CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 77/08
[2009] ZACC 11

BERTIE VAN ZYL (PTY) LTD	First Applicant
MONTINA BOERDERY (PTY) LTD	Second Applicant
versus	
MINISTER FOR SAFETY AND SECURITY	First Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Second Respondent
PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE: LIMPOPO PROVINCE	Third Respondent
CAPTAIN MALAPO	Fourth Respondent
THE PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY	Fifth Respondent

Heard on : 4 November 2008

Decided on : 7 May 2009

JUDGMENT

MOKGORO J:

[1] This matter has been referred to this Court by the North Gauteng High Court (the High Court), previously known as the Pretoria High Court. It concerns the

interpretation of sections 20(1)(a) and 28 of the Private Security Industry Regulation Act (the Act)[1] as it relates to employers using their own staff as private security service providers to protect the employers and their property and premises. Specifically, the declaration of invalidity of certain parts of section 28 has been referred to this Court for confirmation. Additionally, the applicants appeal directly against the High Court's interpretation of section 20(1)(a) of the Act and its consequent refusal to declare section 20(1)(a) unconstitutional and invalid.[2]

The parties

[2] The first applicant is Bertie Van Zyl (Pty) Ltd, a large farming company that grows approximately 30% of the tomatoes marketed in the country. The company employs over 6000 employees across a number of farms in the Limpopo Province, with some of these farms up to 250km apart. The second applicant is Montina Boerdery (Pty) Ltd, also operating a farming enterprise in the Province of Limpopo, and employing about 2000 workers.

[3] The first respondent is the Minister for Safety and Security, the Minister responsible for the impugned legislation. The second to fourth respondents are the National Commissioner of the South African Police Service (the SAPS), the Limpopo Provincial Commissioner of the SAPS, and Captain Malapo of the Monitoring and Auditing Team of the SAPS, respectively. The fifth respondent is the Private Security

[1] Act 56 of 2001.

[2] *Bertie Van Zyl v Minister for Safety and Security and Others*; *Montina Boerdery (Pty) Ltd v Minister for Safety and Security and Others* 2008 (6) SA 562 (T). Although the applicants sought relief in separate applications, the High Court issued a single consolidated judgment, which is hereinafter referred to as the High Court judgment.

Industry Regulatory Authority (the Authority), a statutory body established by section 2 of the Act to regulate the private security industry.

[4] Only the first and fifth respondents are involved in the appeal against the order of constitutional invalidity and the costs order of the High Court.

Facts

[5] The applicants run significant farming enterprises in the Limpopo Province. Given their sizeable assets and the extent of their operations, they have been the target of criminals. Theft of motor vehicles, other equipment and cash have been most common.

[6] As a result, the applicants employed some of their general workforce as security personnel. These employees work as security guards from time to time when needed, and their work includes operating access-control booms and patrolling the premises. The security guards of the first applicant are uniformed, and although the guards of the second applicant are not, they are known on its premises as security guards. These security guards are unarmed and the SAPS are contacted in cases of emergency. The High Court noted as common cause that—

> "included in the duties of some of the applicants' employees is the specific (as opposed to an inherent and general) responsibility to safeguard the applicants' premises, property, operations and even to protect their fellow employees."[3] (Footnote omitted.)

[3] Id at para 7.

[7] In terms of section 20(1)(a) of the Act, only registered security service providers may perform security services.[4] The second to fourth respondents, viewing the security guards of the applicants as well as the managers in charge of supervising security for the applicants as unregistered security officers under the Act, arrested some of them.

[8] After their release on bail, the fourth respondent, Captain Malapo, continued to harass and repeatedly threaten the applicants with further arrests of all their directors and or partners, including the farm workers employed by them as security guards. After the first applicant had successfully interdicted the respondents against further arrests, the second applicant continued to be subjected to similar treatment by Captain Malapo. This incorrigible conduct created particular operational difficulties for the applicants and their employees.[5]

[9] Discussions between the applicants and Captain Malapo failed to resolve these difficulties. Consequently, the applicants launched proceedings in the High Court seeking a declaration that the Act is not applicable to them and their farm workers. Alternatively, they sought a declaration that the Act or its relevant provisions in so far

[4] Section 20(1)(a) of the Act in relevant part provides:

> "No person, except a Security Service contemplated in section 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."

[5] The first applicant submits that arrests of its directors and farm security guards would have resulted in extreme disruption of its farming operations and caused "huge losses".

as they were applicable to them, were overbroad and therefore unconstitutional and invalid.

[10] The High Court, per Satchwell J, held that section 20(1)(a), if read contextually and restrictively, was not unconstitutionally overbroad. However, she also held that the provisions of section 28, which extend the Code to cover in-house security personnel and their employers, were an unnecessary and unconstitutional expansion.[6] She severed from the section all reference to in-house security personnel and employers, and ordered costs against the respondents.

[11] The first and second applicants filed an application seeking confirmation of the order of the High Court declaring portions of section 28(2) and section 28(3)(b) of the Act unconstitutional and invalid. The first and fifth respondents filed an appeal against this order of constitutional invalidity and the costs order made in the High Court.

[6] Section 28(2) of the Act provides:

> "The code of conduct is legally binding on all security service providers, irrespective of whether they are registered with the Authority or not and, to the extent provided for in this Act, on every person using his or her own employees to protect or safeguard merely his or her own property or other interests, or persons or property on his or her premises or under his or her control."

Section 28(3)(b) of the Act provides:

> "The code of conduct must contain rules—
>
> > to ensure the payment of minimum wages and compliance with standards aimed at preventing exploitation or abuse of employees in the private security industry, including employees used to protect or safeguard merely the employer's own property or other interests, or persons or property on the premises of, or under the control of the employer."

[12] The first applicant filed an application seeking leave to appeal directly to this Court against the High Court's ruling on section 20(1)(a) of the Act, and condonation for late filing of this application. A similar application was filed by the second applicant. In these applications, the applicants sought to challenge the constitutionality of section 20(1)(a) of the Act on the same basis as they had in the High Court.

Condonation

[13] The application for condonation relates only to the applicants' application for leave to appeal against the High Court's order regarding section 20(1)(a). The first applicant lodged its condonation application about one month late. The second applicant, who filed its application for leave to appeal even later, gives no reasons for the delay other than that it was "unfortunately impossible" for it to attend the consultation with the applicants' counsel on 17 October 2008.[7] This despite, the second applicant's submission that it has "always been unhappy with the finding of the High Court." There is no explanation for why there was no attempt at an earlier filing. The limited justifications for late filing offered by the applicants are inadequate and, generally, would militate against granting condonation.

[14] However, in determining whether condonation may be granted, lateness is not the only consideration. The test for condonation is whether it is in the interests of

[7] The two applicants filed two separate appeals on 17 and 21 October 2008. The deadline for appeals according to the Rules of this Court was 19 September 2008. Although the appeals were filed separately they are almost identical and will be treated as a single appeal.

justice to grant condonation.[8] In this case, the interpretation of section 28 is already before us for confirmation. The questions relating to section 20(1)(a) raise similar interpretative questions. Furthermore, the lateness of the applications does not appear to have caused substantial prejudice to the respondents, who do not oppose the condonation application. The respondents are already familiar with the issues articulated in the court a quo. More importantly, for purposes of legal certainty it is opportune to resolve the question of the proper construction of section 20(1)(a) with a view to settling the dispute between the parties. For these reasons, condonation is granted in the interests of justice.

The issues

[15] There are two major issues to resolve. First is the constitutionality of section 20(1)(a) of the Act. I refer to this as the "section 20(1)(a) issue". Second is the constitutionality of section 28 of the Act, and in that regard, determining whether the High Court was correct in finding that the regulation of employers of in-house security is not rationally related to a legitimate government purpose. I refer to this issue as the "section 28 issue".[9]

The section 20(1)(a) issue

[8] See *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at paras 20, 22, and 30-4; *Mercer v S* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4; *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) at paras 11-3; and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3, where this Court held that the broad test for granting condonation of late applications is whether it is in the interests of justice.

[9] This is the matter before us for confirmation.

[16] The applicants' contention is that the definition of "security service" in the Act is overbroad in that it encompasses almost all employees in almost all industries, requiring them to register, and therefore be regulated under the Act, as security service providers.[10] The High Court's interpretation of section 20(1)(a), they submit, is also impractical in that it brings countless other people who do not in the true sense provide security services into the ambit of the Act, including for example childminders who protect and safeguard their wards, requiring them to register as security service providers.[11] They contend that section 20(1)(a) is therefore overbroad and irrational, violating the rule of law enshrined in section 1 of the Constitution. It must thus be declared unconstitutional and invalid, and be set aside.

