REPORTABLE / NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D4698/2019

In the matter between:

REACTION UNIT SOUTH AFRICA (PTY) LTD
(Registration No: 2011/103372/07) FIRST APPLICANT

CLAUDE MUNIEN SECOND APPLICANT

and

PRIVATE SECURITY INDUSTRY
REGULATORY AUTHORITY RESPONDENT

ORDER

I make the following orders:

1. The Rule Nisi granted by this court on 24 June 2019 is discharged.
2. The costs of the application, excluding only those incurred by the drafting, delivery and consideration of the notice of counter-application, shall be paid by the applicants, their liability being joint and several, the one paying the other to be absolved.
3. (a) There shall be no order on the counter-application.
   (b) The costs incurred in the drawing, delivery and consideration of the notice of counter-application shall be paid by the respondent.

J U D G M E N T
Delivered on: FRIDAY, 06 SEPTEMBER 2019

Olsen J

[1] By letters dated 10 June 2019 the respondent, the Private Security Industry Regulatory Authority, informed each of the first and second applicants that their registrations as security service providers were suspended. The first and second applicants (Reaction Unit South Africa (Pty) Limited and Mr Claude Munien) received these letters on 11 June 2019. At about 10pm that night the founding papers in this application was served on the respondent by email, and the following morning a Rule Nisi was issued without the respondent having been given an opportunity to deliver answering papers. In its material part the Rule Nisi called upon the respondent to show cause on 24 June 2019 why an order should not be made:

'that the first and second applicants are permitted to continue to engage in business as security service providers as contemplated in the Private Security Industry Regulation Act 56 of 2001, pending the outcome of an appeal with the appeal committee of the respondent in terms of s 30 of the abovementioned Act, which will be lodged by not later than 14 June 2019 (*sic* of the granting of this order) and further pending the outcome of a review to this Honourable Court, in the event of such appeal being dismissed'.

Interim relief in those terms was granted. Answering and replying papers were subsequently delivered and the matter argued. This judgment concerns the question as to whether the Rule Nisi should be confirmed (in amended or original form).

[2] The first applicant is a company which conducts business rendering security services to a large number of customers. It employs some 400 security guards to that end. The second applicant is its sole director. In terms of the Private Security Industry Regulation Act 56 of 2001 (the "Act") the first applicant cannot lawfully conduct the business of rendering security services

unless it and its directorate (i.e. the second applicant) are registered under the Act. The suspension of the registrations of the first and second applicants accordingly brought about that for the duration thereof the first applicant would not be entitled to carry on its business.

THE STATUTORY REGIME

[3] It is not in dispute in these proceedings that the respondent has the power to suspend the registration of a provider of security services. It is necessary to consider the statutory framework within which that power may be exercised in order to decide whether the court may and should intervene when the power is exercised. Upon the assumption that the court may intervene, the question is whether the applicants have made out a case justifying this court's intervention. I take the view that it is necessary first to consider the context within which the statutory provisions reside in order to understand their purpose, and to assess the scope of their operation. The issue of the context of the statute has been dealt with by both the Supreme Court of Appeal and the Constitutional Court. It is appropriate to quote passages from three cases.

[4] The first is the judgment of Howie P in *Private Security Industry Regulatory Authority & others v Association of Independent Contractors & another* 2005 (5) SA 416 (SCA). Paragraph 1 of the judgment reads as follows:

'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 [Act], which requires security service providers to be registered.'

[5] The following appears in para 24 of the judgment of Maya JA in *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd & others* [2007] 1 All SA 154 (SCA):

'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 Authority's part to ensure that the objects of the Act are not undermined.' (Footnote omitted.)

[6] In *Bertie Van Zyl (Pty) Ltd & another v Minister for Safety and Security & others* 2010 (2) SA 181 (CC) at paras 34 and 35 the judgment of Mokgoro J reads as follows:

'[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 and 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, underscores 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 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.'

(Paragraph 35 then goes on to quote the passage from the judgment of Maya JA reproduced above.)

