THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No : 269/06

In the matter between :

AMPLATS MANAGEMENT SERVICES
(PTY) LIMITED Appellent

and

AURET PRITCHARD VAN JAARSVELD Respondent

Coram: SCOTT, NUGENT, JAFTA, MLAMBO, JJA and MUSI AJA
Heard : 14 May 2007
Delivered : 31 May 2007

Summary: Contract of employment – whether established.

Neutral Citation: This judgment may be referred to as *Amplats Management Services (Pty) Ltd v Van Jaarsveld* [2007] SCA 72 (RSA)

SCOTT JA/

SCOTT JA:

[1] The respondent (the plaintiff in the court below) instituted action in the Johannesburg High Court against the appellant for the payment of damages in the sum of R 7 314 900, together with ancillary relief, arising out of an alleged breach of a contract of employment which the respondent alleged it had entered into with the appellant. At the commencement of the trial the court a quo (Horn J), as requested by the parties, ordered the issue of the appellant's liability to be decided first and the issue of the quantum of the respondent's claim to stand over for later determination. The court found for the respondent and declared him entitled to recover damages. The appeal is with the leave of the court a quo.

[2] The appellant, a wholly owned subsidiary of Anglo Platinum Ltd, has as its function the provision of what in effect is a head office for the Anglo Platinum group of companies. It has a number of divisions or departments, each of which has at its head a general manager who reports to an executive director. The senior members of its staff are appointed by a sub committee of an executive committee called the administrative committee which consists solely of directors. I shall refer to the latter as 'the ADCO'. The appellant has a grading system in terms of which each employee is allocated a grade depending on the particular function he performs. The highest grade is level one; it is not clear from the evidence how far down the grading goes. An applicant for appointment to a post at senior level would ordinarily be interviewed by the director in charge of the department concerned and thereafter be graded by a grading committee which, similarly, consists entirely of executive directors. The human resources department would also consider the application and add its input regarding such matters as employment equity requirements and the need to ensure that the size of the staff at senior level did not expand unnecessarily. Thereafter, as I have indicated, the application is considered by the ADCO which takes the final

decision. The director in charge of the department in which it is proposed the applicant will be employed would normally motivate the appointment before the ADCO.

[3] In May 1995 the respondent joined Rustenburg Platinum Mines (Pty) Ltd (also a subsidiary of Anglo Platinum Ltd) as a planning manager at one of its mines. Mr Ray Menne, who was then the General Manager in the business development and planning department of the appellant, was impressed by his work and, with the authority of the director then responsible for that department, Mr Dorian Emmett, arranged to interview the respondent on 6 June 1997 with a view to the latter being seconded to the head office for a period of six months. Menne required the respondent's services for an initiative then in progress, namely, the strategic planning initiative (referred to in evidence as the SPI). What was said and agreed at that meeting was the principal issue at the trial.

[4] According to the respondent, he was told by Menne that if he, Menne, was satisfied with his performance during the period of secondment he, the respondent, would be appointed as a permanent member of the head office with effect from 1 January 1998. On this basis he accepted the offer of secondment and became involved first in only the SPI and later in other aspects of the work undertaken by that department. He testified further that after he had been at the head office for about three months Menne told him that he, Menne, was very happy with his performance and that 'he was definitely going to appoint me at the beginning of the new year' and that his appointment would be at level three. The respondent said that at that stage he had never heard of the ADCO and only became aware of its existence in July 2000.

[5] Before commenting on this evidence and considering the appellant's response thereto, it is convenient to sketch briefly the subsequent events which culminated in the respondent signing a formal agreement of employment on 25 August 2000, which he did without prejudice to his rights.

[6] In about December 1997 (before the expiry of the six months period) the respondent spoke to Menne about his appointment. At the time the department was about to be divided in two. Emmett, the director formerly responsible for the department, was to become the marketing director and another director, Mr Dreyer, would take over as the director responsible for the planning department. According to the respondent, Menne told him that he would 'hold over' his appointment until the new director had had a chance 'to find his feet'. He said that shortly after he returned from vacation which was on 19 January 1998, he again spoke to Menne about his appointment. He said that Menne told him that he had spoken to Dreyer who had explained that he was in the process of restructuring the whole division and that the respondent's appointment was part of that process. It appears, however, that nothing further was done to expedite the respondent's appointment for the remainder of 1998. Menne left officially at the end of the year, but had been absent for some time prior to that on account of poor health. His position as general manager of the department was finally taken over by Dr Baxter in February 1999.

[7] According to Baxter and Dreyer, the two discussed the matter of the respondent's appointment but Baxter was still in the process of assessing the overall position of the department, including his own role, and was unwilling at that stage to make any recommendations regarding new appointments. When approached by the respondent, Baxter made it clear, he said, that he did not regard himself as bound by any 'promises' made by his predecessor. Finally, in about July 1999, Baxter, as he put it, began 'feeling comfortable' about a permanent appointment for the respondent and he approached the human resources department which was the first step in the process of procuring an appointment for the respondent. However, a number of difficulties presented themselves. These included the need for an appropriate grading, the determination of an appropriate salary having regard to that grading and more particularly some resistance from the director responsible for the human

resources department, Mr Ngubane, who was concerned with the need to comply with employment equity requirements.