[17] In the alternative the applicants argue that, assuming that the High Court was correct in its construction of section 20(1)(a), that interpretation is not obvious from the plain reading of the Act. The meaning given by the High Court, they conclude, violates the rule of law, which requires that legislation be stated in reasonably clear terms. This, they argue, is particularly true when the provision in question creates a criminal offence.

[18] Relying on the preamble and other relevant provisions of the Act to provide legislative context, the High Court read section 20(1)(a) as applying only to people in the private security industry, and excluded in-house security from the reach of the Act. The respondents supported the decision of the High Court, contending that that

[10] See [26] for definition of "security service".

[11] Section 20(1)(a) of the Act.

interpretation would indeed restrict the application of the Act and save it from overbreadth.

[19] The question facing this Court is whether, properly construed, section 20(1)(a) passes constitutional muster. The appropriate place to begin is with the constitutional and jurisprudential principles that govern the task of statutory interpretation before us.

The relevant statutory interpretation principles

[20] The Constitution requires courts deciding constitutional matters to declare any law that is inconsistent with the Constitution invalid to the extent of its inconsistency.[12] However, the Constitution in section 39(2) also provides that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

This Court has interpreted this provision to mean, inter alia, that:

> "The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[13]

[12] Section 172(1)(a) of the Constitution.

[13] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

Thus when the constitutionality of legislation is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids",[14] the impugned legislation is capable of being read in a manner that is constitutionally compliant.

[21] Our Constitution requires a purposive approach to statutory interpretation.[15] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[16] Ngcobo J stated:

> "The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights.'"[17]

Indeed this approach is one that has been applied to varying degrees by our courts under the common law.[18] The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[19] The often quoted dissenting judgment of Schreiner JA in *Jaga v Dönges, NO and Another*,[20] also

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[14] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[15] For examples of a purposive approach to statutory interpretation, see *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 25, 28 and 31; *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* [1999] ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[16] [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[17] Id at para 91.

[18] *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (AD). See also *Jaga v Dönges NO and Another*; *Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3. For a discussion of pre-constitutional use of the purposive approach in our courts see JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[19] Thornton *Legislative Drafting* 4ed (1996) at 155 cited in JR de Ville above n 18 at 244.

[20] Above n 18.

cited approvingly by Ngcobo J in *Bato Star*,[21] eloquently articulates the importance of context in statutory interpretation:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."[22]

[22] A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required, as discussed above, to declare the legislation unconstitutional and invalid.[23] As was noted by the minority judgment in *Case and Another v Minister of Safety and Security and Others*; *Curtis v Minister of Safety and Security and Others*[24]—

> "[t]here is a real danger that, in [reading down] an overbroad statute, we will simply substitute for the vice of overbreadth the equally fatal infirmity of vagueness." [25] (Footnote omitted.)

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[21] Above n 16 at para 89.

[22] *Jaga v Dönges* above n 18 at 662G-H.

[23] "[A] construction [of a statute] is not a reasonable one . . . when it can be reached only by distorting the meaning of the expression being considered." See *National Coalition for Gay and Lesbian Equality* above n 14 at para 23.

[24] [1996] ZACC 7; 1996 (3) SA 617 (CC);1996 (5) BCLR 609 (CC).

[25] Id at para 79.

It is indeed an important principle of the rule of law, which is a foundational value of our Constitution,[26] that rules be articulated clearly and in a manner accessible to those governed by the rules.[27] A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.[28]

[23] This Court has recognised that the process of determining the constitutionality of legislation requires a resolution of the following inherent tension:

> "On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[29] (Footnote omitted.)

Mindful of the imperative to read legislation in conformity with the Constitution, but only to do so when that reading would not unduly strain the legislation, I turn to an

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[26] See section 1(c) of the Constitution.

[27] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[28] On this point, in *Case and Another v Minister of Safety and Security and Others*, we cited *University of Cape Town and Another v Ministers of Education and Culture and Others*, which stated:

> "If it is clear that the widest possible meaning was not intended, but at the same time, it is not possible to say where the intended narrower meaning begins or ends, then no ascertainable meaning exists."

Above n 24 at para 79, citing *University of Cape Town and Another v Ministers of Education and Culture and Others* 1988 (3) SA 203 (C) at 213.

[29] *Hyundai* above n 13 at para 24.

analysis of the constitutionality of sections 20(1)(a), 28(2) and 28(3)(b) of the Act. I find below that these provisions can be read in a manner consistent with the Constitution, and that to do so does not result in a far-fetched interpretation of these provisions.

Constitutionality of section 20(1)(a)

[24] Section 20(1)(a) provides:

> "No person, except a Security Service contemplated in section 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."[30]

[25] Although the applicants challenge the constitutionality of section 20(1)(a), a proper interpretation of this provision hinges on how the Act defines a security service. The definition of the term "security service" is therefore critical to determining the ambit and rationality of section 20(1)(a) as it is only persons rendering those services for reward, remuneration, fee or benefit, who are required by the Act to register as security service providers.[31]

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[30] Section 1 of the Act defines "security service provider" as:

> "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".

[31] The one exception to the section 20(1)(a) requirement that persons providing security services for remuneration register as a security service provider, is that a "security service" as contemplated in section 199 of the Constitution need not register under the Act. Section 199(1) of the Constitution provides:

> "The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution."

The Security Services are state or public security forces regulated in terms of their specific legislation, such as the South African Police Service Act 68 of 1995, and fall outside of the purview of the Act.

[26] According to the definition in section 1 of the Act—

> "'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 this 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)* providing a service aimed at ensuring order and safety on the premises used for sporting, recreational, entertainment or similar purposes;
> *(e)* manufacturing, importing, distributing or advertising of monitoring devices contemplated in section 1 of the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992);
> *(f)* performing the functions of a private investigator;
> *(g)* providing security training or instruction to a security service provider or prospective security service provider;
> *(h)* installing, servicing or repairing security equipment;
> *(i)* monitoring signals or transmissions from electronic security equipment;
> *(j)* performing the functions of a locksmith;
> *(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*) to (*j*) and (*l*), to another person;
> *(l)* managing, controlling or supervising the rendering of any of the services referred to in paragraphs (*a*) to (*j*);
> *(m)* creating the impression, in any manner, that one or more of the services in paragraphs (*a*) to (*l*) are rendered[.]"

Each service or activity enumerated in the list above on its own qualifies as a security service. On the text of this definition, a person need only engage in one of these services or activities to be required by the Act to register as a security service

provider. The locus of the interpretive dispute between the applicants and the respondents is paragraph (a) of the definition, which designates the protection or safeguarding of a person or property in *any* manner as a security service.

[27] It may be that, based on a purely textual reading of paragraph (a) of the definition, any act of protecting or safeguarding a person or property, rendered in any manner for remuneration, reward, fee or benefit, would require registration as a security service provider. As the applicants argued, the service may be of a part-time or full-time nature; permanent or temporary; and continuous or ad hoc. Important for the purposes of this case, is that the protection or safeguarding may be provided exclusively or simultaneously with any other service and the remuneration may be direct or indirect.

[28] When the text of paragraph (a) of the definition is considered in isolation and interpreted literally, it seems, as the applicants contend, that section 20(1)(a) applies to *all* workers in *all* industries who in their line of employment simply happen to protect or safeguard the person or property of others in any particular circumstance that may arise. This is so irrespective of the methods used, the nature of the protection rendered or the object against which protection is provided.

[29] On this interpretation, section 20(1)(a) would bring within the ambit of the Act people such as childminders, teachers and doctors — all of whom may protect or safeguard people and property in one way or another in the regular course of their

work. They would be required to register with the Authority and comply with all the subsequent regulations governing the private security industry. As noted by the High Court:

> "On the face of it, [the Act] could apply to protection carried out through the placement of scarecrows in a field, pelting baboons with stones, admonishment of bullying schoolchildren with words, restraint of demented patients with straitjackets or medication, verbal tips from a bookmaker to gambler."[32]

[30] If the applicants' contentions were correct, the scope of the Act would be immensely alarming, and might border on absurdity. It would include within its scope almost all persons who exercise control over people or the property of another. Certainly one would struggle to be employed, as it is essential for an employment relationship that an employee should act in good faith and be trusted with the property of an employer. Almost *all* employment would then be prohibited unless an employee were registered as a security service provider and fulfilled the requirements of section 23, which include among others, that a person must be at least 18 years of age, and be a citizen or permanent resident of South Africa in order to register.[33] Thus, the applicants' construction of the section would not only require vast swathes of society to register before they could be employed, but would also effectively disbar sizeable communities or groups of people from most occupations or activities. That is a purely

[32] Above n 2 at para 22.