(See also the passage from the unreported judgment in *Probe Security CC v The Security Officers' Board and Another (WLD)*, Case No 98/13943, 17 August 1998, quoted in para [40] of the judgment in *Union of Refugee Women v Director: Security Industry Authority* 2007 (4) SA 395 (CC).)

[7] The respondent (which is called the "Authority" in the Act) was established as a juristic person in terms of s 2 of the Act. Its objects are stated in s 3 of the Act. They include the promotion of a legitimate private security industry which acts in terms of principles contained in the Constitution and other applicable law. The respondent is to ensure that security service providers "act in the public and national interest in the rendering of security services". It must "promote a private security industry which is characterized by professionalism, transparency, accountability, equity and accessibility". It must "promote and encourage trustworthiness of security service providers". It must "determine and enforce minimum standards of occupational conduct in respect of security providers". The respondent must also "ensure that compliance with existing legislation by security service providers is being promoted and controlled through a process of active monitoring and investigation of the affairs of security service providers". In mentioning these objects, I have selected those from the list of objects in s 3 of the Act which appear to me to be the most material ones in light of the facts which need to be considered in this case.

[8] In terms of s 28 of the Act the Minister for Safety and Security must prescribe a code of conduct for security service providers. It is binding on all security service providers. Sub-section 28(3)(a) of the Act is to the effect that the code of conduct must contains rules:

'that security service providers must obey in order to promote, achieve and maintain-

(i) a trustworthy and professional private security industry which acts in terms of the law applicable to the members of the industry;

(ii) compliance by security service providers with a set of minimum standards of conduct which is necessary to realise the objects of the Authority; and

(iii) compliance by security service providers with their obligations towards the State, the Authority, consumers of security services, the public and the private security industry in general'.

[9] The code of conduct was published in February 2003 and amended in June 2016. The code of conduct is a comprehensive document which seeks to cover every facet of the security industry. In particular, it recognises the

pressing need for regulation of the industry which is the subject of the passages from the judgments referred to earlier. In the present context I think it necessary to draw specific attention only to clauses 8(2)(b), (3) and (4) of the code, clause 8 being headed "General Obligations towards the Public and the Private Security Industry".

'8.

(2) A security service provider may not infringe any right of a person as provided for in the Bill of Rights and, without derogating from the generality of the foregoing-

(a) …

(b) may not break open or enter premises, conduct a search, seize property, arrest, detain, restrain, interrogate, delay, threaten, injure or cause the death of any person, demand information or documentation from any person, or infringe the privacy of the communications of any person, unless such conduct is reasonably necessary in the circumstances and is permitted in terms of law.

(3) Every security service provider must endeavour to prevent crime, effectively protect persons and property and to refrain from conducting himself or herself in a manner which will or may in any manner whatsoever further or encourage the commission of an offence or which may unlawfully engage the safety or security of any person or property.

(4) A security service provider may only use force when the use of force as well as the nature and extent thereof is reasonably necessary in the circumstances and is permitted in terms of law.'

[10] Section 29 of the Act provides for what it calls "Improper conduct proceedings" which may be instituted by the respondent against a service provider "on account of an allegation of improper conduct".

[11] The Minister has, in terms of s 35 of the Act, made regulations governing improper conduct proceedings.

[12] Chapter 5 of the Act is headed "Monitoring and Investigation" and it provides for the appointment of inspectors. They are entitled to "inspect" the affairs or any part of the affairs of a security service provider and make reports thereon. They are given extensive investigatory powers.

[13] Section 26 of the Act is headed “Suspension, withdrawal and lapsing of registration”. Sub-section 4 allows the respondent to withdraw (i.e. cancel) the registration of a security service provider inter alia on the grounds that it is found guilty of improper conduct. (In context what that means is that it is found guilty in so-called “improper conduct proceedings” held under s 29 of the Act.) Sub-sections 26(1), (2) and (3) of the Act deal with the question of suspension which is at the centre of the present proceedings. Those three sub-sections read as follows:

‘(1) If there is a *prima facie* case of improper conduct in terms of this Act, or of the commission of an offence referred to in the Schedule, against a security service provider, the Authority may suspend the registration of the security service provider-

(a) pending the conclusion of an investigation or enquiry by the Authority into the alleged improper conduct; or

(b) pending the conclusion of the criminal investigation by the State into the offence in respect of that security service provider, or a determination by the prosecuting authority or the finalisation of criminal proceedings in regard to the offence.