[8] The matter appears to have dragged on for some while until as a result of pressure from the respondent, the whole process was expedited with some haste and following approval by the ADCO the respondent was appointed at level four with effect from 15 September 2000. Once so appointed, the respondent became entitled to participate in a share option scheme. His complaint was that by reason of his not having been appointed with effect from 1 January 1998 he suffered damage in an amount of some R7 m on account of the rise in the market price of the shares on the Johannesburg Securities Exchange during the intervening period. In February the following year the respondent lodged a complaint which was ultimately rejected by the ADCO. Of significance is that, at the request of the appellant, Menne submitted a memorandum dated 17 October 2001 to the appellant setting out his view of the matter. Menne died not long thereafter. The memorandum was however admitted at the instance of the respondent without objection. I shall refer to it later in this judgment.

[9] The respondent's case as pleaded, and as presented to this Court in argument, was that by reason of his agreement with Menne and the subsequent approval by the latter of his performance, the respondent's secondment ended on 31 December 1997 and that as from 1 January 1998 he became an employee of the appellant; all that was lacking was a letter of appointment which was a mere formality. In other words, Menne, acting on behalf of the appellant in effect appointed the respondent to a position at the head office, subject only to the condition that Menne was satisfied with his performance during the period of secondment.

[10] Quite apart from the issue of Menne's authority to enter into such an agreement and whether he would have done so, it is clear that the respondent did not become an employee of the appellant as from 1 January 1998. His

secondment was simply extended. The evidence shows that he remained on the pay role of Rustenburg Platinum Mines and was paid by that company. Furthermore, Menne, who at all times was in favour of the respondent being appointed as a permanent member of the staff, recorded in a written appraisal of the respondent in October 1998 that the latter had originally been seconded for six months but 'has continued in this capacity to date'. Menne's advice to the respondent in December 1997 that he would 'hold over' the respondent's appointment until Dreyer had found his feet is similarly inconsistent with the notion that on 1 January 1998 the respondent would automatically have become an employee of the appellant.

[11] Counsel contended, however, that the evidence of the respondent was equally capable of the construction that Menne, acting as agent for and on behalf of the appellant, agreed with respondent that, if the latter's performance was satisfactory, the appellant would be bound to conclude a contract of employment with the respondent on the terms and conditions which Menne and the respondent had agreed upon. Such a contract, known as a *pactum de contrahendo*, is enforceable provided that the terms of the contract to be made in the future are agreed upon. See *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 (2) SA 225 (A) at 233G-J; *Hirschowitz v Moolman* 1985 (3) SA 739 (A) at 765I-766E. On this basis the respondent's case would be founded on the appellant's failure to conclude a contract of employment with the respondent in breach of the latter's agreement with Menne in 1997.

[12] Whichever construction one seeks to place on the respondent's evidence, the cardinal issue is whether Menne, acting for and on behalf of the appellant entered into such an agreement and purported to bind the appellant as alleged. Menne died some while before the trial. The only surviving witness available to testity as to what was said at the meeting between the two was therefore the respondent who is the party who bears the onus of proof. It is a well established rule of practice that in such circumstances, although the onus is no higher than in

any other case, the evidence of the survivor is to be scrutinized with caution and weighed against the probablilities based on other acceptable evidence. See eg *Low v Consortium Consolidated Corporation (Pty) Ltd* 1999 (1) SA 445 (SCA) at 450D-451C and the cases there cited.

[13] Menne undoubtedly had authority to enter into a contract of secondment with the respondent (and with Rustenburg Platinum Mines). This was confirmed by Emmett. But he clearly had no authority to bind the appellant to the contract of employment which, it is alleged, he entered into with the respondent. Menne was a senior member of staff, he knew full well the procedures involved for the appointment of personnel to head office and the need for such appointments to be approved by the ADCO. This much is apparent from his subsequent conduct. In these circumstances, it is most unlikely that he would ever have purported to bind the appellant in the manner alleged by the respondent. The probabilities are overwhelming that he would have done no more than express a view, however strongly, that at the end of the secondment period the respondent was likely to be appointed or that he, Menne, would use his best endeavours to procure an appointment for the respondent. On the respondent's case Menne would have had to deliberately exceed his authority knowing full well what the appointment procedures were. This is unlikely, to say the least.

[14] I have previously referred to Menne's memorandum dated 17 October 2001. It contains the following passage which was the subject of much debate in this Court:

'With the agreement of [Emmett], [the respondent] was offered a secondment to head office for a six-month probation period. If his performance proved to be satisfactory, he would then be offered a permanent position in the department. The implication was always that any administrative procedures required would follow timeously. [The respondent] accepted the offer on this basis.'