[33] See section 23(1) of the Act, which sets out the requirements for registration as a security service provider. If a person does not meet these requirements, he or she cannot register, and thus cannot perform any security services. These requirements include being a citizen or a permanent resident, being 18 years or older, having complied with the prescribed relevant training requirements and not having been convicted of an offence.

literal interpretation of the definition of "security service" and will render section 20(1)(a) of the Act overbroad.

[31] As discussed above:

> "[J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."[34]

In line with a purposive approach to statutory interpretation, it is appropriate to proceed in the manner that this Court has laid out in *Hyundai*:

> "It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance."[35]

But, can paragraph (a) of the definition of "security service" be reasonably construed in a manner that renders section 20(1)(a) constitutionally viable, in line with the injunction in section 39(2) of the Constitution?[36] I find that when the definition is read in light of the purpose of the Act and its context as a whole, the section attains a

[34] *Hyundai* above n 13 at para 23. See also *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC);1999 (7) BCLR 771 (CC) at para 84.

[35] *Hyundai* above n 13 at para 26.

[36] Compare this with the well-established common law rule that precedes the injunction in section 39(2) of the Constitution:

> "It appears to me that the principle we should adopt may be expressed somewhat in this way — that when to give plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it could lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as this Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature." *Venter v Rex* 1907 TS 910 at 914-5.

much narrower meaning than that contended for by the applicants. That construction which renders section 20(1)(a) consistent with the Constitution irresistibly comes to the fore.

Contextual interpretation of section 20(1)(a)

[32] A contextual interpretation of paragraph (a) of the definition of "security service" is capable of restricting the literal meaning of section 20(1)(a) without straining the wording of the provision. The idea is not to read in or sever words or phrases from the text. That can only occur upon declaration of invalidity.[37] The text must be interpreted in the context of the Act as a whole, taking into account whether the preamble and the other relevant provisions in the Act support the envisaged construction.[38]

[33] When this Court considered relevant provisions of the Act in *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and*

[37] *National Coalition for Gay and Lesbian Equality and Others* above note 14 at para 24.

[38] *Bato Star Fishing* above n 16 at paras 89-91. In *Stopforth* Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:

> "In giving effect to this approach, one should, at least,
>
> (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved;
>
> (ii) study the various sections wherein the purpose may be found;
>
> (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with);
>
> (iv) draw logical inferences from the context of the enactment."

Above n 15 at para 21.

Others[39] it noted the importance of considering those provisions in the proper context of the Act and stated:

> "The private security industry is a very particular environment. At stake is the safety and security of the public at large. Section 12 of the Constitution guarantees everyone the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. In a society marred by violent crime, the importance of protecting this right cannot be overstated."[40]

This is equally important to the determination of whether section 20(1)(a) can be interpreted in a manner that is consistent with the Constitution.

[34] The private security industry in South Africa is large and powerful. Although it is not a substitute for state security services, it plays a vital role in complementing those services. According to the Authority, the industry "consists of more than 310 000 active individual security service providers and approximately 5000 active security businesses" and grows at a rate of between 12 to 15% each year. Its members "by far outnumber the combined number of members of the South African Police Service and the National Defence Force".

[35] The sheer size of the private security industry, as well as the coercive power it wields during the regular conduct of its business, underscore the need for regulation and adherence to appropriate standards. Close control and management of this massive industry is imperative. This ensures a sound balance between complying

[39] [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC).

[40] Id at para 37.

with the rule of law on the one hand, and exercising their coercive power in protecting the safety and security rights of the public, as well as those of members of the private security industry itself on the other. As Maya JA observed in *Private Security Industry Regulatory Authority and Another v Anglo Platinum Management Services Ltd and Others*:

> "It is so that there is a legitimate and compelling public interest in the control of the large and enormously powerful private security industry. This is to ensure, for example, that security officers have no links to criminal activities, are properly trained and are subject to proper disciplinary and regulatory standards and avoid any abuses which might be perpetrated by security officers against the vulnerable public. There is therefore a compelling need for vigilance on the [Private Security Industry Regulatory] Authority's part to ensure that the objects of the Act are not undermined."[41] (Footnotes omitted.)

[36] In *Private Security Industry Regulatory Authority and Another v Association of Independent Contractors and Another*[42] Howie P provided a crisp and illuminating account of the background to the Act:

> "[The Act's] forerunner was the Security Officers Act of 1987. It was aimed at regulating security officers who were employees of the person or entity that made their services available. It did not deal with security officers who stood to the provider in an independent contractor relationship. Attempts to evade the provisions of that Act centred on using security officers who were independent contractors. In that way minimum wage legislation and other material statutory provisions could be avoided by the entities that made the security officers available. The disadvantages to the latter, or at least the potential disadvantages, are obvious.

[41] [2006] ZASCA 176 at para 24.

[42] [2005] ZASCA 32; 2005 (5) SA (SCA) 416.

> The Act has the object of overcoming that problem. Its ambit is very much wider than that of its predecessor. It uses provisions and particularly definitions which substantially extend its scope and operation."[43]

[37] Under the repealed legislation individuals and businesses could operate by taking advantage of loopholes in the Security Officers Act[44] avoiding registration and regulation which required adherence to minimum standards, including minimum wages, absent in that legislation. It is not surprising that the legislature deemed fit to broaden the ambit of the Act to avoid this type of evasion. A contextual reading of the Act as a whole, therefore, makes clear that its reach does not extend to cover the likes of childminders and teachers in their respective capacities of safeguarding their wards, but instead confines itself to protection from the sort of criminal activity that has fuelled the expansion of the private security industry itself.

[38] The need for private security services arises at once from the pervasive crime that targets people and property, and the necessity to enhance state security services. Private security services, which by their very nature impose upon others, bear the duty of providing safety and protection from criminal threats and actions and responding to those threats and actions. It must be borne in mind that, by its very nature, a service is not a once-off action taken out of necessity, for example, but instead connotes an element of repeated performance of a duty, however frequent or infrequent.

[43] Id at paras 9-10.

[44] Act 92 of 1987.

[39] That duty is therefore not incidental to the role of a security service provider. It lies at its core. Given the context of the Act and its express objective of regulating the private security industry, the plain meaning of a security service cannot extend to a security activity that is merely a by-product or once-off incident of the core activity. Teachers, nurses and shop tellers might all, in the regular course of their duties, protect people and property. But that protection is merely incidental to those duties. Conversely, a security service provider will direct his or her attention and expertise towards the security duties with which he or she has been specifically tasked for some form of remuneration at that time.

[40] That interpretation is supported by the preamble of the Act which reads:

> "WHEREAS the adequate protection of fundamental rights to life and security of the person as well as the right not to be deprived of property, is fundamental to the well-being and to the social and economic development of every person;
>
> AND WHEREAS security service providers and the private security industry in general play an important role in protecting and safeguarding the aforesaid rights;
>
> AND WHEREAS it is necessary to achieve and maintain a trustworthy and legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law, and is capable of ensuring that there is greater safety and security in the country[.]"

The preamble reflects that a fundamental purpose of the Act is to achieve and maintain a trustworthy and legitimate private security industry, in order to ensure that there is greater safety and security in the country.

[41] 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. It regulates private security service providers in significant part to ensure that the rights of those they come into contact with during the course of their operations are protected against the unlawful conduct of others. As the High Court found, the Act is not intended to regulate the response to hazards from nature or harm from animals for the following reasons:

> "Rights exist in relation to actors who are themselves capable of appreciating the existence and ambit of such rights and acting in accordance therewith. Rights are affirmed against other holders of rights and obligations. Rights cannot be affirmed against the forces of nature or wild animals. . . . The Private Security Act regulates the industry which developed in order to protect and safeguard rights of actors against other actors. The 'safety and security' of which the Preamble speaks can only be in the context of controllable human behaviour."[45]

[42] People like childminders and teachers might engage in some form of protection or safeguarding of their wards and learners respectively, but that protection is not aimed against the kinds of dangers to which the private security industry is placed to respond. It is not, for example, at the core of the childminder's duty in the ordinary terms of her or his employment, to fight off armed attackers who break into a home and attack his or her ward. The protective responses ordinarily required of a

[45] Above n 2 at paras 46-7.

childminder or a teacher will be limited. It could hardly be required that he or she provide protection or take action against unlawful acts against persons or property over whom or which he or she has charge. This would instead be the duty of a bodyguard or other security professional, who would properly be required to register with the Authority in terms of section 20(1)(a) of the Act.

