

EMPLOYMENT LAW

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Order for Reinstatement: Can an employer be held in contempt for failing to effect back pay for reinstated employees?

In Association of Mineworkers and Construction Union obo the AMCU Members v T.W. Civils and Earthmoving (PTY) Ltd and Another (J 1066/2020) [2022]
ZALCJHB 223(T.W. Civils) the Labour Court heard an application seeking to hold the employer in contempt of court, for failing to adhere to a previous order which directed the employer to reinstate the retrenched employees for at least 30 days. The reinstatement was to ensure that a proper consultation process was followed in terms of section 189A of the Labour Relations Act of 1995.



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Order for Reinstatement: Can an employer be held in contempt for failing to effect back pay for reinstated employees?

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The trade union sought to hold the employer and its directors in contempt of court for failing to back pay the employees for the 30-day period, after reinstatement. The employer argued that the order was for reinstatement and is not a judgment in money.

In *National Union of Metalworkers of South Africa obo M Fohlisa and 41 Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9, the Labour Appeal Court held that an order of reinstatement did not encompass an order quantifying the arrear wages payable for the entire period. The restoration of the employment contract in an order for reinstatement had the result that, an employee holds a contractual claim for the payment of any arrear wages. Judge Zondo (as he then was), held that the claim fell into two distinct categories; first, the one before the reinstatement order and the other, being the period after

the reinstatement order. He stated that the claim relating to the first, was a judgment debt, the claim in relation to the second period was a contractual debt.

This viewpoint was further confirmed by the Labour Appeal Court in *Kubheka and others v Ni-Da Transport (Pty) Ltd* [2021] 4 BLLR 352, where the court held that the actual reinstatement of employees resulted in the restoration of their contracts of employment, and that any claim to wages was a contractual debt to be dealt with in terms of the principles of the law of contract.

In the circumstances, any claim regarding remuneration, consequent to reinstatement, is a contractual claim sounding in money. Therefore, it is not competent for an employee who was reinstated by the court, to hold the employer in contempt of court for remuneration not paid. A more appropriate claim will be for the employee to quantify their claim and seek to execute by way of a writ of execution.

Ultimately, in T.W. Civils the court concluded that the employer's obligation in terms of the court order was to reinstate the individual employees for a period of at least 30 days, and that failing to pay any money owing during this period cannot be enforced with a contempt application.

The lesson of this case is an employee must institute a civil claim for payment of monies due after re-instatement. They cannot seek to claim those monies through a contempt application.

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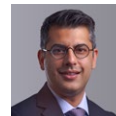
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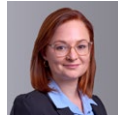
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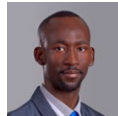
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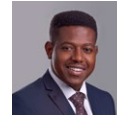
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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