I do not read the passage as supporting the respondent's version that a binding agreement was entered into with the respondent to the effect that at the end of

the six-month period, if his performance was satisfactory, he would become a permanent member of the head office staff or that at the end of the period the appellant would enter into a contract of employment with him on terms previously agreed upon. On the contrary, the passage suggests that Menne told the respondent no more than what was likely to happen at the end of the six-month period. Furthermore, he goes on in the memorandum to say that although he considered that the respondent was a major asset and should be appointed 'a number of events conspired against any immediate action'. These, he says, included an executive decision in December 1997 to split the department with Dreyer becoming the executive director responsible for Menne's department. He says further that he discussed the respondent's appointment with Dreyer who 'while appreciating [the respondent's] contribution to the department ─ requested patience from all parties while he reviewed his division's function, and how to best arrange and rationalise his resources'. In these circumstances, he adds, 'accordingly, it was thus hardly appropriate for me to request that the Human Resources Division proceed with [the respondent's] appointment at that time'. Menne concludes his memorandum by expressing the belief that the appellant 'has a moral obligation to redress its shoddy treatment of a valuable and grossly underestimated employee'. All of this, in my view, is inconsistent with Menne having exceeded his authority and entered into a contract on behalf of the appellant as alleged by the respondent.

[15] Given the probabilities and the content of Menne's memorandum, I am accordingly unpersuaded that the respondent's evidence was enough to discharge the burden of establishing the contract on which he relied. It follows that in my view the court a quo erred in finding in his favour on this ground.

[16] A further ground on which it was alleged that the appellant was liable was stated in the Particulars of Claim to be that during about April or May 1998, the appellant, represented by Menne, orally agreed with the respondent that the latter 'would not suffer any financial prejudice as a result of the [appellant's]

failure . . . to formalize the [respondent's] appointment with effect from 1 January 1998'. In support of this allegation the respondent testified that in about April or May 1998, after expressing his concern to Menne about the fact that he had not yet been appointed, Menne came back to him shortly thereafter and reported that Dreyer had said that he did not understand what the problem was as he, the respondent, need not worry 'about any financial losses or anything like that' as the appellant was a big company and it would look after him. Dreyer, on the other hand, vehemently denied that he had ever given such an undertaking and stressed the improbability of an undertaking of such 'an unquantifiable liability' ever being given on behalf of the appellant.

[17] Given the far reaching consequences of such an undertaking ─ the respondent's claim is far more than R7 m ─ it does strike me as most improbable that, had it been given, it would have been given in such an informal manner without at least being confirmed in writing. Significantly, no mention of it is made in Menne's memorandum of 17 October 2001. It is common cause that the memorandum was given by Menne to the respondent for the latter's approval before being submitted to the appellant. Having regard to the overall tenor of memorandum one would have imagined that had the undertaking been given it would have been dealt with and indeed given some prominence. In the circumstances, I am unpersuaded that the respondent discharged the burden of establishing this ground of liability.

[18] It follows that in my view the appeal must succeed. The following order is made:

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order of the court a quo is set aside and the following substituted in its place

'The plaintiff's claim is dismissed with costs, including the costs of two counsel.'

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D G SCOTT
JUDGE OF APPEAL

AGREE:

NUGENT JA
JAFTA JA
MUSI AJA

MLAMBO JA:

[19] I have had the benefit of reading the judgment of my colleague Scott. In his judgment my colleague Scott makes the finding that Menne had no authority to bind Amplats by entering into a contract with the respondent (Van Jaarsveld). I respectfully differ from my colleague Scott. I believe that the factual basis laid by my colleague does not take account of all the evidence and ignores the context under which the meeting of 6 January 1997 between Menne and Van Jaarsveld, took place. As I demonstrate herein the evidence warrants and indeed justifies contrary findings and a conclusion contrary to that arrived at by him.

[20] It is correct that Van Jaarsveld, a qualified and registered mining engineer, was employed as a Planning Manager at level E1 by Rustenburg Platinum Mines Ltd (RPM) at its Union Section Mine just outside the town of Northam in the Nort West Province. His focus area was the technical planning of new shafts, the

extension of existing shafts including surface and underground infrastructure planning and culminating in financial models inclusive of capital projects requiring R10 million and above.

[21] After his employment by RPM Van Jaarsveld was involved for seven months in an Amplats project known as Project Breakthrough. In this project he worked with executives and mining engineers drawn from throughout the Amplats group of companies where he gained a reputation as an astute and competent mining engineer and this is what drew Menne's interest to him.

[22] On 3 June 1997 Menne, then general manager employed by Amplats, in the Business Development and Strategy Planning Department (the department) within Amplat's structure at head office, telephoned Van Jaarsveld to invite him to an interview regarding possible employment in the department. Menne was, with the agreement of his Executive Director Mr Dorian Emmett (Emmett) headhunting for, amongst others, an experienced mining engineer who had appropriate analytical skills. At that time Menne's department was responsible for the so-called Strategic Planning Initiative and it was for this specific venture that Menne sought, amongst others, the services of an experienced mining engineer. The department was at that time understaffed and Menne's objective was to recruit appropriately qualified and experienced staff. The SPI was in actual fact behind in its work and Menne and Emmett were anxious to get it going.

[23] The discussion, as my colleague points out, at the interview on 6 June 1997 is pivotal to the result of this appeal. It is not in dispute that Menne informed Van Jaarsveld that he had identified him as one of the persons he required for the SPI initiative; that he had the support of his Executive Director Emmett and that the intention was to second him to Amplats for a period of six months to enable Menne to assess if he performed at the required level, instead of finalising the employment and discovering afterwards that he did not meet the grade, something which had occurred in the past. I accept as my colleague Scott does,

that Menne told Van Jaarsveld that if he made the grade, he would be offered a permanent contract of employment by Amplats. It is not in dispute that Van Jaarsveld was interested in the job offer presented by Menne and that the two agreed that Van Jaarsveld would report for duty at head office on secondment for a period of six months starting on 1 July 1997. Van Jaarsveld testified and was not contradicted that when he reported for work at head office in Johannesburg on 1 July 1997 he occupied an office next to Menne's and Emmett's in the 10th floor and that, Emmett took it upon himself to welcome him to the department. He worked with Mr John Wood, a level 3 employee within the SPI.