(2) The Authority may suspend the registration of a security business if any of the grounds contemplated in subsection (1) pertain to a natural person referred to in section 20 (2).

(3) The effect of a suspension of registration is that the security service provider whose registration is suspended may not render any security service, unless the prior written permission of the Authority has been obtained, but during the period of such suspension the security service provider is still bound by all the obligations of a registered security service provider provided for in this Act and in the Levies Act’.

[14] In terms of s 1 of the Act a “security service provider” means a person “who renders a security service to another for a remuneration, reward, fee or benefit” and the word “person” is defined to include a company. It is not disputed that the first applicant is a security service provider.

[15] Section 30 of the Act provides for appeals against decisions. A person aggrieved by a suspension of registration as a security service provider may

appeal against the decision to impose a suspension. (Appeals against other decisions are also available, including an appeal against a withdrawal of registration.)

THE FACTS ON THE FOUNDING PAPERS

[16] For an initial foray into the facts of this case I turn to the founding affidavit of the second applicant. No authority is required for the proposition that it is required to state the grounds upon which relief is sought, and consequently the case which the respondent is called upon to answer.

[17] Aside from drawing attention to the fact that it has some 6000 clients and some 400 employees, the founding affidavit commences its account of the facts by referring to two letters dated 23 April 2019, one of which was addressed to the first applicant and the other to the second applicant. (For some reason the one was received on 30 April 2019 and the other on 2 May 2019.) The letter to the first applicant drew attention to a case in which a number of its employees had allegedly assaulted a member of the public, resulting in an investigation by the South African Police Services. It stated that the matter was being investigated also by the respondent, which regarded the allegations as disturbing, and in breach of the minimum standards of conduct required of the first applicant. The letter then referred to relevant provisions of the code of conduct and stated that consequent upon all these matters the respondent had initiated an investigation relating to improper conduct against the first applicant. The letter then drew the attention of the first applicant to s 26(1) of the Act and offered the applicant an opportunity to submit what it called “written replication” within seven days, stating why the registration of the first applicant should not be suspended. The case number of the criminal investigation relating to the complaint in question was stated in the letter.

[18] The second letter, the one addressed to the second applicant, was in similar vein. It also referred to the case number and stated that the second applicant was subject to “criminal investigation for assault with intent to cause

grievous bodily harm". The second applicant was likewise afforded an opportunity to state why his registration should not be suspended.

[19] The applicants' attorneys responded to the letter addressed to the first applicant, stating that it regarded the letter as vague, and that the first applicant required further details "to support the allegations" before responding. The same attorneys later responded to the letter addressed to the second applicant by stating that he had no knowledge of any criminal investigation under the case number and required information relating thereto in order to make a response.

[20] In response to the request for further information made on behalf of the first applicant, the respondent sent a letter dated 10 May 2019. It named six employees of the first applicant who were subject to investigation on the allegation of assault with intent to do grievous bodily harm under the case number referred to in the letters of 23 April 2019. It drew attention to the fact that five of those six employees were also subject to investigation in other cases with regard to which the case numbers were furnished in each instance. There is no need in this judgment to name the employees, and I simply list the additional allegations then being investigated. In the case of the first of the five it is a matter of attempted murder. In the case of the second it is attempted murder and compelled rape. In the case of the third it is attempted murder. In the case of the fourth it is murder. In the case of the fifth employee the additional criminal investigation is on a complaint of assault. In addition to the aforegoing the letter drew attention to the fact that another two employees were at the time under investigation by the respondent on complaints of intimidation.

[21] The founding affidavit goes on to state that the first applicant's attorneys then responded by letter dated 14 May 2019. Regarding the assaults with intent to cause grievous bodily harm which were mentioned in the letter dated 23 April 2019, the letter recorded that none of those allegedly involved had been charged as yet, and that they denied the charges, their contention being that members of the public had assaulted the complainant.