[43] The long title[46] of the Act identifies its objective as follows:

> "To provide for the regulation of the private security industry; for that purpose to establish a regulatory authority; and to provide for matters connected therewith."

Thus paragraph (a) of the definition of security service must be interpreted restrictively and within its appropriate context. "Protecting" and "safeguarding" must be understood within the context of the dangers sought to be combated by the private security industry.

[44] It is an accepted canon of statutory interpretation that terms with a wide meaning may be restricted by terms with a narrower meaning with which they are connected.[47] Indeed paragraphs (b) to (m) of the definition of security services[48]

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[46] The long title of an Act has long been held to form part of an Act. See *Perishable Products Export Control Board v Molteno Bros* 1943 AD 265 at 273-4. In fact, the long title of statutes has formed part of this Court's analysis in determining the constitutional validity of statutes. See, for example, *African National Congress and Another v Minister for Local Government and Housing, KwaZulu-Natal and Others* [1998] ZACC 2; 1998 (3) SA 1 (CC); 1998 (4) BCLR 399 (CC) at para 9; and *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 35.

[47] The legal maxims are *eiusdem generis* and *noscitur a sociis*. See JR de Ville n 18 above at 124-5. See on the operation of *eiusdem generis* rule: *Skotnes v South African Library* [1997] ZASCA 28; 1997 (2) SA 770 (SCA) at 775 and *S v Wood* 1976 (1) SA 703 (A) at 707; and on the *noscitur a sociis* rule: *Federated Employers' Insurance Co Ltd v Magubane* 1981 (2) SA 711 (A) at 710; *Ovenstone v Secretary for Inland Revenue* 1980 (2) SA 721 (A) at 736; and *Santam Versekeringsmaatskappy Bpk v Kruger* 1978 (3) SA 656 (A) at 664.

[48] See [26] above.

support the restrictive interpretation advanced in this judgment.[49] These paragraphs list aspects which have far more restrictive connotations of security services. They include "providing a reactive or response service", "performing the functions of a private investigator", and "monitoring signals or transmission from electronic security equipment". These terms relate to special performances by security protection services, none of which are ordinarily associated with services provided by, for example, nurses, childminders or teachers.

[45] It is unlikely that the Legislature intended to juxtapose terms which, according to the applicants, have such a vast scope, with terms that are as narrow as those in paragraphs (b) to (m). It is far more likely that the wide terminology of paragraph (a) placed at the beginning of the definition of security services is intended to be a "catch-all" provision. It is intended to prevent activities from slipping through the gaps of the other more specific and restrictive provisions of the Act.

[46] In statutory interpretation, it is important that Courts strike an appropriate balance between the text and its context. Indeed, if one has regard to the nature and role of the private security industry, and to the stated objectives of the Act, section 20(1)(a) is open to an interpretation that promotes the spirit, purport and objects of the

[49] See *Hoban v ABSA Bank Ltd t/a United Bank and Others* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA) at 1044, which held that a definition provided in a statute should prevail, and quoted with approval from *Canca v Mount Frere Municipality* 1984 (2) SA 830 (Tk) at 832F the following statement:

> "Unless it appears that the Legislature intended otherwise and, in deciding whether the Legislature so intended, the Court has generally asked itself whether the application of the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply."

Bill of Rights.[50] That reading favours a common-sense meaning, discernable from the context of section 1(b) to (m) and the Act as a whole. 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.

[47] An important concern raised by the applicants is that, particularly where a criminal penalty is imposed for the violation of a statutory provision, it is critical that the scope of the provision be clear so that those bound by it understand what their rights and obligations are. That is indeed an important rule of law concern. However, as Ngcobo J held in *Affordable Medicines Trust and Others v Minister of Health and Another*:[51]

> "The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."[52] (Footnotes omitted.)

[50] Section 39 (2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[51] [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108.

[52] Id at para 108.

Read in the context of the Act as a whole and in the context of the nature and role of the private security industry, as this judgment shows, the Act binds those who provide protective services against unlawful injury or theft of persons or property and requires them to register as security service providers and be regulated by the Act.

Are the applicants' employees required to register under the Act?

[48] The applicants submitted that in the face of recurring crime such as theft of motor vehicles, equipment and cash, they sought to remedy the problem by employing members of their general force of farm workers "specifically to enhance security." They do so by requiring farm workers to perform specific security duties, and within the companies these farm workers are known as security guards. They perform duties such as controlling the access booms and patrolling the applicant's premises, and the first applicant's security guards wear uniforms that identify them as such. They do not carry weapons and the SAPS are regularly contacted in cases of emergency.

[49] Considering the large numbers of people and vast property they protect, these individuals effectively perform services which would otherwise be provided by an externally contracted security service provider, who would be required to register under the Act. Although they do not carry weapons, they are the first line of defence in the event of a security breach and face the same dangers as their counterparts in the general private security industry. It is in my view, therefore, imperative that they are appropriately trained and skilled, empowering them to perform their duties in terms of

the set norms and standards. As a result, these individuals must be brought within the ambit of the Act.

[50] The High Court concluded that on the facts before it, it was unable to determine which individual employees were or were not security service providers. Similarly, this Court lacks the necessary details to make that determination on a case-by-case basis.

[51] However, based on the reasoning in this judgment and the adopted interpretation of "security services", I conclude that farm workers who are used by their employers to provide private security services for remuneration, reward, fee or benefit, are security service providers.[53] They must, therefore, register accordingly in terms of section 20(1)(a) of the Act. Simply stated, absent registration, farm workers may not be used as security guards by their employers.

[52] The provisions of the Act themselves might not provide absolute clarity, in that there may be cases on the margins where it may not immediately be determined whether or not registration is required under the Act. That, however, is the inevitability of broadly stated legislation. The Act is a regulatory statute aimed at bringing about the necessary order and regulation of a powerful safety and security industry. As shown above, the previous statute fell foul of the creativity of evaders

[53] See definition of "security service provider" in section 1 of the Act.

who relied on its technical loopholes to escape regulation.[54] The element of generality and the relative breadth of the current provisions may indeed be necessary for the state to bring about effective regulation so as to combat the social concerns discussed above. As was held in *R v Nova Scotia Pharmaceutical Society*:[55]

> "Indeed . . . laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern state intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one."[56] (Footnotes omitted.)

Paragraph (a) of the definition of security services and section 20(1)(a) can indeed be read to afford reasonable clarity of meaning. The flexibility of these provisions, based on their generality, does not render them unconstitutionally vague. For the reasons stated in this judgment, section 20(1)(a) is therefore neither overbroad nor vague. In that regard, I agree with the conclusion of the High Court that section 20(1)(a) is not unconstitutional. It is therefore not invalid. In the result, the appeal must fail.

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[54] See [37] above.

[55] 10 CRR (2d) 34.

[56] Id. Also quoted in *Affordable Medicines Trust* above n 51 at para 108.

The section 28 issue

[53] Section 28(2) of the Act provides:

> "The code of conduct is legally binding on all security service providers, irrespective of whether they are registered with the Authority or not and, to the extent provided for in this Act, on every person using his or her own employees to protect or safeguard merely his or her own property or other interests, or persons or property on his or her premises or under his or her control."

Section 28(3)(b) of the Act provides:

> "The code of conduct must contain rules—
> to ensure the payment of minimum wages and compliance with standards aimed at preventing exploitation or abuse of employees in the private security industry, including employees used to protect or safeguard merely the employer's own property or other interests, or persons or property on the premises of, or under the control of the employer."

[54] The High Court declared unconstitutional and struck out parts of sections 28(2) and 28(3)(b) which extend the binding ambit of the Code to include employers of in-house security. It is this issue which has been referred to this Court for confirmation.[57]

[55] Further, the question of whether or not the High Court was correct in holding that in-house security personnel are not members of the private security services

[57] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

industry for the purposes of the Code and are therefore not bound by it, is also before us on appeal. The court distinguished between security service providers, whom it held were part of the private security services industry, and in-house security personnel, who are employees used by their employers to protect their interests on their own premises, including people and property under the employer's control. The applicants' employees belong to the latter category.

[56] The High Court decision, based on that distinction, is supported by the applicants. They also contend that sections 28(2) and 28(3)(b) are inconsistent with the Constitution in that these provisions are not rationally related to any legitimate government purpose. The provisions, they aver, are too wide and vague for employers to know what tasks they can entrust to their employees.

