NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **J4919/2000**

[Matter argued and judgment reserved on 2/10/01]

In the matter between:

WESTERN PLATINUM Applicant

and

CCMA & OTHERS Respondents

ON BEHALF OF APPLICANT A SNIDER

ON BEHALF OF RESPONDENT M O MAMABOLO

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

GERING AJ

[1] This is an application to review and set aside the award of an arbitrator, the award of a commissioner, the second respondent, (Mr E R Mafolo) under section 145 of the Labour Relations Act 66 of 1995 (the "Act").

[2] The award is dated 11 September 2000 and appears in the paginated bundle of documents (the "Bundle") at pages 28 to 37. (Page references to the Bundle will be denoted by "B" followed by the relevant page number).

[3] The employee (the fourth respondent) had been employed for more than ten years with a clean record. (See B31) It should be noted that the date 1998 given on B30 is a mistake and should be 1988.

[4] The main charge against the employee was one of corruption and deliberately using her position for financial gain. [See B176.] There was also a further charge of failing to comply with the company rules and regulations or established procedures relating to the filling in of forms.

[5] In terms of section 192 of the Act, as the existence of the dismissal has been established (which is the position in the present case), the employer must prove that the dismissal is fair.

[6] The employer called only two witnesses, namely Mr Stephen Trollip, the employer's Human Research officer (referred to as Trollip) and Myekeni Boy Dhlamini (referred to as Dhlamini). Trollip testified that it had been reported to

him that the employee had accepted money from job applicants but this was of course hearsay evidence. He could not himself give any admissible evidence on this alleged misconduct. For that the employer relied solely on the evidence of Dhlamini. He was correctly described as a "key witness". [See B205,206,238.]

[7] The arbitrator found as follows in regard to the evidence of Dhlamini:

"Having regard to the testimony of the employer's key witness, Mr Myekeni Dhlamini, I find that his testimony should be rejected as false due to contradictions and his refusal to answer some questions put to him. He was not reliable at all."

[See B36.]

[8] No other witness was called by the employer to prove the alleged corruption although Dhlamini stated that there were others. [See B203, B208.]

[9] There is clear evidence in the cross-examination of Dhlamini that there were material discrepancies and omissions between his evidence at the arbitration hearing and an earlier statement that he made. It is not necessary to burden this judgment with extracts from the record and it is sufficient if I mention the following page references. [B218, B225, B226, B228, B232-233, B242.] The witness admitted that in regard to his own conduct he knew that what he was doing was wrong. [See B 240].

[10] Having regard to the significant discrepancies and omissions and his refusal to answer questions there is ample justification for the view taken by the commissioner that evidence of this key witness was unreliable and accordingly, in

the absence of other admissible evidence to establish the alleged misconduct relating to corruption and deliberately using her position for financial gain by taking money from job seekers, the employer has failed to discharge the *onus* of proof in regard to the main count of misconduct.

[11] As regards the charge of not complying with the employer's procedure in filling in forms, the following points should be mentioned:

(a) Her evidence was that she was instructed by Trollip to assist one Andrew in completing forms; Andrew was not however called as a witness. [See B251, B354 and B260.]

(b) The evidence-in-chief of Trollip was part of the transcript that was missing and it is not clear what particularity was given as to the procedure to be followed by the employee.

(c) This was the first time that she had been given this task. [See B250 and B259.]

(d) Nowhere on the evidence is it made clear that non-compliance with the procedure of completing forms could result in dismissal.

(e) The completion of the forms was only a preliminary step towards obtaining employment. The job seeker had to pass a medical examination. [See B201, B202, B210.]

[12] As appears from the following extract from the bundle [B202]:

"Her testimony will go further to say that after she received those instructions from you and after she had completed those medical fitness forms, it is out of her whether the people passed the fitness test or not. In other words, it is out of her whether those people succeed in getting employment or not. What will be your comment? --- Yes, it is up to the hospital to decide whether the person is

medically fit or not."

And again on B210:

"When a person is found medically fit and he passes his security screening, will he be denied employment? --- No.

COMMISSIONER: Medically fit? --- Medically fit.

If he is medically fit and he passes the security screening. If a person is found medically fit and he passes his security screening, will he be denied a post?

COMMISSIONER: What was the answer? --- No, he will not be denied employment."

[13] It seems clear from this that the mere completion of the form by the employee would not in itself enable a person to obtain employment. It was still necessary for the job applicant to be found medically fit before he could obtain employment.

[14] In my view this misconduct, even if proved, (which in my view was not the case) would not have been a basis for the dismissal of an employee who had worked for ten years with a clean record and who was doing this particular job for the first time.

[15] I refer to the judgment in *Shoprite Checkers (Pty) Ltd v Ramdaw* [2001]9 BLLR 1011 [LAC} 101:

"In my view it is within the contemplation of the dispute resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but which nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act's objective of the expeditious

resolution of disputes would have no hope of being achieved. In my view the first respondent's award cannot be said to be unjustifiable when regard is had to all the circumstances of this case and the material that was before him."

[16] In my view this applies also to this case. There are unsatisfactory features in the award, such as the mistake of the date on B30 and his statement on B36:

"In order to establish a finding of misconduct it is necessary to establish prejudice. This requires proof that the employee was selling jobs and had benefitted from this. In the light of all the evidence and on assessment of all probabilities, it is my view that this element has not been established with a sufficiently high degree of proof. The employer has relied on their internal disciplinary hearing to convince me of the employee's alleged misconduct, forgetting that I cannot rely on hearsay evidence and the credibility of its key witness did not make matters any better."

[17] The reference to the "necessity to establish prejudice" is not at all clear and the reference to "a sufficiently high degree of proof" may be misleading because the requisite degree of proof is simply a preponderance of probabilities.

[18] Nevertheless, it seems to me that there is ample evidence to support the view that the evidence of the key witness, namely Dhlamini, called by the employer was so unsatisfactory that it could not be held to discharge the *onus* of proof in relation to the misconduct alleged of deliberately using her position for financial gain by receiving money from job seekers.

[19] In the result, in my view no grounds have been established under section 145 of the Act to justify the setting aside of the arbitrator's award and I accordingly order that the application for review and setting aside of the award should be dismissed.

[20] The award of the arbitrator is set out on B37:

"I, therefore, award as follows:

That the employer reinstate the employee to her former position on the same terms and conditions that prevailed prior to her services being terminated; that the employer pay to the employee the amount of R20 600,00, which is equivalent to the employee's salary for twelve months; that the employer comply with the terms and conditions of the award within seven days of its receipt and that the employer comply with section 195 of the Act."

[21] I confirm the arbitrator's award and I order that the application under section 145 be dismissed with costs.

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GERING AJ
ACTING JUDGE OF THE LABOUR COURT