[24] My colleague finds that Menne only had authority to enter into a contract of secondment with Van Jaarsveld and that he had no authority to bind Amplats to the contract of employment alleged by Van Jaarsveld. Reliance for this finding is based on Menne's seniority within Amplats and his knowledge of the procedures involved in the appointment of personnel at head office as well as the need for such appointments to be approved by Amplats' Administrative Committee (Adco). My colleague goes on to find that it is most unlikely that Menne would ever have purported to bind Amplats in the manner alleged by Van Jaarsveld. My colleague Scott then concludes that the probabilities are overwhelming that Menne did 'no more than express a view, however strongly, that at the end of the secondment period' Van Jaarsveld 'was likely to be appointed or that, Menne, would use his best endeavours to procure' his appointment.

[25] I cannot agree with this analysis. In essence my colleague says Menne merely predicted that Van Jaarsveld would be offered a contract of employment by Amplats at the end of the secondment if he performed well. I call this the prediction thesis. This thesis does not take account of all the evidence and is incompatible with the documentary trail. The correct factual analysis as I hope to show is that Menne with proper authorisation offered Van Jaarsveld a job subject only to proving himself in the six month secondment. This Van Jaarsveld did.

When therefore he was not appointed at the end of six months a breach of contract occurred.

[26] In my view the context within which Menne made the representation is also relevant and it is that Menne and Emmett were concerned that the SPI, a key initiative of that department had fallen behind due to understaffing. That this is so is demonstrated by the approach to Van Jaarsveld and the appointment in October/November 1997 of Messres Paul Brogan and Pieter Du Preez into the SPI with effect from 1 January 1998. These appointments were not from within the group and were at Menne's instance. Du Preez was appointed to Wood's position when the latter was transferred to the Operations Division with effect from 1 January 1998. Even though Du Preez was appointed into that position Van Jaarsveld in actual fact took over Wood's duties.

[27] It is remarkable that these appointments were to take effect from the date put forward by Van Jaarsveld as being the effective date of his permanent appointment if he made the grade during the six month secondment. What is also remarkable about these appointments is that their passage through Adco was nothing more than a mere formality. In my view these appointments coinciding, as they do, with the effective date put forward by Van Jaarsveld as the date he agreed with Menne within the SPI, initiated by Menne and the ease with which Adco formalised them, shows that Van Jaarsveld's appointment was in the same mould and was meant to be treated similarly.

[28] On 1 January 1998 the department was divided into two and Emmett became the marketing director. The other section in which the SPI was located was headed from that date by Mr John Dreyer (Dreyer). It is not in dispute that just before the end of the six month secondment period and thereafter when he returned from annual leave, Van Jaarsveld enquired on several occasions from Menne about his permanent employment. He testified that on one of these enquiries during April/May 1998 Menne reported to him that he had spoken to

Dreyer about his situation and Dreyer's response was that he could not understand why Van Jaarsveld had a problem because Amplats was a big company, and that Van Jaarsveld did not have to worry about financial losses, as he would be looked after and would not suffer any prejudice as a result of his delayed appointment.

[29] Van Jaarsveld also testified that during the six month secondment he and Menne discussed his possible participation in the Anglo American Platinum share option scheme. It was during this discussion that Menne, having been made aware that as a mine employee Van Jaarsveld did not participate in the scheme, stated that it was critical that Van Jaarsveld be put on the books of Amplats as soon as possible so that he did not lose out.

[30] My colleague concludes that Van Jaarsveld failed to discharge the burden of proving that he was told by Menne in April or May 1998 that he should not worry as the delay in his permanent appointment would not result in any financial loss to him. The basis for this conclusion is based partly on the observation that Menne's memo of 17 October 2001, (which I deal with later) does not mention this. If one accepts, as I do, that Van Jaarsveld continuously pestered Menne about his permanent appointment from the beginning of January 1998, then it is significant that these enquiries died down from April/May 1998 until just before Menne left Amplats employ in October/November 1998 on medical grounds. Clearly Van Jaarsveld must have been given some assurance hence he stopped his enquiries. He started his enquiries again when he realized that Menne was about to leave the employ of Amplats. The probabilities are in my view overwhelming that Van Jaarsveld stopped his enquiries in April/May 1998 because he received the necessary assurance from Menne. Furthermore Van Jaarsveld had specifically made reference to this assurance from Dreyer in an e-mail he sent on 2 August 2000 to Baxter and in a memo he sent to Dreyer on 27 February 2001. Dreyer was aware of this correspondence at the time and in actual fact responded to the memo of 27 February. He did not dispute giving the

assurance alluded therein in his response to the memo of 27 February. This shows in no uncertain terms that Dreyer gave the assurance. Objectively viewed the giving of this assurance goes to the heart of the agreement concluded by Menne and Van Jaarsveld in that it preserves 1 January 1998 as the effective date of his permanent appointment.

