IN THE LABOUR COURT OF SOUTH AFRICA

REPORTABLE

HELD AT JOHANNESBURG

Case No. **JR 806/2001**

In the matter between:

KNIGHTWATCH SECURITY (PTY) LTD
Applicant

and

MBILENI, N N.O. (cited in her capacity as commissioner of the Commission for Conciliation, Mediation and Arbitration) First Respondent

THE COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

MDIDIMA, P & 5 OTHERS Third and Further Respondents

J U D G M E N T

NTSEBEZA AJ:

1. This matter came before me on 21 June 2002 when I ordered that the matter be postponed *sine die* because the papers were not in order. The

contents of the review application were missing from the file and, according to Mr Snyman, who appears for the Applicant, the disappearance of file contents in this matter had become the rule more than the exception. Indeed, on 27 June 2002 my brother, Sutherland AJ asked Mr Snyman to file an affidavit giving a history of why it appeared documents seemed to be disappearing from the Court file and that the matter was being delayed from being finalised. Sutherland AJ also ordered that Mr Snyman once again prepare documents for the Court file and that the Registrar should not release the Court file out of his/her control. The matter was set down for 25 July 2002 when it again came before me. Mr Snyman duly complied with this Court order and, on 25 July 2002, the documents that were filed as copies of the originals which had disappeared out of the Court file, were the Applicant's heads of argument filed on 7 June 2002 and an entire Court file bundle containing all the indexed pleadings which had been filed on 7 June 2002, which bundle has an index and 175 bound pages.

2. I may indicate here that when the matter was heard, Mr Ndzimande, who appeared on behalf of the Third and Further Respondents, claimed that he had not been served, by Mr Snyman, with any documents for the hearing on 25 July 2002. Mr Snyman produced another Court file bundle which he handed over to Mr Ndzimande. Mr Snyman claimed that he had in fact

given the same Court file bundle, indexed and paginated, to Mr Ndzimande on 7 June 2002. It is not for me to investigate and decide on the circumstances surrounding the disappearance of documents from the Court file, save only to remark that this is an extraordinary occurrence and does not augur well for the administration of justice. It also begs the question as to how it is possible for documents to disappear out of the Court file with such regularity as has been testified to by Mr Snyman in the affidavit which my brother Sutherland ordered him to file. It is a matter of grave concern, and one which the Registrar of this Court must take particular notice of. The affidavit of Mr Snyman is a serous indictment and it would be hoped that definite steps are being taken in the office of the Registrar to ensure that occurrences of this nature do not take place.

3. This is an application for the review of an arbitration award by a commissioner of the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in terms of section 145(1)(a), 145(1)(b) and 145(2) of the Labour Relations Act, No. 66 of 1995 ("the Act"). The said arbitration award was handed down by Commissioner Mbileni (the First Respondent) in terms whereof the Third and Further Respondents (hereinafter referred to as "the employees") were found to have been unfairly dismissed and were awarded compensation. The Applicant seeks to set aside that finding.

4. The employees allege that they were unfairly dismissed by the Applicant on 22 August 2000. The Applicant posts security guards at the premises of its customers whose property it safeguards. From time to time, and for a variety of reasons – Applicant's permanent guards being off duty, or being off sick, or being on leave --- the Applicant procures the services of casual guards to fill in the particular posts for the particular day. These **"casuals"** are normally selected from a group of guards who usually gather at the Applicant's premises hoping to be selected for a casual position for the day. All casuals so appointed by the Applicant get posted and are paid for the day so posted. Simply put, there was always a large **"pool"** of casuals from which the Applicant was able to fill daily posts that became vacant on a day-to-day basis.

5. Due to discrepancies that developed in this system of selecting casuals from a pool of people who would merely gather at the gates of the Applicant's premises, the Applicant decided to conclude independent contracts with a group of casual employees in terms whereof they would be appointed for a specific period of time to work as and when required by the Applicant during such periods. It is from such **"casual pool"** that the employees in this application were drawn. According to the Applicant, all the employees were appointed on the first occasion on the basis of a casual position for one day on either 29 June or 3 July 2000 respectively.

They were given letters of appointment for the one day. Subsequent to this first appointment, they continued to work on an *ad hoc* basis, and from time to time, as and when required to fill a vacant post, being a part of the group of casuals gathered at the Applicant's premises every day.

6. In this regard, casual job sheets were made out for each day's work in respect of each of the individual employees. From the documents filed as part of the Court bundle, it is clear from these documents that the employees only worked on an *ad hoc* basis. Towards the middle of July 2000 the Applicant had vacancies for permanent staff appointments. The casual workers were invited to apply for such posts, by way of agreeing to undergo a free two-day course, with the Applicant in selecting the top performers on such courses as permanent employees. All the individual Respondents applied in writing. These courses took place on 18 and 20 July and 19 and 21 July respectively.The employees were not successful in obtaining permanent positions, having failed to complete the relevant courses. Only one of them actually completed the course but he also was unsuccessful in obtaining employment. Having failed to obtain permanent employment, the employees however remained part of the **"casual pool"**.

7. The Applicant has given a detailed account of how these employees were engaged by it. For an example, one Price Mdidimba, according to the

Applicant, applied for employment on 29 June 2000. His application was not successful. He was however given casual jobs from time to time, as part of the casual pool. He worked on 29 June and on 6, 7 and 8 July. He again applied for a permanent position as part of the 19 and 21 July 2000 test candidates referred to herein above. He did not succeed in his employment application and was not appointed. He was then appointed on a fixed term contract of employment from 17 November to 16 December 2000 which contract was signed by him. His fixed term contract of employment terminated on 15 December 2000 which fact was confirmed in writing to him on 8 January 2001.

