IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO 127/04

In the matter between

THE PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY	**First Appellant**
THE ACTING DIRECTOR OF THE PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY	**Second Appellant**

and

ASSOCIATION OF INDEPENDENT CONTRACTORS	**First Respondent**
ALMERO DEYZEL	**Second Respondent**

CORAM: **HOWIE P, STREICHER, MTHIYANE, CONRADIE, et LEWIS JJA**

Date Heard: **28 February 2005**

Delivered: **31 March 2005**

Summary: Private Security Industry Regulation Act 56 of 2001 – meaning of 'security service provider' – whether the expression applies to an association which secures security service work for its members who are security officers and independent contractors

---

J U D G M E N T

HOWIE P

HOWIE P

[1] The private security industry has work for more people than the police and defence forces combined. The security officers who operate in the industry provide personal and property protection. They secure enjoyment of others' fundamental rights. In carrying out their functions they often wear uniforms, bear arms and are granted access to homes and other landed property. The legislature considered that in these circumstances it was necessary to regulate the industry to monitor security service providers. To ensure the integrity and reliability of their service it enacted the Private Security Industry Regulation Act 56 of 2001 (the Act) which requires security service providers to be registered.

[2] The first appellant is a juristic person established in terms of the Act.[1] The second appellant was at the relevant times its acting director. It is the first appellant's statutory responsibility to regulate the industry.

[3] The first respondent is an association whose membership includes private security officers. Second respondent is the association's executive officer. He is also referred to in the record as its director.

[4] The respondents applied to the High Court in Durban for an order declaring that neither was a security service provider within the meaning of the Act nor liable to register in accordance with it. The appellants cross-applied for an order declaring that the respondents were security service providers in terms of the Act and interdicting them from rendering security services unless they were registered.

[5] The matter was heard by Magid J who granted the respondents an order declaring that they were not security service providers within the meaning of the Act. The counter application was dismissed. The learned

---

[1] S 2.

Judge gave the appellants leave to appeal to this court. In what follows I shall refer to the first respondent as the association and to the second respondent as Mr Deyzel.

[6] In broad outline the association's case is that it is a voluntary association which attracts to membership individuals who are independent contractors in a number of different fields. The purpose of the association is to obtain work for its members and to represent them in contracting for such work. 2200 of its members are security officers. A member who is a security officer will, in the normal course, as an independent contractor, perform contract work for a security business. That business will have a client requiring security services. The security business then makes the security officer available to the client to perform the necessary services. In this process the security officer never works as an employee for anyone. Should he become anybody's employee his membership ceases. For the benefits of membership a member owes the association a weekly or monthly subscription fee. Membership fees constitute the association's only income. The client pays the security business for the security officer's services. In turn the security business remunerates the security officer by making payment direct to the association. The membership fee is then deducted and the balance is paid by the association to the security officer.

[7] Plainly, and this is one of the first appellant's concerns, the security officer in the situation just described never has the benefits of any employment legislation and is therefore liable to exploitation.

[8] Whether the respondents are obliged to be registered depends on a proper construction of the Act as applied to the evidence presented to the Court below.

[9] First there is the history of the Act. Its forerunner was the Security Officers Act 92 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 at all 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.

[10] 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.

[11] The Act came into force in February 2002. Section 20(1) contains a fundamental prohibition expressed in very broad terms. It says (irrelevant words omitted):

'No person … 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.'

In s 1(1) there are important definitions. They are these:

' "security business", means, subject to subsection (2), any person who renders a security service to another for remuneration, reward, fee or benefit, except a person acting only as a security officer.'

"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 any remuneration, reward, fee or benefit, for rendering one or 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 service 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.'

' "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.

'Security service provider' means 'a person who renders a security service to another for a remuneration, reward, fee or benefit and includes such a person who is not registered as required in terms of this Act.'

[12] Section 1(2) of the Act reads as follows:

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

Next there is s 20(2). It provides:

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

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

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

A further exemption provision is contained in s 20(5). It reads

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

[13] Lastly, s 27 empowers the first appellant to apply to the High Court for an interdict preventing a security service provider from rendering a security service if the latter is contravening the Act.

