

CASE NO D576/05

DATE 8 FEBRUARY 2007

In the matter between

THEKWINI SECURITY SERVICES

Applicant

5 And

DIRECTOR GENERAL, DEPARTMENT OF LABOUR

Respondent

JUDGMENT

8 FEBRUARY 2007

PILLAY D. J

10 [1] This is an appeal noted against the order of the Department of Labour (the respondent) in terms of section 69 read with section 71(3) of the Basic Conditions of Employment Act of 1997 ("the BCEA) in terms of which the appellant was ordered to pay certain employees an amount in respect of annual bonus.

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[2] The compliance order also directed the appellant to comply with the sectoral determination relating to the payment of an apparel allowance of R1, 50 per week.

20 [3] With regard to the first ground of appeal, it became common cause during the hearing that the applicable sectoral determination for the calculation of annual bonus was worded thus:

25 " (1). An employer shall pay to every employee for every week that the employee was paid or entitled to be paid and in respect of each completed 12 months of service with such employer an annual bonus calculated as follows:

30 Employee's monthly actual ordinary hours of work x "R"

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35 (2). The annual bonus will be paid on the anniversary of the

employee's date of employment with the employer unless the employer and a representative trade union and/or employee mutually agree in writing upon another rate.

- 5 (3). The annual bonus will be calculated monthly at the rate in effect during each relevant month and shall be paid to the employee as per 2."

- 10 [4] The issue in dispute is the interpretation of the formula. In the previous sectoral determination the formula read:

$$\begin{array}{ccccccc} \text{Employee's hourly wage} & \times & 52 & & \text{"R"} \\ \text{ordinary hours of work} & & \underline{\hspace{1cm}} & \times & \underline{\hspace{1cm}} \\ & & 12 & & 100 \end{array}$$

- 15 [5] It is common cause that the applicable formula for the period in dispute makes no mention of the hourly wage. As a result, the appellant in this case interpreted the formula strictly. The result was that the employees were paid less than one month's salary, as would have been the case if the formula in the previous sectoral
20 determination had applied.

- [6] The error was discovered and subsequently a correction notice was published to correct the applicable sectoral determination. However, the correction was not made retrospective.

- 25 [7] As a result, the Court is hamstrung as it has no choice but to give effect to the strict wording of the formula and uphold the appeal on this ground.

- 30 [8] The second ground of appeal is, likewise, based on the interpretation of the sectoral determination. Clause 16.1.(c) of the sectoral determination No 6 for the private security sector provides:

"An employer who provides an employee with such apparel may require the employee to clean it in the

employee's own time, in which event the employer shall pay the employee not less than R1,50 per week which shall however not be payable during periods of absence from work."

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[9] The intention of the parties to the bargaining council might well have been to require an employer to pay an apparel allowance if it provided employees with a uniform. However, that intention is not captured in the text of section 16.1. (c). effectively, an employer who does not require its employees to clean their uniform is not obliged to pay the uniform or apparel allowance.

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[10] The appellant's case is that it has not required its employees to clean their uniforms and on that basis denies liability for a uniform allowance.

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[11] On the basis of a strict interpretation of clause 16 the second ground of appeal must also succeed.

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[12] In the circumstances the appeal on both grounds succeeds.

[13] With regard to costs, the Department acted in a supervisory capacity to represent the interests of employees. It did so in good faith and in pursuit of clarity of the sectoral agreement which would benefit the industry as a whole. While the interpretation might be obvious to the Court, it may be less so to the Department of Labour who also did not incur any costs in getting legal opinion before opposing this appeal. The judgment of the Court is required to inform the workers who have an expectation of the extra remuneration if this appeal fails. In the circumstances, the Court declines to make any order for costs.

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[14] The appeal succeeds with no order as to costs.

Date of Hearing:

Date of Judgement:

For the Applicant:

5 For the Respondent: