

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-04-12

Case Number: 59156/08

In the matter between:

VERICON OUTSOURCING (PTY) LTD

Applicant

and

MINISTER OF SAFETY AND SECURITY
PRIVATE SECURITY INDUSTRY REGULATORY
AUTHORITY

First Respondent

Second Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicant applies on notice of motion for a final order –

(1) declaring that:

(i) the verification and reconciliation auditing services
provided by the applicant and its employees engaged in

the function of end-controllers, do not constitute a 'security service' as defined in s 1 of the Private Security Industry Regulation Act 56 of 2001 ('the Act');

- (ii) the business in which the applicant is engaged does not constitute a 'security business' as defined in s 1 of the Act;
- (iii) the applicant is not a 'security service provider' as defined in s 1 of the Act;
- (iv) the employees employed by the applicant as end-controllers do not fall within the definition of 'security officer' in s 1 of the Act;
- (v) the applicant and its employees employed as end-controllers have no obligation to register as service providers in terms of s 20 of the Act;
- (vi) the applicant and its employees employed as end-controllers are not bound by the Code of Conduct prescribed by the Minister of Safety and Security under s 28 of the Act.

- (2) In the alternative:

- (i) an order reviewing and setting aside the decision of the Minister of Safety and Security to refuse the applicant's application for exemption in terms of s 1(2) and 20(5) of the Act; and
- (ii) an order substituting for the decision of the Minister a decision granting exemption to the applicant in terms of s 1(2) and s 20(5) of the Act;
- (iii) in the alternative to prayer (ii): an order remitting the matter to the Minister for reconsideration and a fresh decision to be made taking into consideration the contents of the judgment of this court.

In the notice of motion the applicant sought in the further alternative to prayer (1), an order declaring as constitutionally invalid the definitions of 'security business', 'security officer', 'security service' and 'security service provider' in s 1 of the Act and referring the declaration of constitutional invalidity to the Constitutional Court for confirmation. At the hearing the applicant's counsel informed the court that the applicant is not persisting with this constitutional attack. Accordingly it is not necessary to consider this relief further.

- [2] The first respondent delivered a notice of intention to oppose but did not file an answering affidavit and was not represented at the hearing. The second respondent opposes the grant of any relief and requests that the application be dismissed with costs.
- [3] As far as the declaratory relief is concerned I am satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation' and that this case is a proper one for the exercise of the court's discretion in terms of s 19(1)(a)(ii) of the Supreme Court Act – see ***Durban City Council v Association of Building Societies 1942 AD 27*** at 32: ***Langa CJ and Others v Hlophe 2009 (4) SA 382 (SCA)*** para 28.
- [4] The applicant seeks the declaratory orders on the basis of the facts which it alleges. The second respondent disputes these facts and sets out other facts in support of its contentions. In ***National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)*** para 26 the court summarised the rules governing such a situation as follows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well-established under the ***Plascon-Evans*** rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ... affidavits, which have

been admitted by the respondent ... , together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

There is no suggestion that the second respondent's version should be rejected.

- [5] This case is concerned with the application of certain provisions of the Act to some of the applicant's employees who the applicant describes as 'end-controllers' or 'process controllers'. The primary dispute relates to the function performed by these employees: in particular, whether they provide a 'security service' as defined in the Act and accordingly are obliged to be registered as 'security service providers' in accordance with s 20(1)(a) of the Act and are bound by the Code of Conduct prescribed by the first respondent in accordance with s 28 of the Act.

- [6] The following definitions in the Act are relevant –

- (1) 'security service provider' - which means 'a person who renders a security service to another for a remuneration, reward, fee or benefit and includes such a person who is not registered as required in terms of this Act;

- (2) 'security business' - which means 'any person who renders a security service to another for remuneration, reward, fee or benefit, except a person acting only as a security officer';
- (3) 'security officer' - which means 'any natural person
 - (a)(i) who is employed by another person, including an organ of State, and who receives or is entitled to receive from such other person any remuneration, reward, fee or benefit, for rendering one or more security services; or
 - (ii) who assists in carrying on or conducting the affairs of another security service provider and who receives or is entitled to receive from such other security service provider, any remuneration, reward, fee or benefit as regards one or more security services;
 - (b) who renders a security service under the control of another security service provider and who receives or is entitled to receive from any other person any remuneration, reward, fee or benefit for such service; or
 - (c) who or whose services are directly or indirectly made available by another security service provider to any other person, and who receives or is entitled to receive from

any other person any remuneration, reward, fee or benefit for rendering one or more security services’;

(4) ‘security service’ - means ‘one or more of the following services or activities

(a) protecting or safeguarding a person or property in any manner;

(b) giving advice on the protection or safeguarding of a person or property, on any other type of security service as defined in the section, or on the use of security equipment;

(c) providing a reactive or response service in connection with the safeguarding of a person or property in any manner;

(d)-(j) ...