[57] The respondents, basing their argument on the broad definition of a security service provider in the Act, contend that the High Court erred in its construction of the provisions. They submit that in-house security personnel are security service providers. Their approach is that section 28 does not distinguish between regular security service providers and in-house security as the High Court did. Instead the section merely includes *employers* of in-house security who would otherwise not be covered by the Act, except for the limited purpose of preventing the exploitation of in-house security employees in the manner described in section 28(3)(b).

[58] In determining whether or not the Code applies to in-house security, the first question is whether or not farm workers used by their employers specifically to protect or safeguard their property, or people on their premises or under their control, are security service providers under the Act. In particular, it is questioned whether the High Court was correct in finding that in-house security personnel are not part of the private security industry for purposes of the Code and therefore not security service providers as defined by the Act. The second question is whether or not there is a rational connection between a legitimate objective of the Act and the inclusion of employers of in-house security within the ambit of the Code.

[59] The High Court found that the impugned provisions of section 28 expand the ambit of the Act to include in-house security personnel, who are not security service providers. That expansion, the court held, has no rational connection with a legitimate government purpose. The court also found that nothing in the Act indicates that it was ever the intention of the Minister for Safety and Security or the Authority to regulate employers or employees operating outside of the private security industry.

Are in-house security personnel part of the private security industry?

[60] Section 28(2) makes the Code legally binding on all security service providers. Under section 28(3)(b), and according to the definitions of "security service" and "security service provider" in section 1, the Act recognises in-house security as part of the security services industry. As first and fifth respondents contend, the word "including" in section 28(3)(b) does not expand the meaning of "employees in the

private security industry", nor does it draw a distinction between the private security industry and in-house security in other industries. Section 28(3)(b) merely makes clear that in-house security personnel are included in the private security industry, to which section 28(3)(b) applies. The Code is therefore legally binding on those who operate in-house security services in any other industry, including, as in this case, the farming industry.

[61] Section 1 of the Act defines "private security industry" as the industry conducted by security service providers. Security service providers are in turn defined as persons who render a security service for remuneration, a reward, fee or benefit.[58] This returns us to the definition of "security service" discussed in detail above.[59] Although in-house security personnel may be primarily employed in services other than security services, they provide the security services in the particular operation, whether on a part-time or full-time basis. They provide their services as part of their employment and are remunerated, directly or indirectly. As pointed out earlier, in-house security is used in place of external private security service providers and serves the same purpose.[60]

[62] As shown above, once employees are used by their employers to provide private security services on their premises, and they are remunerated, they are required to register as security service providers under section 20(1)(a) of the Act, regardless of

[58] See section 1 of the Act.

[59] See [26]-[30] above.

[60] See [48]-[49] above.

whether they are remunerated directly or indirectly or employed on a full-time or part-time basis. As with any other private security service provider, their services are covered by the definition of "security service" in section 1(a) of the Act, making them part of the private security services industry.

[63] Having concluded that in-house security employees are part of the private security industry, it follows that section 28(2) of the Act is applicable to them, bringing them within the ambit of the Code.

[64] An important purpose of the Act is that private security services, including in-house security, act in terms of the relevant law and norms and standards in the Code.[61] Whether they carry arms or not, private security service providers exercise coercive power, authority and control. To ensure that the public is safeguarded against undue exercise of authority and abuse of power, it is important that the private security industry be regulated and subjected to the discipline and standards of the Code. As security service providers, in-house security personnel are no different. They too exercise authority, control and coercive power. The need for scrutiny invariably arises to ensure that in-house security personnel observe the law and act in a manner consistent with related rights. Against the backdrop sketched above, it is necessary and therefore reasonable that in-house security personnel be subject to the Code. In that regard, the ambit of the Code is not too wide and the inclusion of in-house

[61] See the Preamble of the Act. See also Chapters 2 and 4 of the Code.

security for regulation has a rational connection with the legitimate purpose of the Act.

To what extent are employers of in-house security personnel bound by the Code?

[65] The text of section 28(2) is explicit. It makes the Code binding on employers of in-house security personnel to the extent provided in the Act. Section 28(3)(b) compels the Minister to include in the Code rules that ensure compliance with standards aimed at preventing exploitation and abuse of employees and payment of a minimum wage.

[66] In section 33 of the Act provision is made for "the inspection of the affairs of any . . . person who employs a security officer".[62] I find that in-house security personnel, based on the security services they perform, are security officers in terms of section 1(a)(i) of the Act.[63] It follows that employers of in-house security personnel are also subject to inspection under the Act and, for reasons which follow, that inclusion is reasonable.

[62] Section 33(1) provides:

> "An inspector may, subject to any direction of the director, carry out an inspection of the affairs or any part of the affairs of a security service provider, of any other person who employs a security officer, or of a person whom the director has reason to believe is a security service provider or employs a security officer."

[63] Section 1(a)(i) of the Act provides:

> " 'security officer' means any natural person—
>
> 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[.]"

[67] Although the working conditions of farm workers have transformed progressively in recent years,[64] pockets of concern persist. The Minister of Labour has observed that "[f]arm workers are isolated and often at the mercy of their employers" and that "on some farms conditions are still those of our lamentable past where workers are subjected to appalling wages and enjoy no rights".[65] The South African Human Rights Commission (SAHRC) reports that:

> "[Farm workers] are not only in an employment relationship with the farmer. Instead they live in . . . a community in which the farmer has extensive control over virtually every aspect of the farm worker's life."[66]

It also reports that:

> "The power of farm owners extends to ownership of land, employment and access to economic and social needs. Farm [workers] are dependent on employers for employment and tenure security, and in some cases, for their basic economic and social rights. This pervades all aspects of [their lives], resulting in gross power imbalances between [the employer and farm worker.]"[67]

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[64] Historically, farm workers have been the most marginalised workers in the South African economy. It was only during the nineties that they were accorded the same rights as employees in other sectors of the economy. Farm workers acquired protection under the law with the introduction of the Basic Conditions of Employment Act 75 of 1997 and the Sectoral Determination for Agriculture. See South African Human Rights Commission (2008) *Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003* (2008 SAHRC Report) at 65.

[65] The social relationship between farm worker and employers, in some cases, still constitutes one of abuse, violence and racism. Escaping these conditions is difficult. Poor access to education and information is prominent in farm worker communities and according to Statistics South Africa, farm workers "are the most destitute and least educated group in South Africa." The SAHRC reports that the main obstacle remains the implementation of laws which govern farm workers. This, it is reported, may be attributed to various factors, including the difficulties relating to accessing farms; the lack of unionisation among farm workers and the fact that workers are reluctant to come forward to lay complaints against their employers for fear of being evicted from their homes. See 2008 SAHRC Report above n 64 at 16, 34-88. See also Woolman and Bishop *Down on the farm and barefoot in the kitchen: farm labour and domestic labour as forms of servitude* accessed from https://www.up.ac.za/dspace/bitstream/2263/4268/1/Woolman_Down%282007%29.pdf on 5 May 2009.

[66] 2008 SAHRC Report above n 64 at 15.

[67] South African Human Rights Commission (2003) *Final Report on the Inquiry into Human Rights Violations in Farming Communities* (2003 SAHRC Report) at 172.

[68] The payment of a minimum wage and the prohibition on the exploitation of workers are integral to the right to fair labour practices guaranteed and protected in the Constitution.[68] This right is also regulated by the relevant laws, including labour legislation.[69] However, in view of their general isolation from the rest of the private security industry and the general absence of organised labour protections in the context of their general social conditions described above,[70] farm workers who are employed as in-house security are particularly vulnerable to exploitation.[71] Including their employers within the purview of the Code is reasonable, if not necessary.

[69] Unlike their counterparts in the general private security industry, in-house security might not possess the force of great numbers to organise powerful labour formations. Generally, they lack the clout to advocate effectively for their rights in the context of existing labour laws. Bringing employers of in-house security personnel into the fold of the inspection imperatives of the Code serves to prevent the exploitation and abuse of their employees.[72] The legislature consciously took these steps to provide in-house security officers whose lives are constantly at risk in the course of their work, with the necessary protections. A requirement that employers of in-house security subscribe to a code which gives effect to the protection of fair labour rights practices for the benefit of vulnerable workers is clearly a reasonable one. So too is the inspection of the affairs of employers of in-house security. Through the

[68] Section 23(1) of the Constitution provides that "[e]veryone has the right to fair labour practices."

[69] Section 185 (b) of the Labour Relations Act 66 of 1995 provides that "[e]very employee has the right not to be subjected to unfair labour practice."

[70] See [67] above.

[71] Id.

[72] Section 28(3)(b) of the Act.

binding operation of the Code, the state therefore has a legitimate interest in ensuring that employers of in-house security personnel abide by the law in general and the Act in particular.