[31] It is not Amplat's case that Van Jaarsveld did not make the grade during the six month secondment. In this regard Van Jaarsveld testified, and was not challenged, that Menne informed him sometime in October 1997 that he and Emmett were very happy with his performance and that he would be appointed permanently on 1 January 1998. That Van Jaarsveld was a star performer is borne out by his appraisal by Menne around July 1998. By all accounts Van Jaarsveld scored very high in this appraisal, scoring a final performance rating of +4 translated to mean 'very good'. Menne commented on the form that: 'APVJ (Van Jaarsveld) has performed admirably. He has aptly demonstrated his expertise with respect to all aspects of mining engineering, business and strategic planning'.

[32] Another comment in the appraisal reads: 'APVJ is currently on secondment from U/S since July 1998. RM has on various occasions tried to get APVJ transferred to HO (correspondence to JAD dated April 1998 and August 1998 refers)'. I pause to point out that at the pre-trial stage Van Jaarsveld's legal representatives requested the discovery of this correspondence but were informed that Amplats did not have the documents in question. Emmett signed this appraisal signifying his agreement with it.

[33] After Menne left the employ of Amplats his position was filled by Dr Rodney Baxter (Baxter) during February 1999. Van Jaarsveld informed Baxter of his employment situation and requested the latter to take up the matter with Dreyer. It is not in dispute that Van Jaarsveld directed further enquiries to Baxter in this regard, just like he did with Menne.

[34] It is common cause that Van Jaarsveld continued to perform exceptionally. In this regard during 1999 when he was appraised by Baxter, Baxter commented:

'Auret continues to be a major and valued contributor to the Department. The Department relies heavily on his technical mining experience in evaluating the integrity and business cases of many capital investment proposals. The Department will continue to look to Auret to fulfil the role of assessing projects from a technical as well as a business perspective, and to question and input into the technical development teams and assist in their decision-making on the back of sound business assessments.'

Baxter and Dreyer signed this appraisal on 23 December 1999. In my view, the comments on the 1998 appraisal that Menne had tried on several occasions to get Van Jaarsveld permanently appointed as well as Van Jaarsveld's own 'pestering' of Menne and Baxter is in line with him having concluded the agreement he alleges on 6 June 1997 to the effect that he would be permanently appointed on 1 January 1998. Baxter's comments further demonstrate that Van Jaarsveld was indispensable to the department and was not viewed as a temporary sojourner, so to speak, but was a permanent and reliable member of the department.

[35] My colleague makes the point that all appointments of head office personnel could be authorised only by Adco. This is based on the evidence by Amplats to this effect and that it being so Menne had no such authority to bind it in his discussions with Van Jaarsveld. This view, in my opinion, is not determinative of the matter and as stated not supported by the evidence. Menne had a mandate from Emmett, his Executive Director, to recruit personnel to the SPI. The appointment of Brogan and Du Preez and the ease with which these appointments went through Adco bears this out. Menne's mandate as far as Van Jaarsveld is concerned did not only encompass a six month secondment. The

evidence shows that his mandate encompassed a six month secondment as a trial period and an offer of permanent employment just like Brogan and Du Preez. No evidence was given by the Amplats's witnesses why Van Jaarsveld was to be treated differently.

[36] It is inconceivable that Emmett would have given Menne only a mandate to offer Van Jaarsveld a six month secondment without stating the purpose thereof. The absence of any evidence by Amplats that Van Jaarsveld was to be offered an open ended secondment or why he was treated differently to Brogan and Du Preez shows that Menne's mandate extended beyond the limits fixed by my colleague Scott. In fact Emmett and Dreyer did not give evidence that having become aware of the agreement concluded by Menne with Van Jaarsveld, that they told him that he was not authorised to do so. This demonstrates, in my view that they acquiesced in what Menne had done. Their acquiescence shows in my view that Menne never acted out of line.

[37] As far as Adco's authority is concerned the evidence suggests that this could only mean that an executive director placed any matter before Adco to be formalised. Indeed Menne did not qualify to place any matters before Adco but Emmett and Dreyer did. It was therefore their responsibility to place Van Jaarsveld's matter before Adco for his appointment to be formalised. They did not do so and failed dismally to provide an acceptable reason why they omitted to do this on the expiry of the six month secondment.

[38] My colleague seems to attach a lot of significance to Dreyer's assertions that before considering Van Jaarsveld's permanent appointment he had to finalise the department's restructuring process which included Van Jaarsveld's position in the department. Significance seems to be also given to Baxter's assertion that he was also unwilling to recommend Van Jaarsveld's permanent appointment as he was in the process of assessing the overall position of the department. In my view no significance should be accorded to these assertions

for the simple reason that they are not borne out by the evidence. Baxter gave no evidence of exactly what he was assessing and what the end result was. He simply says it was only around July 1999 that he felt comfortable to appoint Van Jaarsveld permanently but does not say what influenced this, other than of course that Van Jaarsveld was a competent and reliable employee.

[39] Dreyer for his part gave no evidence of the restructing he was allegedly engaged in. In fact the record shows that no restructuring of any sort was undertaken by him. The only restructuring was the splitting of the department into two, which occurred before Dreyer's arrival and this had absolutely no effect on the position occupied by Van Jaarsveld and the work he did on the SPI.