[14] Clearly the legislature did not intend that the statutory net could be easily evaded and certainly not in the same manner as under the previous enactment. The enquiry now is whether the fact that the association's security officer members are independent contractors, and the fact that what it receives does not emanate from the persons for whom security services are rendered, puts either respondent beyond the Act's reach.

[15] The association's constitution was adopted on 21 January 2002. It is annexed to the association's founding affidavit deposed to by Mr Deyzel. It contains a number of paragraphs that are material to the enquiry. Clause 3 reads –

'3. Scope – The aim of the association is to promote the mutual and individual interests of independent contractors who are members of the association. The association will seek work assignments for its members, negotiate market related fees for them, ensure that their fees are paid, prevent exploitation of them and will endeavour to arrange social benefits for them such as provident fund benefits, medical aid benefits, etc. The association will administer the fees paid to its members as well as a reserve fund which is to be used when members do not have any work assignments.'

[16] Membership is referred to in clause 4. Only independent contractors are entitled to be members. Membership ceases, amongst other circumstances, if a member becomes, or claims to be, an employee (4.2) and

can be terminated by the vote of the majority of 'the representatives of members' present at a general or special meeting (4.5).

[17] Clause 6 declares who are the association's office bearers. There is a director (currently Mr Deyzel) who chairs meetings of 'representatives of members' and exercises general control of the association's day to day affairs. Then there is a secretary. Thirdly there is a 'liaison contractor representative' who liaises between the management committee and other liaison contractors and acts as director when the latter is unavailable. Finally there are principal liaison contractors who liaise inter alia between members and the entities for which they render services. The constitution does not say whether members' representatives are designated *ad hoc* or on a more permanent basis.

[18] Clause 9 provides for what are called liaison contractors. It reads

'The principal liaison contractors will liaise between members and the person or entity with whom they have contracted ("the client") and may negotiate a fee to be paid by such client in addition to the fee that he/she is paid by the association on behalf of the members who are contracted to such client. Principal liaison contractors will also perform the negotiation function referred to in clause 12. In consultation with the members engaged by a client the principal liaison contractor will appoint ordinary liaison contractors to liaise between the members and the client on a day to day basis if it is not practical for the principal liaison contractor to be solely responsible for the performance of such function. A fee may be negotiated with the client for the liaison function performed by an ordinary liaison contractor which fee will be in addition to the fees that such ordinary liaison contractor is paid by the association on behalf of the members contracted to such client.'

[19] Clause 11 provides for a code of conduct. Any breach of the code is deemed unprofessional conduct and may result in a letter of warning or

remedial measures. The more serious breaches, or repeated breaches, may result in termination of membership. Paragraph 5 of the Code reads –

'5. Members must meet their obligations in terms of the contracts of work entered into on their behalf by the association.'

[20] The essential role of the first respondent is spelt out in clause 12 of the constitution. It reads:

'12. Negotiations – By joining the association members authorise the association to seek work assignments for them and negotiate the terms and conditions that would govern such work assignments on their behalf. Members further authorise the association to negotiate changes to the terms and conditions governing work assignments on their behalf.'

[21] One of the other annexures to the founding affidavit is the association's membership application and registration form. Under the heading 'Explanatory notes' it contains the following paragraphs –

'14. Liaison contractors are appointed by the association to assist independent contractors at the places where they are engaged.

15. The liaison contractors will ensure proper communication between independent contractors and the party whom they are contracted to as well as proper communication between the members and the association.

16. The liaison contractor will represent members in negotiations with the party [to] whom they are contracted and will advance their interests during association meetings.

17. The liaison contractor will be paid by the association (on behalf of its members) and also by the party to whom the members are contracted to.'