(k) making a person or the services of a person available, whether directly or indirectly for the rendering of any service referred to in paragraphs (a)-(j) and (l) to another person;

(l) managing, controlling or supervising the rendering of any of the services referred to in paragraph (a)-(j);

(m) creating the impression, in any manner, that one or more of the services in paragraph (a)-(l) are rendered'.

[7] The private security industry in South Africa plays a vital role in supplementing or complementing the services provided by the South African Police Service (SAPS) which is the organisation primarily concerned with safety and security. The private security industry in South Africa consists of approximately 5 000 active security businesses which employ more than 310 000 security service providers. These security service providers far outnumber the total numbers in the SAPS and SA National Defence Force. The private security industry is growing at 12-15 % per annum. Private security service providers have more firearms at their disposal than the members of the SAPS.

[8] Since 14 February 2002 the Act has delegated the task of regulating the private security industry to the second respondent. Registration is the cornerstone for the proper regulation of the industry. In this regard s 20 of the Act provides:

'(1)(a) No person, except a Security Service contemplated in s 199 of the Constitution (Act No 108 of 1996), may in any manner render a security service for

remuneration, reward, a fee or benefit, unless such a person is registered as a security service provider in terms of this Act;

(b) ...

(2) A security business may only be registered as a security service provider –

(a) if all the persons performing executive or managing functions in respect of such security business are registered as security service providers; and

(b) in the case of a security business which is a company, close corporation, partnership, business trust or foundation, if every director of the company, every member of the close corporation, every partner of the partnership, every trustee of the business trust, and every administrator of the foundation as the case may be, is registered as a security service provider'

[9] All security service providers, whether registered with the second respondent or not, are obliged to comply with the Code of Conduct prescribed by the first respondent (s 28). They are also subject to disciplinary procedures (s 29), inspections (ss 33 and 34) and the Private Security Industry Regulations, 2002.

[10] At the heart of the dispute is the definition of 'security services' whose primary connotation is –

‘Protecting or safeguarding a person or property in any manner’.

The applicant contends that the relevant employees do not fall within this definition as they merely perform an auditing function for the applicant’s clients. This, according to the applicant, is a purely administrative function and involves verification and reconciliation. The second respondent contends the opposite: that the relevant employees are involved in protecting or safeguarding the applicant’s client’s property and that is their core function. Therefore, according to the second respondent, they are providing a security service and must be registered in terms of the Act.

[11] In ***Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others*** [2009] ZACC 11 the Constitutional Court was required to interpret ‘security services’ as defined in the Act for the purpose of deciding whether farm employees employed by the two applicants to safeguard their farming operations were providing a security service. In paragraph 41 the court concluded that –

‘A “security service”, defined as the protection or safeguarding of a person or property in any manner, must be interpreted to mean the protection or safeguarding of persons or property from unlawful physical harm, including injury, physical damage, theft or kidnapping caused by another person. This must be so because the security of person and property is central to what the Act aims to protect.’

In paragraph 46 the court clarified this conclusion as follows –

‘Therefore, only those whose duty it is to protect against the dangers with which the private security industry concerns itself – criminal acts against persons or property – are security service providers who provide security services and must be regulated under the Act. That interpretation is not unduly strained and gives effect to the purpose of the Act.’

It is clear from the judgment that this must be the core function of the employees concerned. This is a matter of fact.

- [12] The applicant attempts to portray the function performed by the relevant employees as an auditing function. According to the applicant these employees perform a purely administrative function which involves verification and reconciliation. They verify and reconcile stock that it is about to leave the premises. This audit process is done to ensure that what has been ordered and paid for corresponds with the physical items that are being removed from the client’s premises by its customers. The audit process consists of verifying what the cashier has rung up compared to the actual product that has been placed in the trolley. The applicant contends that this is a specialised service. It uses specialised staff trained in this particular field (which involves auditing, verifying, reconciling and report writing) and uses carefully developed and constantly evolving audit systems aimed at ensuring proper control.