These statements were preceded by the observation that "there is no evidence or proof before any court of law …" with respect to the charges. In relation to the other matters the letter stated consistently that guilt is denied by the employees concerned and that none of the employees had yet been charged. The tone of the letter appears to me to be consistent with the tone of the founding affidavit, and is reflected in these two statements made in the letter:

(a) 'Our client Reaction Unit SA, maintains the stance all accused members are innocent until proven guilty by a court of law'.

(b) 'The alleged complaints against the employees of our client have yet to be proven and all persons are innocent until proven guilty'.

The letter contained no denial of the fact that the complaints being investigated were with regard to the alleged conduct of the first applicant's employees in the course and scope of their employment. The letter implies that the first applicant (and obviously the second as its directing mind) adopts the view that the respondent is powerless to act in terms of the statutory provisions already referred to when the breaches of the code are so serious that they involve criminal conduct of the kind just described, unless the first applicant's employees have been convicted by a court of law.

[22] The founding affidavit then speaks to a letter dated 17 May 2019 which the second applicant received from the respondent drawing the former's attention to a charge dating from 2010 that he was involved in the unlawful selling or supply of a firearm or ammunition. His attorney replied stating that the charge had been withdrawn. This statement was repeated by the second applicant in the founding affidavit where he said that the charge had been withdrawn shortly after it had been laid. (There is a dispute about this. According to the respondent's research the charge was withdrawn in June 2018 and was due to be reinstated in June 2019.)

[23] The founding affidavit then records the receipt of the letters dated 10 June 2019 conveying the suspensions which are the subject of the application. Subject to one qualification, which I will mention shortly, the so-called grounds upon which the applicants seek an order in effect setting aside

the suspension of registration imposed by the respondent are then contained in two paragraphs of the founding affidavit. They read as follows:

'19.

In my respectful submission, it is clear from the aforegoing that the respondent has grossly and gravely misdirected itself in suspending the first applicant and I from rendering such security services. The rendering of such security services is our livelihood and through it, some four hundred of our employees generate their sole sources of income and without which they and members of their families would be destitute. In addition, such suspension will force upon the first applicant and I the closure of our security business.

20.

The relief that we seek is simply to allow the first applicant to continue trading in the security service sphere and for me to continue providing security services, pending the outcome of an internal appeal and failing which, a review to this Honourable Court'.

[24] The relief sought, that the court should interfere with the suspension rulings made by the respondent, is sought in the first instance pending the appeal. Any lingering doubt which may remain after a reading of the founding affidavit, about the basis upon which the applicants contend that the respondent got it wrong when it suspended the applicants, is extinguished by the notice of appeal which the applicants delivered on the same day as this court granted the Rule Nisi with interim relief. In the case of the second applicant, notwithstanding the fact that he was the sole director and therefore the guiding mind of the first applicant, the notice is restricted to the proposition that the charge relating to the supply of firearms was withdrawn. In the case of the first applicant and its various employees whose registrations were also suspended (which employees are not party to this litigation) it is said that the respondent's reliance on the criminal investigations against them is "misplaced and unfounded as in terms of South African law, a person is presumed to be innocent until proven guilty". It is also said that the respondent misdirected itself in the case of some of those employees by not taking into account that there had been a lapse of about a year since the alleged crimes were committed, and they were not yet charged.

[25] It has not been argued before me, nor could it have been argued, that conduct on the part of security personnel of the type which is the subject of the complaints being investigated by the police (and the respondent) would not constitute serious breaches of the code of conduct applicable in the security industry. Neither was it argued, upon the assumption that the allegations against the particular security personnel were true, that the first applicant as employer was not itself affected by the breaches of the code. The complaints in question are of a type which might be expected to be made against an employer in the security industry which fails in its duty properly to regulate the conduct of its employees. It is conduct of this type which generates what Maya JA called the "legitimate and compelling public interest in the control of the large and enormously powerful private security industry." (See *Anglo Platinum Management* quoted in para 5 above.)