[22] The founding affidavit also annexes the association's standard written form of contract entered into when a member agrees to work for what in the form is designated 'the company'. The document uses the word 'agreement'

throughout. The first thing of importance is that the association is a party to the agreement. Next, in the preamble, it is recorded that the association and the company have come to what is a separate agreement that members of the association will be given preference if contract work becomes available. It is also recorded that they have joined the association so that it can secure work assignments for them and represent them in dealing with the company. It is further recorded that members specifically authorise the association to represent them in all such dealings. Then follow general terms. One of them reads as follows:

'2.3 The independent contractor will not perform the work subject to the supervision and or control of the company. To ensure effective communication the independent contractor authorises the association to nominate from amongst the members of the association a liaison contractor(s) who will act as an intermediary/intermediaries between the parties, to represent the independent contractor in his/her dealings with the company and the association, to keep proper records of the work performed by the independent contractor and to provide such record to the association so that the association can ensure that the independent contractor is paid in accordance with this agreement.'

[23] Lastly, clause 8 of the agreement provides inter alia that if the member's membership ceases then the agreement also terminates.

[24] The founding affidavit contains allegations as to the role of liaison contractors. Mr Deyzel deposes

'The members pay these liaison contractors in that a portion of the membership fees is utilised for this purpose. Those liaison contractors, who in their private capacity provide security services, have themselves entered into contracts with security businesses for the performance of such security services. Whenever the management of a security business (and any other business that contracted with members of the association) wishes to communicate with the members it does so through the liaison contractors who are on their sites and when the members wish to communicate with management they also do so

through the liaison contractors. Insofar as such communications relate to working conditions and the improvement thereof the liaison contractors act as officials of the association. Insofar as such communications relate to the operational requirements of the relevant security business the liaison contractors act in their private capacity and in the performance of their contractual obligations stipulated in the contracts that they in their personal capacity have entered into with such businesses. The principal liaison contractors are not involved in the day to day affairs of the businesses that members have contracted with. They act as agents of the association and are involved in the recruitment of members, the negotiation of contractual terms and the improvement thereof on behalf of members, providing assistance to the liaison contractors who are on site in resolving issues relating to working conditions. Principal liaison contractors also play an administrative role in that they prepare the invoices on behalf of the members and also prepare remittance vouchers to inform the members what fees were collected on their behalf and what deductions were made.'

He goes on to say:

'As envisaged by the constitution the association appointed from the members engaged by a security business liaison contractors to liaise between such members and the security business in such a manner that the security business does not exercise control over the members. The liaison contractors are security officers who are themselves (in their personal capacity) contracted to the security businesses to perform a security service and are paid by the security businesses for the performance of such service. Insofar as the liaison contractors are managing the security service performed by members of the association they are not doing so in their capacity as officials of the association but in terms of the contracts that they have entered into with the security businesses in their private capacity. In respect of the liaison function that the liaison contractors perform for members of the association, the association pays the liaison contractors a fee which is derived from the membership subscription fees.'

He then says:

'Clients utilising security services are prohibited from managing, controlling or supervising security officers directly unless the persons mentioned in section 20(2) of the Act are registered as security service providers. For this reason clients mainly rely on security businesses to provide them with security officers and it is virtually impossible for a security officer to secure a contract directly with a client. Security officers therefore have very little or no choice but to provide security services through security businesses and it is for this reason that they are contracted to such security businesses and why such security businesses are able to make them available to clients.'

[25] It is common cause or not disputed that the security businesses for which security services are rendered, as well as the security officer members of the association, are all registered in terms of the Act. So much for the statutory provisions and the evidence with regard to which the appeal must be decided.

[26] In the court below the Judge assumed in the appellants' favour, without deciding, that the association was rendering a security service. He then proceeded to construe the definition of 'security service provider' and in particular the word 'renders a … service to another for remuneration …'. In his view these words meant that to fall foul of s 20(1) the service had to be rendered – in his words – 'in consideration of a remuneration … emanating from the person for whom the security service is rendered'. On the evidence, the association received nothing for its own account from the person for whom the actual security service was rendered. It followed, so he concluded, that even if the respondents' conduct fell within the definition of 'security service' they were not security service providers nor operators of a 'security business'. In my respectful view that finding and its underlying conclusion fail to take account of the Act's history, certain other provisions

in the Act and several crucial features of the documentation annexed to the founding affidavit.