[40] It is inconceivable that Menne would have expressed a view merely that Van Jaarsveld would be employed at the end of the secondment. This finding is equally not borne out by the evidence. The memo written by Menne on 17 October 2001 clearly states that '<u>with the agreement of Emmett</u>', Van Jaarsveld '<u>was offered a secondment to head office for a six month period if his performance proved satisfactory, he would then be offered a permanent position in the department</u>' (my emphasis). There is nothing predictive in this statement. It is a statement of fact. Clearly within the context of a department that was behind in its work, and which was desperately looking for an experienced and reliable mining engineer, amongst others, it is highly improbable that having found such a person and being satisfied with his performance his permanent employment would become dependant on requirements other than those discussed on 6 June 1997.

[41] Clearly at the end of the six month secondment Amplats was obliged to inform Van Jaarsveld either that he had not made the grade and to return him to his mine if this was so. No one told him this. The agreement reached between Menne and Van Jaarsveld was a probationary agreement for a period of six months. Because Van Jaarsveld was employed within the group it became

necessary to agree that another agreement would be concluded if he made the grade during the secondment period. Had Van Jaarsveld been an outside employee only one agreement would have been concluded, as was the case with Brogan and Du Preez, followed by a mere formalisation of the employment by Adco if he made the grade. Because Van Jaarsveld was within the group the only way in which he would be employed at head office was through a permanent transfer from his mine to head office. That is what was agreed should have happened if he make the grade. That this is so is borne out by the fact that the secondment of Van Jaarsveld was known by his immediate boss Knock and his superior Beamish. Furthermore Van Jaarsveld's position in the mine was filled in 1998 (after the secondment) and he remained on the mine's books in name only, a source of irritation to the mine managers at Union Section. In my view his position would not have been filled after the six month secondment if he was coming back. If anything this is a powerful indication that his passage through the secondment period with flying colours was to result in his permanent transfer to head office.

[42] Van Jaarsveld realized for the first time that his appointment required Adco approval in July 2000 when his appointment was processed. No one had told him this before and no case is made out by Amplats that this was done. Emmett and Dreyer never placed Van Jaarsveld's matter for consideration by Adco until Dreyer did so in August 2000 under pressure from Van Jaarsveld. Adco approved Van Jaarsveld's appointment at its meeting on 14 August 2000. The minute of the meeting reflects:

'Auret van Jaarsveld

JAD reported that the formal appointment of Auret van Jaarsveld at C&OO (Business Planning) had been delayed depending on the evaluation of his job and the overall structure of Business Planning. The initial evaluation of the position did not make a transfer to C&OO attractive. The job grading was

subsequently reviewed and evaluated at Level 4. As a result of the delay in the appointment process, AvJ had not received a salary increase for the past two years. He had taken legal advice on this situation.

The position had been advertised and AvJ was the only applicant.

JAD recommended, and it was agreed (subject to BEN's confirmation that the prescribed recruitment process had been duly followed) that a job offer be made to Auret van Jaarsveld on the terms and conditions of a Level 4 appointment with back-pay for his loss of annual increases. AvJ's performance was satisfactory.'

It is instructive that this minute does not mention that the appointment was delayed because Dreyer was busy with a restructuring or that Baxter was still assessing the department's needs. These are the reasons advanced by Amplats for the delay in appointing Van Jaarsveld permanently. If anything this minute goes to show that Amplats' failure to appoint Van Jaarsveld permanently on 1 January 1998 was not because Menne was not authorised to conclude the agreement of employment with Van Jaarsveld, but that the appointment was not put before Adco timeously due to administrative bungling.

[43] Having dealt with the aforegoing factual analysis it remains for me to cite two pieces of correspondence which in my view sketch the true background of the matter. One is from Van Jaarsveld to Dreyer dated 27 February 2001. This memo sketches the bureaucratic bungling that accompanied his situation from the moment he started work at head office on 1 July 1997. I find it necessary to cite the memo in full:

'1. In August 2000, during the time of crisis concerning my situation at Anglo Platinum, you invited me to come to you directly in future should there be any further problems. A matter of great concern to me has arisen in

relation to my share options, and I am appealing to you to assist in resolving it.

2. The problem is briefly this. Whereas I have in substance been a permanent employee of H/O since January 1998, purely as a result of bureaucratic delays, that situation was only formalised with effect from 1 September 2000.

3. However, as a direct result of these delays, my participation in the share option scheme was delayed by 33 months, during which period the share price rose dramatically. If matters are allowed to stand, I will lose an amount in excess of R2 million. As I am approaching possible early retirement due to my health, this is a matter of the utmost importance to me and my and my family and one which I trust the company will rectify for the reasons which I will set out below.

4. In order to assist in understanding the situation, I will briefly list the sequence of events from June 1997 to September 2000.

5. RL Menne (RLM) offered me a position in his department (Business Development and Planning ie BD&P) in June 1997. Our agreement was that I would be on secondment from the mine for a trial period of six months and if RLM was satisfied with my performance, my position would become permanent. I accepted the offer.

6. Before the six month period had expired and in about October 1997, RLM told me that he was highly satisfied with my performance and that I would be permanently appointed to H/O in January 1998.