[70] For the above reasons, the application of section 28 to employers of in-house security, to the extent shown in this judgment, is not in conflict with the Constitution, nor is it invalid. In the result, the order of unconstitutionality of section 28(2) and section 28(3)(b) by the High Court is not confirmed.

Are the applicants' in-house security guards entitled to the minimum wages applicable to the Private Security Industry?

[71] Section 28(3)(b) of the Act provides that the Code must contain rules to ensure the payment of minimum wages in the private security industry. Section 23(f) of the Code provides :

> "An employer of in-house security officers –
>
> must, in respect of all employees used, permitted or directed to render a security service as contemplated in paragraph (a), comply with the relevant provisions of the Levies Act as well as all applicable laws and measures promulgated in terms of law regarding minimum wages and standards aimed at preventing exploitation or abuse of employees in the private security industry."

Farm workers who are used by their employers as security guards are, for purposes of the Act, security officers who provide security services. They are part of the private security services industry, as shown in this judgment. In terms of section 23(f) of the

Code their employers are therefore included within the binding ambit of the minimum wages provisions.

[72] Section 28(3)(b) provides that the Code must contain rules to ensure the payment of minimum wages, among others, aimed at preventing exploitation or abuse of employees in the private security industry, including employees used to protect or safeguard merely the employer's own property or other interests, or persons or property on the premises of, or under control of the employer.

[73] So far, employers of in-house security personnel are bound by the rules envisaged under section 28(3)(b).

[74] Section 28(3)(b) makes provision for an important consideration: a minimum wage for security officers operating in the private security industry, including in-house security. The need for this protection arises in the context of the working conditions of farm workers which tend to render them particularly vulnerable.[73] It is imperative therefore that, for purposes of ensuring the minimum wage, in-house security personnel and their employers are bound by the Code.

Ultra vires

[75] A concern that arose during oral argument is whether the Code itself might be *ultra vires*. In particular, the question raised was whether, by requiring employers to

[73] See [67] above.

ensure the proper registration and training of their employees, the Code goes beyond its powers. The *ultra vires* issue was not dealt with on the papers, nor was it sufficiently argued or canvassed before this Court. It is therefore best left for another day and is not decided in this judgment.

Costs

[76] The respondents seek costs if they are successful. Counsel, however, conceded that the questions raised by this matter are in the public interest. The respondents nonetheless aver that the charges against the applicants had been withdrawn earlier, so that they need not have instituted these proceedings. Counsel also submit that the fifth respondent only became involved much later in the proceedings and should not be targeted in a costs order based on wrongful arrests.

[77] On the contrary, the issue of the applicants' arrests led by the fourth respondent, is a cause for concern.[74] I have outlined the fourth respondent's deplorable conduct earlier in this judgment.[75]

[78] This sort of conduct is reminiscent of the abuse of power and police harassment of people and communities which were rife in our past. In a constitutional democracy, based on the values of equality, human dignity and freedom, the harassment to which the applicants were subjected was most regrettable. In public service where policing

[74] See [8] above.

[75] Id.

must have regard to the values of ubuntu,[76] the conduct of the police was indeed disappointing, and, frankly sanctionable.

[79] Although the applicants have not been successful, costs should not be ordered against them. They have raised an important constitutional issue which required to be resolved in the public interest. The respondents conceded as much. Besides, the question regarding the constitutionality of sections 28(2) and 28(3)(b) of the Act was already before this Court for confirmation.

[80] In the result, there is no order as to costs.

[81] Because we come to a different conclusion than that of the High Court, the costs order there must be set aside.

Order

[82] In the result, the following order is made:

a) The applications for condonation are granted.

b) The applicants' application for leave to appeal against the decision of the North Gauteng High Court in respect of section 20(1)(a) of the Private Security Industry Regulation Act 56 of 2001 is granted.

[76] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 227, 237, 263, 308 and 374.

c) The applicants' appeal against the decision of the North Gauteng High Court in respect of section 20(1)(a) of the Private Security Industry Regulation Act 56 of 2001 is dismissed.

d) The respondents' application for leave to appeal against the order of constitutional invalidity and costs order by the North Gauteng High Court in respect of sections 28(2) and 28(3)(b) of the Private Security Industry Regulation Act 56 of 2001 is granted.

e) The respondents' appeal against the order of constitutional invalidity and costs order by the North Gauteng High Court in respect of sections 28(2) and 28(3)(b) of the Private Security Industry Regulation Act 56 of 2001, is upheld.

f) The order of the North Gauteng High Court, declaring portions of section 28(2) and section 28(3)(b) of the Private Security Industry Regulation Act 56 of 2001 to be unconstitutional and invalid, is not confirmed and is set aside.

g) The costs order in the North Gauteng High Court is set aside.

h) There is no order as to costs in the North Gauteng High Court.

i) There is no order as to costs in this Court.

Langa CJ, Moseneke DCJ, Ngcobo J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Mokgoro J.

O'REGAN J:

[83] Unfortunately I cannot agree with the conclusion that my colleague, Mokgoro J, reaches in relation to the constitutionality of section 20(1)(a) of the Private Security Industry Regulation Act 56 of 2001 (the Act). In my view, section 20(1)(a) is not consistent with the Constitution because it is impermissibly vague. I do agree with Mokgoro J that section 28(2) and section 28(3)(b) of the Act are not inconsistent with the Constitution, but I do so on a somewhat different basis. My reasons for these conclusions are set out in this judgment.

[84] I commence by confirming that I agree with Mokgoro J that the private security industry should be properly regulated by government. As Mokgoro J points out in her judgment,[1] it is a growing industry employing large numbers of people, many of whom are armed. Nothing I say in this judgment should be understood to detract from this principle.

[85] It will also be helpful to note at the outset that the private security industry is an industry comprising companies which – as the name of the industry suggests – exists

[1] Above at [34] and [35].

to provide personal and property protection[2] to others for reward. It is called "private" security primarily to distinguish it from the security provided by the security services of the state.[3] The industry comprises employers whose primary function is to provide security services for reward. There are, however, many employers who employ their own "in-house" security guards. This case, by and large, is about the manner in which the Act regulates in-house security guards and their employers, if at all.

[86] The simple difference between Mokgoro J and me turns on the question whether section 20(1)(a) can, in its context, be construed to provide a meaning that is not vague while remaining true to the wording of the section. Section 20(1)(a) provides:

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[2] *Private Security Industry Regulatory Authority and Others v Association of Independent Contractors and Another* [2005] ZASCA 32; 2005 (5) SA 416 (SCA) at para 1.

[3] Section 199 of the Constitution provides:

> "(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
>
> (2) The defence force is the only lawful military force in the Republic.
>
> (3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.
>
> (4) The security services must be structured and regulated by national legislation.
>
> (5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.
>
> (6) No member of any security service may obey a manifestly illegal order.
>
> (7) Neither the security services, nor any of their members, may, in the performance of their functions—
>
> (a) prejudice a political party interest that is legitimate in terms of the Constitution; or
> (b) further, in a partisan manner, any interest of a political party.
>
> (8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament."

"No person, except a Security Service contemplated in section 199 of the Constitution . . . 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."[4]

[87] "Security service provider" is in turn defined as:

"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".[5]

"Security service" is defined in section 1 of the Act as follows:

"'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 this 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) providing a service aimed at ensuring order and safety on the premises used for sporting, recreational, entertainment or similar purposes;

(e) manufacturing, importing, distributing or advertising of monitoring devices contemplated in section 1 of the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992);

(f) performing the functions of a private investigator;

(g) providing security training or instruction to a security service provider or prospective security service provider;

(h) installing, servicing or repairing security equipment;

[4] Section 1 of the Act.

[5] Id.

> *(i)* monitoring signals or transmissions from electronic security equipment;
>
> *(j)* performing the function of a locksmith;
>
> *(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*) to (*j*) and (*l*), to another person;
>
> *(l)* managing, controlling or supervising the rendering of any of the services referred to in paragraphs (*a*) to (*j*);
>
> *(m)* creating the impression, in any manner, that one or more of the services in paragraphs (*a*) to (*l*) are rendered".

[88] The difficulty arises from paragraph (a) of the definition which states that a security service means "protecting or safeguarding a person or property in any manner". The phrase "in any manner" is of broad import, sweeping within it a range of conduct not ordinarily construed to be the provision of a security service. As was pointed out in argument, it could include the work of a shepherd or cowherd who watches over sheep or cattle; or the task of a childminder who cares for a child or a self-employed car guard in an urban street. The work of all these occupations is primarily concerned with the protection or safeguarding of persons or property. Giving the provision its ordinary meaning would therefore produce an absurd result. All those engaged in any manner with safeguarding people or property would have to register as security service providers and comply with the obligations imposed by the Act. It is, I think, indisputable that the Legislature did not intend such a result. The question then is whether paragraph (a) of the definition of "security service" can be given a narrower meaning consistent with the legislation as a whole.