[27] The Court was also of the view that there was nothing to gainsay the allegations in the founding affidavit. Here, again, I do not agree. Certain of those allegations are contradicted by material portions of the annexed documentation. There is no suggestion that the documentation is not currently applicable or that it wrongly states any material aspect. The only exception mentioned is an irrelevant amendment to the standard contract form. In the circumstances the application before the court below had to be determined on the basis that the documentation prevailed where it conflicted materially with Mr Deyzel's founding affidavit.

[28] Turning to the learned Judge's reasoning, he construed 'security service provider' in such a way, as I have indicated, that the source of the remuneration, reward, fee or benefit was necessarily the person receiving the security service. To arrive at that construction, however, one has to read in the words 'emanating from the person for whom the security service is rendered' or words to that effect. Nothing in the definition, viewed in isolation, warrants the limitation those words would import. The words 'to another' take it no further and are really superfluous. A service rendered would always be 'to another'. Very similar wording is contained in the definition of 'security business', again with no limitation as to the source of the remuneration, reward, fee or benefit. (For convenience I shall simply refer to 'the fee'.) On the face of them the two definitions are such that the fee could be from any source.

[29] There is even less reason to read in when regard be had to the wording of those definitions when viewed in context. The Act has been framed broadly with the specific intention to encompass all circumstances in which

private security services are rendered. No reason suggests itself why the legislature would have wanted to limit the source.

[30] The matter is put beyond doubt by reference to the definition of 'security officer'. For convenience I repeat it

'"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 person any remuneration, reward, fee or benefit, for rendering one or more security services; or

(ii) who assists in carrying on or conducting the affairs of another security service provider, and who receives or is entitled to receive from such other security service provider, any remuneration, reward, fee or benefit, as regards one or more security services;

(b) who renders a security service under the control of another security service provider and who receives or is entitled to receive from any other person any remuneration, reward, fee or benefit for such service; or

(c) who or whose service 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.'

[31] There are two considerations which require emphasis. First, in paragraph (a) the source of the fee is specified. In (b) and (c) the source can be any person. This shows that the legislature was alive to the need to specify the source in some instances and to leave the source limitless in others. These paragraphs display the choice it made.

[32] Secondly, each paragraph describes a situation where a security officer works for, or with, or at the instance of, 'another security service provider'. By definition a security officer is also a security service provider. And if, as such security service provider, a security officer falls within the

ambit of the Act by reason of receipt of a fee from any source whatever then there is no logical or contextual reason why other security service providers should not also fall within the statutory net irrespective of the source of the fee they receive.

[33] I conclude that the court below was not correct in limiting the source to the recipient of the security service. The association (leaving aside for the moment the position of Mr Deyzel) is not spared registration simply because it does not receive any fee from security businesses or their clients.

[34] The next question, then, is whether the association renders a security service. In this regard counsel for the appellants focused their argument on paragraph (k) of the definition of 'security service' in contending for an affirmative answer. Counsel for the association and Mr Deyzel argued that such contention depended on an interpretation that was absurdly wide and could not have been the meaning intended by the legislature. They said, for example, it would ensnare even an employment agency the moment it had a security officer on its books.

[35] The association has, as I have said, 2 200 members who are security officers. That is a substantial force of available personnel. Its constitution and standard form contract show that the association exists to find work for its members and they authorise it to act on their behalf in securing work.

[36] In the founding affidavit Mr Deyzel seeks to break any relevant possible connection between the association and the security officers by suggesting that liaison contractors fulfil a dual role. He claims that when liaison officers communicate with a security business on a security officer's behalf the liaison contractors act as officials of the association if they discuss the member's working conditions. However, if they discuss the operational requirements of the security business they act in their personal capacity. That

cannot be accepted. In the first place it receives no support from the terms of clause 9 of the association's constitution or the terms stated in the membership application form. More significantly, however, it conflicts with the standard contract form in terms of which the association is a party to the contract and represents the member in all dealings with the security business. To carry out that representative role the association appoints liaison contractors. Their duties include keeping records for the association of work performed by members. If a liaison contractors' role has the appearance of duality it is because they represent the association in representing the members. What is important is the association's role. It is clear that the association agrees with a security business that members will get preference if security work is needed. The association is then actively involved in finding such work. It becomes a party to the resulting contract and remains involved as the member's representative until the work is done.

