

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****JUDGMENT**

Not Reportable

CASE NO: JR 2344/11

In the matter between

**WESTERN PLATINUM LIMITED**

Applicant

and

**NUM obo MOLEMA JM**

Respondent

**Heard:** 21 November 2012**Delivered:** 21 November 2012

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**EX-TEMPORE J U D G M E N T**

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**CELE J**

[1] The arbitration award dated, 5 August 2011, issued by the second respondent as a Commissioner of the first respondent is sought to be reviewed and set aside in terms of section 145 of the Labour Relations Act, hereafter referred to as the "Act" or the "LRA". The third and fourth respondents did not oppose this application. The award was issued in favour of the fourth respondent, who is actually an employee of the applicant. The third respondent being the union that the fourth respondent was a member of.

[2] The employee commenced his employment with the applicant on 21 May 2003 as a loco operator, I think it should be locomotive operator but they call it loco operator. On or about 10 May 2011, the employee was suspended with full pay pending the outcome of an investigation

regarding his involvement in an assault perpetrated on a fellow employee. Over and above, the employee had a disciplinary history according to the record of the applicant, whose disciplinary history included a valid final written warning for the offences of arriving late at the workplace, threatening violent and using abusive language.

- [3] One of the conditions of the suspension was that the fourth respondent had to report to the Human Capital Consultant, which is normally abbreviated as HCC, and he had to report daily whilst he was on suspension. The notice to attend a disciplinary hearing for allegations pertaining to an assault was issued to him on 16 May 2011.
- [4] On 17 May 2011, the applicant received an indication that its employees were considering withholding labour. The reason appeared to be a demand from employees that the Branch Committee, which included one Mr Steve Khululekile and one Mr Dan Nomboketsi who had been dismissed, be reinstated. The applicant's employees participated in a march to the office of the applicant's Vice President of the Karee Mine and presented their demands.
- [5] On 18 May 2011, following the Municipal election, applicant's employees on nightshift commencing at about 22h00, flatly refused to continue with their work. Thereafter, on 19 May 2011, the entire workforce at the applicant's Karee Mine, including the fourth respondent, embarked on an unprotected strike. On Friday, 20 May 2011, which was the following day, the applicant approached this Court seeking on urgent basis an order interdicting what it called an unprotected industrial action. The order was accordingly granted prohibiting the strike and declaring it to be unprotected. The order was served on the employees.
- [6] However, despite the employees having been served with the order,

they continued with their unprotected industrial action. There were three shifts which were scheduled for the weekend of 20 May 2011, and these employees did not resume their work. The employee himself joined the team that was on strike. On Monday, 23 May 2011, the applicant distributed a notice to its employees at the hostel and at various points on its premises. The applicant did not receive any representations from the employees and even less from the fourth respondent who participated in an unprotected strike as to why they were not returning to work and to comply with the ultimatum given to them.

[7] On Wednesday, 24 May 2011, the applicant sent a notice to its employees, barring those who had tendered their services, in which the applicant informed them that they had been dismissed with immediate effect. That order included the fourth respondent who had similarly participated in the industrial action. The applicant required these employees to vacate the premises immediately and offered them transport from the applicant's premises to stations and bus depots. The applicant maintained that the fourth respondent was dismissed on 24 May 2011 on the grounds of his participation in an unprotected strike.

[8] The applicant then embarked on a process to try and re-employ certain of its employees. It engaged the union in the course of that process and certain ground rules were set. They included the fact that any employee who had a final written warning would not be reemployed. And in due course, the applicant began to process reemployment of its employees, these were about 9 000 in all. It then issued a certain document which appears here on page 39, it is a memorandum inviting employees that qualified to avail themselves to resume work. The memorandum is dated, 24 May 2011. Paragraphs 1, 2 and 3 of this read:

*"[1] The company invites former employees who were dismissed on 24 May 2011 for taking part in an unprotected strike action and breaching their contractual obligations to make application to be considered for*

*reemployment.*

*[2] The company has a right to reject applications for reemployment where former employees were on a final warning for previous participation in unlawful industrial action or previous breach of their contractual obligations owed to the company prior to their dismissal on 24 May 2011.*

*[3] The company also reserves a right to reject an application for reemployment by a former employee who is found to have instigated, caused or promoted this unlawful and unprotected strike in addition to having participated therein."*

[9] As events would have it, somehow the employee was also in possession of the offer of reemployment and he queued up as if he qualified, but the applicant quickly picked it up that he had wrongly been invited according to it because he had a final written warning that had been given to him. He was then detected and then was removed from continuing with the re-employment process.

[10] He felt aggrieved by that exclusion. He then referred an unfair dismissal dispute for conciliation and for arbitration. The second respondent was appointed to arbitrate this dispute. The arbitration was scheduled for 18 July 2011 and it was eventually proceeded with on 20 July 2011. At the commencement of the arbitration proceedings, the parties firstly had to establish what exactly the fourth respondent was alleging his case to be. The fourth respondent then alleged that he was dismissed on 27 May 2011 after his contract of employment, so he claimed, was repudiated leading to his dismissal.

[11] He was actually saying that he had been reemployed in terms of the offer given to the 9 000 employees and that the dismissal took place at that time. The applicant disputed that and insisted that he had been

dismissed on 24 May and that he attempted unlawfully to find his way back into employment. The second respondent in the award found that the applicant, that is the employee, referred to being dismissed while the respondent vigorously disputed that. The second respondent said:

*"I find it a bit strange that the respondent can print 9 000 copies of contracts including those who were not supposed to be reemployed knowing very well that others did not meet the required criteria."*

A further finding he made was the following:

*"On a balance of probabilities, I defer to the version of the applicant during his arbitration as vastly more credible than the version presented to me by the respondent. It was overwhelmingly clear to me that the applicant was offered reemployment, which he accepted and he was then dismissed."*

[12] The second respondent made no reference to the document which I have referred to as the memorandum, which clearly indicated that the company reserved its right to reject any application for re-employment where a former employee was on a final written warning. It is clear from the evidence that was adduced during the arbitration proceedings by the witnesses of the applicant that a mistake took place which could not be detected or the source of which could not be detected and so he came, that is the employee, came to have a form for re-employment. It is clear that the employee did not qualify for re-employment because he did not meet the rules set by the employer and by the unions together, and they knew about all of this.

[13] The second respondent clearly misdirected herself in the manner that she approached the evidential material. She failed to consider the very important evidential material, as a consequence of which she misdirected herself. Clearly the misdirection was so gross that it allows this Court to review the award of the second respondent. There is no

doubt in my mind that the evidence is overwhelming to show that the fourth respondent was dismissed by the applicant on 24 May 2011, and that he did not qualify for re-employment.

[14] Accordingly, therefore, the order is granted as prayed for in paragraph 1 of the Notice of Motion, which reads thus:

1. The arbitration award issued by the second respondent under case NWRPRB1685/11 on 5 August 2011, received by the applicant on 11 August 2011, is reviewed and set aside.
2. No costs order is made.

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CELE J

Judge of the Labour Court