7. Late in 1997, RLM told the department that we were getting a new director, namely, yourself, and that Paul Brogan and Pieter du Preez

would be joining the department. He said that our new director would probably restructure the department and formalise my permanent appointment.

8. RLM indicated to me that my situation would be resolved in a few weeks and indeed that he was continuously discussing the matter with you. He gave me an assurance, on behalf of the company that I would not be financially compromised by any delays in formalising my appointment to H/O.

9. In the meanwhile my position on the mine was filled. It follows that my transfer to H/O was a *fait accompli*, even if the paperwork was not yet in place.

10. Late in 1998, RLM retired and Larry Cramer acted as departmental head for a short period. Rod Baxter (RCB) was appointed as departmental head and I immediately informed him of my unresolved situation and my unhappiness with it. He undertook urgently to address it.

11. On 3 February 1999, RCB told me that he had discussed my situation with you and that he was instructed immediately to proceed with the administrative process of my transfer to H/O.

12. Since that time I was told on numerous occasions that the formalisation of my transfer was delayed by administrative and workload problems in the HR Department. At the time I accepted this in good faith. I believed that the company was committed to a policy of fair dealing and integrity and that I would not be compromised by these bureaucratic delays. In addition, I had a very heavy workload (Maandagshoek, SPI and ad hoc projects) and believing, as I did, that I would not be prejudiced, I could not spend

too much time dealing with what was after all, a purely bureaucratic matter, or so I believed.

13. In August 1999, I was informed that the Business Manager of Union Section refused to authorise my annual salary increment because I was an H/O employee. I reported this to RCB and he suggested that we ignore it and handle it as part of the process of my formal transfer to H/O. I was told that my transfer was imminent and again I accepted this in good faith.

14. Late in 1999 / early 2000, I was told that due to the introduction of the Employment Equity Bill, all new appointments (including mine) would be made according to new procedures adopted by the HR Department. The process of my transfer was administratively delayed yet again although, I was assured on numerous occasions that there had been progress.

15. In May 2000, Paul Grogan acted in RCB's position. He was asked by RCB to handle aspects of my transfer, which I believe he discussed with you. When he discussed it with me it became apparent that the process was far from complete.

16. In July 2000 I was told that my transfer would definitely be finalised at a meeting to be held on 26 July 2000. However, the meeting never took place and at that point I sought legal advice and put the company on notice on 31 July 2000, to resolve the matter. With your help and involvement my transfer to H/O was concluded within a mere three weeks, for which I sincerely thank you.

17. My appointment was formalised on the 1 September 2000 and I received a shares option offer on 22 December 2000 which was back-dated to 1 September 2000.

18. As I understand the position, the share option scheme is intended to incentivise and reward H/O executives for their efforts. I have given nothing less than my best. I contributed to projects of more than R4 billion, I developed the SPI model and I introduced the Alcar software to the department / company. I have had three performance assessments (1998, 1999 and 2000), all of them excellent. I received H/O bonuses in 1998, 1999 and 2000.

19. I have no doubt that had my transfer been formalised, as it ought to have been, in January 1998, I would immediately have been invited to participate in the share option scheme, in accordance with the normal practice in the company.

20. To summarise:

    Since July 1997 I have fulfilled my role as a member of the BD&P Department at H/O.
    On the basis on which I was initially seconded and the subsequent assurances given to me by RLM, I would, but for purely arbitrary and bureaucratic delays, have been permanently appointed with effect from January 1998.
    I was expressly assured that I would not be financially compromised as a result of the delays in formalising my appointment.

21. In the circumstances I cannot accept that I am not entitled to the same incentives as my colleagues, some of whom joined the department after I did.

22. The basis for Anglo Platinum's code of ethics is "*. . . a fundamental belief that business should be conducted honestly, fairly and legally. The Group expects all employees to share its commitment to high moral, ethical and*

legal standards." I humbly appeal to you for assistance to ensure that these values are also applied to me in my current situation.' (p 903-908)

[44] The other memo is the one by Menne to Geldenhuys dated 17 October 2001 to which reference was made earlier. This memo is also a critical piece of evidence and I also find it necessary to cite it in full:

'1. I refer to your telephone call in late June, 2001 regarding APvJ's inexplicably delayed appointment to Anglo Platinum head office – and the impact this has had on his associated share option entitlement(s). The purpose of this memorandum is to add further perspective to this unfortunate event and my involvement in same. It is believed that APvJ has indeed been severely compromised by events beyond his control and the Corporation should redress the issue as soon as possible.

2. By mid 1997 it had become apparent that the planning department of the Commercial Division was severely under-resourced. As head of department, and with the agreement of the Commercial Director, Mr Emmett ("DTGE"), I canvassed both "in house" and externally for an experienced mining engineer with the appropriate analytical skills to assist with the extra workload of the department. The opportunity presented itself in the form of APvJ – then planning manager at Union Section – and who indicated his interest at moving to head office. Furthermore, it was established that he could be released from his current position by the Mine Manager (with the concurrence of the Operations Director). With the agreement of DTGE, APvJ was offered a secondment to head office for a six-month probation period. If his performance proved to be satisfactory, he would then be offered a permanent position in the department. The implication was always that any administrative procedures required would follow timeously. APvJ accepted the offer on this basis.