[37] One must not be misled into focusing only on what the association does for the member. The focus must necessarily also fall on what it does for the recipient of the member's service. The unavoidable conclusion in the latter regard is that what the association does results in making those services available, directly to a security business and indirectly to its client. The association's activities therefore fall within the ambit of paragraph (k) of the definition of 'security service'.

[38] There is no absurdity in either this construction of paragraph (k) or its application to the facts. The case of an employment agency provides no example helpful to the debate. If such an agency became as involved in the private security field as the association has, there is every reason to say that it, too, would be hit by the Act.

[39] Apart from finding that the association renders a security service in terms of paragraph (k), it seems to me that the evidence also justifies a finding adverse to it under paragraph (l). Independent as members may be of control by the persons for whom security services are performed, it is altogether another matter when it comes to the relationship between the association and the members, and particularly in so far as the members' performance of their work is concerned. A member's failure to meet obligations owed to the party for whom a security service is rendered constitutes a breach of the association's code of conduct and may render the member liable to disciplinary action by the association, including possible membership termination and the consequent loss of membership benefits. That, in turn, would entail termination of the agreement between the member and the security business. In other words for a perceived contractual breach by the member the association can effectively achieve what in the case of an employee would amount to dismissal. That is enough to give it 'control' within the meaning of paragraph (l).

[40] The final question as regards the association's being hit by the Act or not, is whether it receives a fee in return for the security service it renders. What it receives are membership fees. Although received from the persons for whom the service is rendered the fees are in reality paid by the members. Nevertheless the fees are paid to obtain the benefits of membership. To give a member those benefits the association carries on the activity which I have found to constitute the provision of a security service. The fees are accordingly, in the case of the association's security officer members, received by the association in return for the security service it renders. It follows that the association is a security service provider and must be registered as such in terms of the Act. Finally in regard to the association's

case, I should say that I have throughout taken at face value the allegation that its members are independent contractors. However, a number of considerations tend to indicate they are not. The finding made in regard to paragraph (l) of the definition of security service is one of such factors. As the matter can be disposed of without finally determining the question I shall leave it there. It suffices to say that whether members are independent contractors or not the scheme devised by the association has been unable to evade the reach of the Act.

[41] For these reason the court below should have granted relief against the association as sought by the appellants.

[42] As to the case involving Mr Deyzel, the constitution places him in control of the 'day to day affairs' of the association. Other evidence takes it further. He attended a meeting with representatives of the first appellant on 9 June 2003. A transcript of some of what he said there is annexed to the founding affidavit. At one point he said 'I am in control of this association'. That admission is enough, in my view, to establish that he, as the driving force behind the association (which is not a juristic person having separate legal personality) is, like it, hit by the terms of paragraphs (k) and (*l*) of 'security service' and therefore liable to registration.

[43] There is a further reason why Mr Deyzel has to be registered. Registration of the association must, in the light of the provisions of s 20(2)(a), necessarily also involve him in view of his executive or managerial function in respect of the association's business.

[44] In the result the following order is made –

1. The appeal succeeds with costs, such costs to include the costs of two counsel.

2. The order of the Court *a quo* is set aside and replaced by the following:

'(a) The application is dismissed with costs.

(b) The counter application succeeds with costs and the following order is made:

(i) It is declared that the applicants are security service providers in terms of the Private Security Industry Regulation Act 56 of 2001 ("the Act').

(ii) Interdicting the applicants from rendering a security service within the meaning of the Act until such time as they have been duly registered in accordance with the Act.

(c) The costs are to be paid by the applicants jointly and severally, the one paying, the other to be absolved.

(d) The costs will include the costs of two counsel.

CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

STREICHER JA
MTHIYANE JA
CONRADIE JA
LEWIS JA