusion that it is liable”* for the payment of the arrear remuneration for the period between the reinstatement order date and the factual reinstatement date.

[135] The defence to the applicants' claim for full arrear remuneration and benefits was set out as follows:

‘26. In the present case the respondents defence raised to the claim for backpay is that some of or all of the individual applicants were employed by another employer during the period between the court order and reinstatement. The respondent is accordingly entitled to deduct from whatever amount is claimed in backpay, the income received by the employee from another employer. The LAC, while finding that the employer could not rely upon a defence of prescription, had no difficulty with the employer's approach.’

27. In light of this, the employer has a defence to the employees' backpay claims. The quantum of any backpay to be paid cannot be determined at this stage- at least until the correct amount that is owing has been determined.'

[136] In *Hendor*, Zondo J stated this:

'[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.'

[137] Herotel has taken the point that some, if not all, of the applicants must have earned income between the reinstatement order date and the factual reinstatement date. The applicants have not denied earning income but contend that such income need not be taken into account when calculating the remuneration due to them. I have already determined that they are wrong on this issue.

[138] Since it is undisputed that some or all of the applicants earned income from alternative employment, it follows that Herotel's contention that the arrear remuneration due to the applicants for the period between the reinstatement order date and the factual reinstatement date can be calculated only once the applicants have disclosed the income earned from employment during this period must be upheld.

Relief

[139] The applicants sought an order that the respondents make suitable arrangements within seven days of the court order to calculate what is owed

to them and to pay those amounts to their attorneys, failing which the applicants may approach the Court, on the same papers and supplemented as necessary, for an order that the respondents are in contempt of court. That relief is competent in respect of arrear remuneration and benefits for the period between the dismissal date and the Rabkin-Naicker J order.

- [140] That a detailed Excel spreadsheet reflecting the applicants' remuneration and benefits was submitted to Herotel was not disputed. Herotel should work from that spreadsheet. Seven (7) days are sufficient to complete the calculations for the arrear remuneration and benefits for this period.
- [141] Interest on arrear remuneration and benefits for that period should be calculated from 6 February 2024 to the date of payment.
- [142] Regarding arrear remuneration and benefits for the period from 7 February 2024 until 2 November 2025, the respondents are directed to calculate the arrear remuneration due to the applicants within fourteen days of receipt of information from the applicants or their attorneys regarding what the applicants earned, if anything, from alternative employment for that period.
- [143] Interest on the arrear remuneration and benefits for the period from 7 February 2024 to 2 November 2025 must be calculated from the date each monthly wage became due until the date of payment.
- [144] In the event that the parties cannot agree on the calculations, either party may refer the issue to this Labour Court for a decision. The approach to the Labour Court can be made on an expedited basis to achieve finality in this dispute, which has been ongoing since early 2020.

Costs

- [145] The parties sought costs against each other, with the applicants seeking costs on the attorney-client scale.
- [146] Both parties have been partially successful with their contentions. A costs order in accordance with the requirements of law and fairness is that each party pays its own costs.

[147] In the result, I make the following order:

Order

1. The matter is heard as one of urgency.
2. The applicants' failure to comply with Rule 58 of the Rules of this Court is condoned.
3. The respondents are liable for the applicants' full arrear remuneration and benefits for the period from 1 November 2020 to 6 February 2024, pursuant to the Rabkin-Naicker J order dated 6 February 2024, in case number C135/2021.
4. Interest on the full arrear remuneration, in terms of paragraph 3 above, is to be calculated from 6 February 2024 to the date of payment.
5. The respondents are in contempt of the Rabkin-Naicker J's order in case number C135/2021, dated 6 February 2024, for failing to pay the applicants their full arrear remuneration in respect of the period 1 November 2020 to 6 February 2024.
6. The respondents are ordered to calculate and pay to the applicants' attorneys the arrear remuneration due to the applicants for the period from 1 November 2020 to 6 February 2024 within seven days of this order, failing which the applicants may, on the same papers and supplemented as necessary, seek an order imposing a sanction on the respondents for contempt of court.
7. The respondents are ordered to calculate and pay to the applicants' attorneys the arrear remuneration due to the applicants for the period from 7 February 2024 to 2 November 2025, within fourteen days of the applicants' providing information about income earned from alternative employment, where applicable.

8. Interest on the full arrear remuneration, in terms of paragraph 7 above, is to be calculated from the date each monthly wage became payable to the date of payment.
9. If the parties cannot agree on the calculations, either party may approach this Court for a final determination, on an expedited basis.
10. Each party must bear its own costs.

T Gandidze

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Oosthuizen SC

Instructed by: Mcaciso Stansfield Attorneys

For the Respondent: Advocate Redding SC

Instructed by: Solomon Holmes Attorneys

LABOUR COURT