[89] Mindful of the need to interpret the legislation in a purposive and narrow manner, Satchwell J in the High Court held that paragraph (a) could be read down so that it applies only to those "engaged in the *occupation* of security service provider within the private security *industry*" (her emphasis).[6] For the majority in this Court, Mokgoro J also adopts a narrow but different reading of paragraph (a). After a consideration of the context of the Act, she concludes that paragraph (a) should be read to mean—

> "the protection or safeguarding of persons or property from unlawful physical harm, including injury, physical damage, theft, or kidnapping caused by any other person. This must be so because the security of person and property is central to what the Act aims to protect. . . . [T]he Act is not intended to regulate the response to hazards from nature or harm from animals".[7]

[90] I find both readings hard to align with the text of paragraph (a) which states explicitly that a security service means the protecting or safeguarding of property or persons *in any manner*. The interpretation of Mokgoro J requires us to read paragraph (a) as if it stated "protecting or safeguarding a person or property from unlawful physical harm". And the interpretation of Satchwell J requires us to read paragraph (a) as if it read "protecting or safeguarding a person or property, but only while engaged in the occupation of security service provider within the private security industry". It cannot be said that either interpretation is the ordinary, or indeed reasonable, construction of paragraph (a). The words "in any manner" import breadth

[6] *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security and Others; Montina Boerdery (Pty) Ltd v Minister of Safety and Security and Others* 2008 (6) SA 562 (T) at para 41. See also para 43 where she states that: "'Protecting' and 'safeguarding' must be understood within the context of the dangers sought to be combated by the private security industry."

[7] Above at [41].

and do not suggest a narrow, purposive meaning such as those attributed to them (albeit differently) by Mokgoro J and Satchwell J.

[91] This Court has repeatedly held that statutes must be construed contextually and, given section 39(2) of the Constitution,[8] where possible, consistently with the Constitution. In *Hyundai*, the Court described the proper approach as follows:

> "[J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can reasonably be ascribed to the section."[9]

A court may thus avoid unconstitutionality by ascribing a constitutionally compliant meaning to legislation, as long as that meaning can reasonably be ascribed to the provision; that is, the interpretation must not be "unduly strained."[10]

[92] Is section 20(1)(a) of the Act, read with the definition of "security service", capable of a clear meaning without undue strain to its text? We need to start with the relevant text. The language of paragraph (a) of the definition of "security service" is broad. Within the provision itself, there is no clear indication of a narrower purpose. Yet its ordinary meaning is so broad as to render an absurd result, as mentioned above.

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[8] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[9] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 23.

[10] Id at para 24.

[93] Next we need to look at the context in which the provision appears in order to see if a narrower purpose might be found. In my view, an overall reading of the Act does not provide a clear answer as to how to narrow the textually sweeping terms of paragraph (a). Both Mokgoro J and Satchwell J sought a narrower purpose for paragraph (a) in this statutory context. This contextual analysis must start by considering the Preamble to the Act which provides:

> "WHEREAS the adequate protection of fundamental rights to life and security of the person as well as the right not to be deprived of property, is fundamental to the well-being and to the social and economic development of every person;
>
> AND WHEREAS security service providers and the private security industry in general play an important role in protecting and safeguarding the aforesaid rights;
>
> AND WHEREAS every citizen has the right to freely choose an occupation, including the occupation of security service provider;
>
> AND WHEREAS it is necessary to achieve and maintain a trustworthy and legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law, and is capable of ensuring that there is greater safety and security in the country;
>
> BE IT ENACTED THEREFORE, by the Parliament of the Republic of South Africa, as follows".

[94] The Preamble makes clear that Parliament's purpose is to ensure that the private security industry is "trustworthy and legitimate" to ensure greater safety and security in the country. Indeed, the primary purpose of the Act is to regulate the private security industry. The title of the Act (the Private Security Industry

Regulation Act) suggests this. So does the long title ("To provide for the regulation of the private security industry; for that purpose to establish a regulatory authority; and to provide for matters connected therewith"). And the establishment of the Private Security Industry Regulatory Authority in Chapter 2 of the Act[11] further identifies this purpose. Section 3 stipulates that 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".

[95] It is quite plain that all employees within the private security industry who perform the tasks listed in the definition of "security service" will be security service providers as defined; and are therefore required to register in terms of section 20(1)(a) of the Act. The broad ambit of paragraph (a) admits no confusion in relation to employees within the private security industry, which no doubt was the contextual basis for Satchwell J's narrow reading of paragraph (a) to limit it only to employees in the private security industry.

[96] But the approach of Satchwell J cannot be right because, although the primary purpose of the Act is to regulate the private security industry, it is clear from some of the other provisions of the Act that the regulatory effect of the Act is not limited to the private security industry. Section 28(2), for example (a provision to which I shall turn later in this judgment), stipulates that the code of conduct which the Minister for Safety and Security may prescribe is binding on all "security service providers" and,

[11] Section 2(1) of the Act.

"to the extent provided for in this Act, on every person using his or her own employees to protect or safeguard his or her own property or other interests".

[97] Moreover, section 33 provides that inspectors may inspect the premises of any "security service provider" or of "any other person who employs a security officer". These provisions make plain that the purpose of the Act is to reach beyond the private security industry to employers who employ security service providers even when the business of those employers does not fall within the private security industry.[12] Given that the Act seeks to regulate beyond the confines of the private security industry, I cannot agree with Satchwell J that the context of the Act makes it appropriate to read paragraph (a) narrowly to affect only security service providers within the private security industry.

[98] Mokgoro J, on the other hand, adopts a narrow meaning of paragraph (a) to mean, in effect, "protecting or safeguarding a person or property from unlawful physical harm". I have two difficulties with the interpretation adopted by Mokgoro J. The first is that it is not a meaning suggested anywhere in the Act. The Preamble speaks only of regulating the private security industry, as do both the title and the long title of the Act. Nowhere does the Act state that it intends to regulate those outside of the private security industry to the extent that they are "safeguarding or protecting people from unlawful physical harm". Indeed, the only provisions of the Act which suggest that it seeks to go beyond regulating the private security industry are to be

[12] See, in this regard, *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd and Others* [2006] ZASCA 176; [2007] 1 All SA 154 (SCA) which dealt with in-house security officers employed by a mining company.

found in section 28(2) and section 33 (to which I have already referred). These sections do not suggest that the purpose of the Act is the comprehensive regulation of those providing protection from unlawful physical harm outside the private security industry. My second difficulty with the formulation proposed by Mokgoro J is that on its own terms, it is not clear. It might be very difficult to identify those people that are protecting property or people from "unlawful physical harm" and those that are protecting property or people from other dangers. It is also not clear what "physical" harm denotes in the context of property as opposed to persons.

[99] It is clear that the purpose of the Act is to spread the net wide in relation to the private security industry. As Howie P concluded in *Private Security Industry Regulatory Authority and Others v Association of Independent Contractors and Another*:

> "The Act has been framed broadly with the specific intention to encompass all circumstances in which private security services are rendered."[13]

That case was concerned with the question whether an association, which had as its members independent contractors who rendered private security services, was itself a security service provider within the meaning of the Act. The Court concluded that this was put beyond doubt by the broad definition of "security officer".[14] The Court

[13] Above n 2 at para 29.

[14] Id at para 30. The Act defines a "security officer" as follows:

> "'security officer' 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

concluded that the association assisted its members to provide security services, received remuneration from them for so doing and therefore constituted a security service provider itself. What is clear from the reasoning of the Court is that the legislative intention was to spread the net wide to include all those engaged in the private security industry. But it is not clear just how this wide application should affect those who are employed as in-house security guards.

[100] The rule of law, a founding value of our Constitution,[15] requires that the law be formulated in a clear and accessible manner.[16] A law that is vague will not constitute "law" as contemplated by the Constitution. Specifically, it should be added that a

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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".

[15] Section 1 of the Constitution provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[16] *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* 2006 (8) BCLR 901 (CC) at paras 27-28; *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 47.

vague law will not constitute a law as contemplated by section 36 of the Constitution.[17]

[101] Section 20(1)(a) of the Act contains a criminal prohibition. Any person who performs a security service without being registered is guilty of an offence.[18] A first offence will render a person liable to a fine or to imprisonment for not more than five years and a second offence to a fine or to imprisonment not exceeding ten years.[19] When we are considering criminal prohibitions, there is all the more need for reasonable clarity.