[13] The second respondent disputes this portrayal of the employees' function. It has gone to the premises where the applicant's employees are deployed and examined the role played by the employees. It is common cause that the applicant's employees are employed as 'end-controllers' at certain Makro premises and as 'process controllers' at certain Distell premises.

(1) Makro

The second respondent has graphically illustrated by means of photographs of the employees and the relevant notices which are displayed next to their stations that they are safeguarding the client against theft. They are stationed at the exits and their primary duty is to ensure that customers do not remove from the premises goods which they have not purchased. In short they are safeguarding the applicant's client's property against theft.

(2) Distell

From the relevant documents the second respondent has established that –

- (i) the applicant's Business Unit Manager on site reports to Distell's warehouse manager and security controller and

is responsible for ensuring that the warehouse manager and security controller are informed of all occurrences which affect the integrity of loads and the security of the warehouse;

(ii) the applicant's supervisor supervises all the process controllers in order to protect Distell's wealth producing capacity which includes supervising the locking and unlocking of the various departments by the process controllers;

(iii) the process controllers:

(a) wear prescribed uniforms;

(b) may conduct body searches of Distell employees and other outsourced security personnel;

(c) do floor walks *inter alia* to inspect walls from the inside of the warehouse to detect any openings and to check waste bins and litter bags for products that are hidden and report any irregularities inside the warehouse and any defects;

- (d) must make sure that stock is safe and controlled in the bond store and high value cage;
- (e) are responsible for locking and unlocking entrances and sealing those entrances;
- (f) control the movement of Distell's employees and members of the public by preventing them from accessing certain areas;
- (g) liaise with outsourced security contractors in respect of the safeguarding and protection of Distell's property specifically as far as the sealing of keys of locked premises is concerned;
- (h) check goods purchased by clients of Distell before these clients are allowed to load the goods and process controllers stand in a position of authority over the employees/contractors of such clients;
- (i) report to Distell's security controller, Mr Ian Nel, at least as far as receipt of stock is concerned.

The applicant's employees ('end-controllers' or 'process controllers')

are therefore providing a security service and they must be registered in terms of s 20 of the Act with all that this entails. Accordingly the applicant is not entitled to the declaratory relief which it seeks.

[14] In January 2008 the applicant applied to the first respondent in terms of s 20(5) of the Act to be exempted from the provisions of the Act. The applicant contended in the application that it is in the business of providing an audit function for its clients and that this function is not to be confused with or compared to that provided by a security officer or a security service provider. The second respondent furnished the first respondent with its submissions relating to the application and in June 2008 the first respondent refused the application. The first respondent's letter notifying the applicant of the refusal states that any person who renders a security service as defined in the Act must be registered in terms of s 20(1)(a) of the Act as a security service provider, that the first respondent was satisfied that the applicant's services constitute a security service as defined in the Act and that the reasons furnished in the application do not justify an exemption.

[15] The applicant seeks to review and set aside the first respondent's decision in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') on the ground that the first respondent did not apply his mind to the true issues. It contends that the first respondent did not give any meaningful, rational, proper or fair consideration to the facts pertaining to the services provided by the applicant and its employees

which are set out in the applicant's founding and replying affidavits in the application for exemption. It is also contended that there is no rational justification for the conclusion reached by the Minister. In the applicant's supplementary affidavit in terms of Rule 53(4) the applicant further contends that the first respondent dealt with this application in a procedurally unfair manner because he did not consider the applicant's replying papers filed in the application. This last contention is based on the fact that the record of the proceedings filed by the first respondent in accordance with Rule 53(1)(b) and (3) does not contain the replying papers. The applicant contends that this justifies the inference that the first respondent did not consider the replying papers.

[16] The first respondent's letter dated 27 June 2008 in which the first respondent notified the applicant's attorneys of his decision in the exemption application refers pertinently to the applicant's requests dated 22 January 2008 and 5 March 2008. This clearly refers to the application for exemption (wrongly) dated 22 January 2007 (it was received by the first respondent on 23 January 2008) and the applicant's replying affidavit dated 28 February 2008 but served on 5 March 2008. In my view the letter clearly indicates that the first respondent considered both documents.

[17] The applicant's counsel concedes that if the applicant did not make out a proper case for exemption the application for review cannot succeed. Whilst conceding that the allegations and contentions in the documents

were directed primarily at showing that the applicant does not provide security services he argues that paragraph 5.14 of the applicant's founding affidavit made out a case for exemption. The paragraph reads as follows:

'If it is found that VERICON does render any type of security service, which is denied, it is submitted that the inference that may be drawn therein, is so insignificant or perhaps incidental that the non-security element certainly prevails herein;'

[18] The Act contains two provisions which relate to exemption: s 1(2) and 20(5).

