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EMPLOYMENT

Reinstatement awards: Valid tender of services survives review and appeal proceedings

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The Labour Appeal Court's ("LAC") recent judgment in Ni-Da Transport (Pty) Ltd and Another v AMCU obo Fakude and 211 Others provided clarity on the obligations of employers and employees following an award of reinstatement, particularly where the employer pursues review and appeal proceedings.

On 06 March 2019, a bargaining council arbitrator found that Ni-Da Transport (**"Ni-Da"**) had unfairly dismissed 127 employees (whose services had been engaged through a temporary employment services provider) and ordered their reinstatement. In terms of the arbitration award, the employees were required to tender their services within 10 days of service of the award.

On 29 March 2019, following service of the award, 58 of the employees attended at Ni-Da's premises and tendered their services. Ni-Da refused to accept their tender and subsequently instituted review proceedings challenging the award and furnished security, thereby suspending enforcement of the award.

The Labour Court dismissed the review on 25 May 2022, and a petition for leave to appeal was refused by the LAC on 15 February 2023. Thereafter, Ni-Da approached the Constitutional Court with an application for leave to appeal which was also refused on 29 September 2023. The parties then engaged in settlement negotiations which broke down on 7 February 2024. The union

demanded compliance with the arbitration award and, in particular, that Ni-Da reinstate the employees. Ni-Da refused, arguing that the employees should have tendered their services 10 days after the Constitutional Court issued its order. The employees then sought to enforce the award through contempt proceedings at the Labour Court.

The Labour Court found that the 58 employees had already validly tendered their services within the prescribed period (back in March 2019) and were not required to re-tender following the conclusion of Ni-Da's legal challenges. It further held that Ni-Da bore a positive obligation to facilitate the 58 employees' reinstatement once its legal remedies had been exhausted. Ni-Da's failure to take proactive steps to reinstate the employees consequently resulted in a finding of contempt.

On appeal, the LAC agreed that the employees were not required to repeat their tender of services. The court found that review and appeal proceedings merely suspended the enforcement of an arbitration award; they do not have the effect of invalidating an earlier valid tender or extinguishing an employee's rights flowing therefrom. Furthermore, that a valid tender of services survives the period during which enforcement of an arbitration award is suspended, irrespective of the duration of the employer's legal challenges. The court determined that requiring the employees to re-tender would effectively penalise them for delays occasioned by the employer's decision to pursue its legal remedies, notwithstanding that the employees had already complied with the arbitration award. Importantly, the fact that the award had not been certified when the employees tendered their services did not invalidate their tender.

On the question of whether an employer bears a positive obligation to facilitate reinstatement, the LAC found that while this may be good industrial relations practice, there was no legal basis for an obligation to do so. Referring to the Constitutional Court's judgement in *NUMSA on behalf of Fohlisa & Others v Hendor Mining Supplies*, the LAC reaffirmed that it is the employees who must elect to take advantage of reinstatement by tendering their services. However, this does not mean that an employer may refuse to reinstate employees who have validly tendered their services. Once the employer's legal challenges have been exhausted and the suspension on the enforcement of the award is lifted, the employer is obliged to accept the employees' existing tender and reinstate the employees.

The LAC accordingly dismissed Ni-Da's appeal and upheld the finding of contempt.

For employers, this judgment serves as an important reminder that they may lawfully refuse a tender of services while review or appeal proceedings are pending, however, during the suspension period, the integrity of the award remains unaffected and intact. Once the suspension lifts, the position reverts and the employer must implement the award, failing which, it risks contempt. While there is no legal duty to actively facilitate reinstatement, doing so may be sensible practice. For employees, this judgment highlights the importance of tendering their services where reinstatement has been awarded, and further that the rights flowing from a valid tender remain unaffected by subsequent review or appeal proceedings.



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