[102] Intelligible criminal prohibitions make it possible both for citizens and law enforcement officers to identify with reasonable certainty what conduct is prohibited.[20] Where a criminal standard is vague or uncertain, citizens will not know what they should do to avoid criminal prosecution; and law enforcement officers will be given too much discretion to determine who to prosecute. The risk is that a wide range of conduct will potentially fall within the criminal prohibition, and it will be left to law enforcement officers to determine who should be prosecuted. Such a result is undesirable, as Marshall J cogently reasoned in *Grayned v City of Rockford*:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values.

[17] In this regard, see the useful summary furnished by Gonthier J, in the Canadian context, in *R v Nova Scotia Pharmaceutical Society and Others* [1992] 2 SCR 606 (SCC) at 626f.

[18] Section 20(1)(a) read with section 38(3)(a).

[19] Section 38(3)(i) and (ii).

[20] It is not necessary in this case to determine whether the approach to vagueness should be different in relation to legislative provisions that do not create criminal prohibitions.

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application."[21]

Such a situation violates "the precept that individuals should be governed by the rule of law, not the rule of persons".[22]

[103] Of course, "[w]hat is required is reasonable certainty and not perfect lucidity."[23] Language is often imprecise and in many cases it will not be possible to draw with complete certainty the boundaries of a legislative prohibition. Setting the test as one of "reasonable certainty" accepts that some imprecision is unavoidable. It recognises that in most criminal provisions there will be a core of certainty about the meaning of a provision, and a limited penumbral sphere of uncertainty. Where the penumbral sphere of uncertainty is limited, it will not fall foul of the constitutional standard. However, where a provision has no certain core meaning at all, or where it has a significant penumbral scope of uncertainty, it will probably be constitutionally impermissible. Thus the larger the uncertain penumbral scope of a criminal prohibition, the more likely it is that it will be held to be vague. The key questions to

[21] 408 US 104 (1971) at 108-9.

[22] McLachlin CJ in *Canadian Foundation for Youth, Children and the Law v Attorney General in Right of Canada* [2004] 1 SCR 76 (SCC) at para 16. See also the dissenting judgment of Arbour J at para 177.

[23] *Affordable Medicines* above n 16 at para 108, citing with approval *R v Pretoria Timber Co (Pty) Ltd and Another* 1950 (3) SA 163 (A) at 176G.

determine vagueness will be whether the provision provides "fair warning"[24] to citizens of what constitutes unlawful behaviour and whether it impermissibly delegates the power to determine who should be prosecuted to law enforcement officers with the attendant risks of arbitrary application.

[104] The question which we must answer is whether section 20(1)(a) read with paragraph (a) of the definition of "security service" in the Act is capable of a reasonably clear meaning. As I have noted above, the ordinary textual meaning of paragraph (a) would sweep within the prohibition a range of activities in a fashion that the Legislature could not have intended. On the other hand, there is no guidance within the context of the Act as a whole which can reasonably be said to limit the scope of the section in an intelligible fashion. It is interesting that Satchwell J and Mokgoro J, in their attempts to narrow the scope of the section, have attributed different meanings to the section to do so. Neither approach seems to me to be interpretively permissible. The approach adopted by Satchwell J, although it fits well with the Preamble to the Act and both its long and short titles, and could be said to accord with common sense, collides with provisions in the Act which make plain that it is not only those employed within the private security industry who fall within its terms. The approach adopted by Mokgoro J is based on no express provision of the Act at all and does not provide reasonable certainty as to the scope of the section. It cannot, therefore, be considered to be a meaning that the provision is reasonably capable of bearing.

[24] In Marshall J's formulation in *Grayned* above n 21.

[105] If we look at section 20(1)(a) read with paragraph (a) of the definition of security service, it is not possible for a citizen to determine from the Act when an occupation which involves protecting or safeguarding a person or property in any manner will constitute a "security service" for the purposes of the Act. Should a person who is not an employee but who guards cars on the streets of Melville register as a security service provider? Should a person who is employed to watch children swimming in a municipal swimming pool register? The Act does not provide a clear answer to these questions. The result is that both citizens and law enforcement officers are left uncertain as to the scope of the Act. Should a law enforcement officer arrest a car guard who is unregistered? The Act does not tell us. Because there are so many people engaged in work that constitutes safeguarding of people or property in a wide range of occupations in our country, the penumbral area of uncertainty is vast. Uncertainty of this sort is at odds with the rule of law. It opens the door to arbitrary and discriminatory law enforcement, a spectre of our past to which we should avoid returning.

[106] I conclude therefore that section 20(1)(a) read with paragraph (a) of the definition of "security service" is impermissibly vague. It is vague because, on its own terms, its meaning is so broad that it borders the absurd, and yet its context provides no definitive limited meaning. In the light of this conclusion, it seems to me impermissible, as the majority judgment does, to attach an interpretation to the section which is not suggested by its context. To do so is an exercise in drafting, not

interpretation.[25] Drafting should be left to the Legislature. Moreover, in seeking to ascribe an interpretation to the provision, the majority leaves intact a criminal prohibition the meaning of which cannot be discerned on an ordinary reading of the Act.

[107] Although this is a minority judgment, I should note that in my view the appropriate order, which would follow from my conclusion that section 20(1)(a) is invalid, would be to suspend the order of invalidity relating to the section for a reasonable period of time to afford the Legislature an opportunity to rectify the defect. This would be a just and equitable order, since section 20(1)(a) is an important legislative provision that regulates the private security industry. In order to avoid uncertainty during the period of the suspension, I would propose a mandatory order providing that until legislation rectifying the uncertainty has been enacted, section 20(1)(a) should be read to apply only to employees within the private security industry. In this manner, the primary purpose of the legislation would not be undermined.

Section 28(2) and section 28(3)(b)

[108] The second issue that arises in this case relates to the constitutionality of section 28(2) and section 28(3)(b). Satchwell J, having concluded that section 20(1)(a) related only to those employed in the private security industry and not any person employed outside it, found the two provisions to be irrational to the extent that they

[25] See the comment by Arbour J in *Canadian Foundation for Youth, Children and the Law* above n 22 at para 190.

sought to impose obligations upon employers outside the private security industry. On the basis of this reasoning, she declared aspects of these two provisions to be inconsistent with the Constitution. Once her reasoning in relation to section 20(1)(a) has been rejected, however, her conclusion in respect of sections 28(2) and (3)(b) cannot stand. In this I am in agreement with Mokgoro J.

[109] I also agree with Mokgoro J that section 28(2) empowers the Minister to make the code of conduct binding upon employers outside the private security industry who employ security service providers, only to the extent provided for in the Act.[26] That extent appears from section 28(3)(b)[27] – "to ensure the payment of minimum wages and compliance with standards aimed at preventing exploitation or abuse of employees".

[110] The Minister's power to make the code of conduct binding on those who employ in-house security guards therefore extends only to the limited purpose of ensuring that minimum wages are paid and employment standards are observed. I should add, however, that this does not mean that the employers of in-house security

[26] Section 28(2) of the Act provides:

> "The code of conduct is legally binding on all security service providers, irrespective of whether they are registered with the Authority or not and, to the extent provided for in this Act, on every person using his or her own employees to protect or safeguard merely his or her own property or other interests, or persons or property on his or her premises or under his or her control."

[27] Section 28(3)(b) of the Act provides:

> "(3) The code of conduct must contain rules—
>
> (b) to ensure the payment of minimum wages and compliance with standards aimed at preventing exploitation or abuse of employees in the private security industry, including employees used to protect or safeguard merely the employer's own property or other interests, or persons or property on the premises of, or under the control of the employer."

guards are required to pay the wages determined for the private security industry in terms of Sectoral Determination 6.[28] The wages that each employer is obliged to pay will depend on the industry in which that employer falls in terms of the applicable labour legislation. Section 28(3)(b) does not affect that matter.

[111] To the extent that the code of conduct purports to impose obligations upon employers who fall outside the private security industry beyond the issues contemplated by section 28(3)(b), it may well be ultra vires. However, this is not an issue that arises in this case and it is not necessary to consider it further.

[28] See the Basic Conditions of Employment Act 75 of 1997 and Sectoral Determination 6: Private Security Sector, South Africa, initially published under GN R1250 GG 22873 of 30 November 2001, and then corrected and replaced by GN R879 GG 27992 of 9 September 2005.

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