S 1(2) provides:

'The Minister may, after consultation with the Authority and as long as it does not prejudice the achievement of the objects of this Act, by notice in the *Gazette*, exempt any service, activity or practice or any equipment or any person or entity from any or all the provisions of this Act.'

S 20(5) provides:

'The Minister may, after consultation with the Authority, by notice in the *Gazette* exempt any security service provider or security service provider belonging to a category or class specified in the notice, either generally or subject to such conditions as may be specified in the notice, from the operation of any provision of this Act.'

Although the two sections are not identically worded they deal with the same thing: exemption from the provisions of the Act. S 1(2) lays down the requirement which must be satisfied before exemption can be granted: it must not prejudice the achievement of the objects of the Act. This must be shown whenever a security service provider seeks exemption. It is not disputed that the security service provider seeking exemption bears the onus of establishing this fact.

[19] The second respondent is responsible for achieving the objects of the Act listed in s 3. The section provides –

‘The primary objects of the Authority are to regulate the private security industry and to exercise effective control over the practice of the occupation of security service provider in the public and national interest and the interest of the private security industry itself, and for that purpose, subject to this Act, to –

- “(a) promote a legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law;
- (b) ensure that all security service providers act in the public and national interest in the rendering of security services;
- (c) promote a private security industry which is characterized by professionalism, transparency, accountability, equity and accessibility;
- (d) promote stability of the private security industry;
- (e) promote and encourage trustworthiness of security service providers;

- (f) determine and enforce minimum standards of occupational conduct in respect of security service providers;
- (g) encourage and promote efficiency in and responsibility with regard to the rendering of security services;
- (h) promote, maintain and protect the status and interests of the occupation of the security service provider;
- (i) ensure that the process of registration of security service providers is transparent, fair, objective and concluded timeously;
- (j) promote high standards in the training of security service providers and prospective security providers;
- (k) encourage ownership and control of security businesses by persons historically disadvantaged through unfair discrimination;
- (l) encourage equal opportunity employment practices in the private security industry;
- (m) promote the protection and enforcement of the rights of security officers and other employees in the private security industry;
- (n) ensure that compliance with existing legislation by security service providers is being promoted and controlled through a process of active monitoring and investigation of the affairs of security service providers;
- (o) protect the interests of the users of security services;
- (p) promote the development of security services which are responsive to the needs of users of such services and of the community;
- (q) promote the empowerment and advancement of persons who were historically disadvantaged through unfair discrimination in the private security industry.”

[20] The effect of exempting the applicant from all the provisions of the Act on the achievement of these objects is not dealt with at all in paragraph 5.14 of the applicant's founding affidavit and the thrust and effect of the founding affidavit is that the applicant seeks exemption because it is not a security service provider. Even if the paragraph can be read as containing reasons for exemption it does not go far enough. In the light of the applicant's counsel's concession the review application cannot succeed.

[21] The applicant seeks the wasted costs of the postponement of this matter on 25 September 2009. On that date the matter was postponed because the affidavits had not been filed. On 15 September 2009 the second respondent's attorney, Savage Jooste & Adams, addressed a letter to the applicant's attorney to record an agreement that the matter would be postponed on 25 September 2009 and the costs reserved. On 25 September 2009 the court ordered that the application be postponed *sine die* and that the costs were reserved. It is clear that there was negotiation between the attorneys. The second respondent had requested production of certain documents and was not satisfied with the applicant's response. This apparently delayed the preparation of the second respondent's answering affidavit. On the scant information presented to me from the bar I cannot determine whose actions caused the matter to be postponed. I therefore shall not order that the second respondent pay the applicant's costs and shall order that the reserved costs of 25 September 2009 be costs in the cause.

Order

- [22] I The application is dismissed with costs;
- II The wasted costs relating to the postponement on 25 September 2009 are ordered to be costs in the cause.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 59156/08

HEARD ON: 24 March 2010

FOR THE APPLICANT: ADV. P. KENNEDY SC
ADV. F. VENTER

INSTRUCTED BY: Mr. J.J. van Gaalen of Van Gaalen Attorneys

FOR THE SECOND RESPONDENT: ADV. J.H. DREYER SC

INSTRUCTED BY: M. van Staden of Savage Jooste & Adams Inc

DATE OF JUDGMENT: 12 April 2010