8. The Applicant has similar details in respect of Dyson Maluleke, Meshack Mashiola, Simiso Dalton Ndzimande and one George Mncube. In the Applicant's submission, no evidence whatsoever exists, nor was any presented by any of the employees to, illustrate or prove any dismissal on 22 August 2000, which is their only stipulated date of dismissal. All of the allegations by the Applicant are fully supported by substantial documentary evidence and it does appear that all of this evidence, including documentary support thereof, was placed before the First Respondent (the arbitrator). The criticism of the arbitrator's award is the fact that it does not seem to refer to this substantial documentary evidence presented to him nor does it fully record the evidence available to it. The further criticism is

that the arbitrator failed also to appreciate the fact that the employees had the onus to prove that they had been employed, as well as the existence of a dismissal, all of which had always been in dispute. See Lewis and Another v Contract Interiors CC (2001) 22 ILJ 466 (LC); Ngcobo and Others v Blyvooruitzicht Gold Mining Co. Ltd (1999) 20 ILJ 1996 (LC); Sappie Kraft (Pty) Ltd t/a Tugela Mill v Majake N.O. and Others (1998) 19 ILJ 1240 (LC).

9. Mr Snyman submitted that the failure by the arbitrator to even record all the evidence which was placed before her was a gross irregularity and a clear indication of her fundamental failure to apply her mind to the facts before her. Consequently, the arbitrator's award being neither in accordance with or supported by the bulk of the evidence properly before it, is irregular, unreasonable and unjustifiable. All evidence shows that the employees signed one-day contracts of employment, each of which expired on each of the days that they were contracted for. Where there is no evidence, either by way of a letter of dismissal or any particulars given by the employees concerning an alleged dismissal on 22 August 2000, and where there is no evidence by any of the employees that they in fact worked on a continuous basis from the end of June/beginning of July until 22 August 2000, their purported date of dismissal, it is totally unreasonable for the arbitrator to record, as she did, that all the employees worked from

either 29 June or 3 July until 22 August 2000 when they were dismissed. Further, argued Mr Snyman, if, as they allege, the employees were permanent as from either 29 June and/or 3 July 2000, why did they apply for positions as part of the programme on 18 and 20 and 19 and 21 July 2000? This is an inconsistency that should have been taken into account by the arbitrator, and to the extent that she did not do so, to that extent it shows that she did not apply her mind at all to this evidence and therefore acted in an irregular, unreasonable and unjustifiable manner.

10. Mr Snyman further argued that the arbitrator misdirected herself by concluding that because the Applicant **"allowed"** the employees to work beyond their initial one-day contracts the Applicant had created a **"legitimate expectation"** that their services would not be terminated without due process. This was a misdirection because it was never the contention of the employees that they had been employed as **"casual"** employees who had developed an expectation of being classified as permanent employees. At all material times they had been contending that they had been appointed as permanent employees and were dismissed without reason or process. Mr Snyman also contended that in any event, section 186 of the Act does not provide for alleged legitimate expectation of due process. It provides for an expectation of continued employment. Where the employees themselves contend that they were

permanent employees from the outset, there can be no room for arguing that they had an expectation of continued employment. Mr Snyman finally submitted that in none of the responses in their answering affidavits do the employees in any way contradict the factual averments made on behalf of the Applicant. To that degree, therefore, such factual evidence must be accepted as uncontradicted evidence.

11. Mr Ndzimande, on behalf of the employees, did no more than merely state to me that they were permanently employed because their employer had told them so. According to him, the company had given them application forms and had told them that they were being employed permanently. He provided as **"proof"** that they had been employed the fact that they had referred their matter to the CCMA. In his argument, he asked a question as to how they could have been before the CCMA if they had never been employed. He argued that the matter should not revert to the CCMA but must be dealt with to finality in this Court and he made a prayer for compensation and reinstatement.

12. On the evidence before me, and on the documentation provided, there is no support for any of the contentions made by Mr Mdzimande on behalf of himself and his colleagues. I find as a matter of fact and law that the arbitrator's award cannot stand. It is reviewable and must be set aside.

Insofar as the arbitrator, in ordering compensation to be paid, does not appear to be motivating or giving reasons for its compensation award, this constitutes an irregularity, rendering its award reviewable, argued Mr Snyman. Mr Snyman referred me to a number of authorities in support of his submission that it is incumbent upon an arbitrator to properly motivate a determination of the quantum of compensation to be awarded in favour of a successive party. La Vita v Boymans Clothiers (Pty) Ltd (2001) 22 ILJ 454 (LC); Zeelie v Price Forbes (Northern Province) (2001) (1) 22 ILJ 2053 (LC); Alpha Plant and Services (Pty) Ltd v Simmonds and Others (2001) 22 ILJ 359 (LAC).

13. It is not necessary for me to refer to any of the authorities quoted to me by Mr Snyman to any great length. I accept that in the view that I have taken of the matter, the arbitrator did not exercise her discretion judiciously in her award of compensation for all the reasons submitted by Mr Snyman. In the result, the order is as follows:

(a) The award of the First Respondent, being Commissioner Mbileni of the Second Respondent, under Case No. GA 108298, dated 13 May 2001, in the arbitration proceedings between the Applicant and the Third and Further Respondents is hereby reviewed and set aside;

(b) The finding that **"the dismissal of the Applicants was unfair"** in the award of the arbitrator is substituted by a finding that none of the Third and Further Respondents were employed by the Applicant, and the CCMA accordingly has no jurisdiction to entertain the matter;

(c) The order of compensation is substituted by the order that there is no compensation due to any of the Third and Further Respondents.

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D B NTSEBEZA

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: **25 July 2002**

Date of Judgment: 27 **AUGUST 2002**

For the Applicants: **MR SNYMAN**

On behalf of Snyman van der Heever Heyns

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