3. It should be stressed that APvJ was initially known to me only by reputation, which included a published article on the inefficiencies of the gold mining industry which struck my colleagues and myself as particularly insightful (if unpopular within the mining fraternity). Subsequent meetings with APvJ also reinforced my opinion of his suitability to contribute to the department's ongoing development of long term mining options (the so-called strategic planning initiative).

4. Once at head office, APvJ soon demonstrated his value to the department. Such sentiments were conveyed to him by myself who, in addition, advised DTGE that APvJ was indeed a major asset to the division and his appointment to head office should be formalised forthwith. Unfortunately, a number of events conspired against any immediate action, including

   (i) the intense workload of the Planning Department (manifested by two additional appointments made within APvJ's probation period (PLB) and PEdP) to further strengthen the department's resource base,
   (ii) my deteriorating health condition, and
   (iii) an executive decision in December 1997 to split the division as it then existed with Mr Dreyer ("JAD") accepting the position of executive director of the Business Development and Strategic Planning Division (in which the planning department resided), while DTGE retained and further developed the Marketing Division.

5. In discussions with JAD (DTGE no longer having executive control of planning), APvJ's delayed appointment was highlighted and recommendations were made that such be formalised. JAD – while appreciating APvJ's contribution to the department – requested patience from all parties while he reviewed his division's function, and how to best

arrange and rationalise his resources. In any event, such was my interpretation of JAD's position. Accordingly, it was thus hardly appropriate for met to request that the Human Resources Division proceed with APvJ's appointment at that time.

6. Unfortunately, by mid 1998 my health had deteriorated to the extent that I applied for – and was granted – disability status in October of that year. The intervening few months were extremely busy in finalising my involvement with the current affairs of the department. To my discredit, I failed to secure APvJ's appointment. Be that as it may, I took no further part in the affairs of the Division/department from October 1998 onwards. I recall, however, urging the new head of department, Dr Baxter, to accelerate the unsatisfactory state of affairs regarding APvJ, both with respect to a permanent appointment and indeed, a merit promotion.

7. There was, in my opinion, never any intention to get APvJ "on the cheap" and the fact that he has now been prejudiced financially by only being officially appointed – let alone promoted – in September 2000 (ie some 40 months after being seconded to head office) seems grossly unfair. Anglo Platinum should not only redress this situation as soon as possible, but also earnestly encourage the corporation to strive to retain his services in whatever capacity is mutually agreeable. He is far too valuable a resource to lose, especially over a period of major industry changes and corporate expansions.'

[45] In my view the agreement between Menne and Van Jaarsveld on 6 June 1997 crystallized into a legally enforceable contract on fulfilment of the condition agreed therein. The omission and/or failure by Amplats to offer Van Jaarsveld a permanent employment contract was a clear breach. It does not assist Amplats to contend that Menne and Emmett for that matter did not have authority to bind Amplats in those terms. As I have shown in the aforegoing paragraphs the Adco

step was a mere formality. The process through which Van Jaarsveld was subjected to before his eventual permanent appointment in September 2000 was a farce, a fact acknowledged by Emmett and Baxter. This process, accepted by my colleague Scott and relied on in these proceedings by Amplats to lend credence to the contention that it was an Adco requirement that all appointments go through it, was no more than a pretext engineered to justify the delay in appointing Van Jaarsveld permanently. No evidence was given about such a process regarding Brogan, Du Preez, Baxter and Dreyer himself. The Ngubane angle on employment equity is clearly a red herring. It did not feature when Menne spoke to Van Jaarsveld in June 1997. Nor did it feature in the appointment of Brogan, Du Preez, Baxter and Dreyer who are all white for that matter.

[46] Anyway Amplats cannot rely on Menne's (and Emmett's for that matter) lack of authority. A representation was made to Van Jaarsveld which he believed as he was entitled to and Emmett, Baxter and Dreyer who were aware that such a representation was made did nothing to contradict it or even correct it. This court stated in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) at 411 para 25:

'As Denning MR points out, ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the

principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him.'

See also *SABC v Coop* 2006 (2) SA 217 (SCA) at 234 para 66.

[47] It is correct that Van Jaarsveld did not become a permanent employee on 1 January 1998 as found by my colleague Scott because of the absence of the Adco formality. However the evidence justifies a conclusion that Menne concluded a binding contract to employ Van Jaarsveld if he made the grade on 1 January 1998. This was an agreement to conclude another agreement in future, the so-called *pactum de contrahendo* discussed by my colleague Scott.

[48] The terms of the future agreement were also established being the employment of Van Jaarsveld on a level 3 or 4 and subject to the conditions applicable to those levels. It is probable that Van Jaarsveld would have been employed as a level 3 employee for the reason that his E1 grading was lower than that level but he worked in a level 3 capacity and his appointment at head office was in fact a promotion. There is also no suggestion that had he been appointed, as he should have, on 1 January 1998, he would not have been accorded all the benefits in accordance with his appointment such as participation in the Anglo American Platinum share option scheme.

[49] Van Jaarsveld has in my view demonstrated that a breach occurred. I would therefore dismiss the appeal with costs.

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D MLAMBO
JUDGE OF APPEAL