[26] The issue of what might be called the standard proof in the anticipated improper conduct proceedings against the applicants is not an issue before me. I simply make the observation, lest my views should be misunderstood, that if factual findings can only be made in improper conduct proceedings upon the basis that they be proved beyond a reasonable doubt, then the laudable aims of the legislation spoken to by the Supreme Court Appeal and the Constitutional Court would be substantially undermined.

[27] The standard this case is concerned with is the one set by s 26 of the Act, which empowers the respondent to suspend the registration of security service providers if, in the view of the respondent, there is a *prima facie* case of improper conduct. In the pending appeal, the appeal body will not concern itself with the question as to whether the conduct complained of has been proved beyond a reasonable doubt.

[28] I mentioned earlier that there is one other feature of the founding affidavit which is obviously mentioned in the hope that it could constitute a ground for relief. It is stated in the founding affidavit that on 11 June 2019 (the day the applicants received the letters advising them of the suspensions

of registration) an employee of the first applicant received a telephone call from a female who claimed to be from the respondent and who said that upon payment of R500 000, the first applicant's suspension would be withdrawn and all the first applicant's problems would "go away". That this happened at the instance of the respondent (if it happened at all) is denied by the respondent. And the respondent points out that if one has regard to the record of the investigations of the first applicant and its employees, and its prominence in the respondent's offices, the notion that anyone taking a bribe could put a stop to everything is absurd. That alleged ground of relief was not argued, and I do not propose to deal with it any further.

THE APPLICABLE TEST AND PRELIMINARY EVALUATION

[29] The Rule Nisi issued in this case calls upon the respondent to show cause why its decisions as to the suspension of the two registrations should not be operative not only pending the administrative appeal, but also pending any subsequent review if the appeal should be unsuccessful. There are presently no review proceedings underway. It is uncertain that such proceedings will be instituted. It is accordingly not possible to make any assessment of what qualities the proceedings may have. For these reasons counsel who appeared for the applicants conceded that if the Rule Nisi is to be confirmed, its provisions can only operate pending the decision in the appeal.

[30] It is a peculiar feature of this case that we are dealing with the conduct of an administrative body which is empowered not only to make the final decisions required of it by the regulatory structure within which it operates, but also to deal with what we would ordinarily term "interim relief". The court is asked to override the decision of the respondent by granting permission to the applicants to continue as registered providers of security services pending the administrative appeal. It strikes me as arguable that the fact that the applicants seek their relief pending the appeal, instead of pending the conclusion of the misconduct proceedings, does not necessarily make this a case to be judged according to the test for the grant or refusal of interim interdicts. It is not the case of the applicants that the respondent erred by not

awaiting the outcome of the appeal before suspending the registrations of the applicants. On the founding papers, the case for the applicants (to the extent that one is made) is that the suspension order (which operates well beyond the appeal decision, assuming the appeal goes against the applicants) was reviewable when it was made. On that footing it appears to me to be arguable that what is sought is final relief, despite the fact that the applicants ask the court to confine its interference with the administrative decision of the respondent for only part of the period during which that decision was to operate. It will be apparent from the observations already made that in my view the founding papers failed dismally to make out a case for final relief. However, I propose to say no more about this aspect of the matter as counsel for the respondent was content to argue on the basis that this application may be treated as one in which the applicants seek an interim interdict.

[31] The applicants seek a temporary restraining order against the exercise of statutory power. Counsel for the respondent argued that the test to be applied in such a case is that set out in paras 41 to 47 of the judgment in *National Treasury & others v Opposition to Urban Tolling Alliance & others* 2012 (11) BCLR 1148 (CC). The essential elements of the treatment of the issue in that case may be summarised as follows:

(a) The test set out in *Setlogelo v Setlogelo* 1914 AD 221, subject to its adaptation by case law, remains a "handy and ready guide".

(b) The two adaptations specially mentioned in *National Treasury* are the refinement of the test in *Webster v Mitchell* 1948 (1) SA 1186 (W) and the decision in *Gool v Minister of Justice & another* 1955 (2) SA 682 (C).

(c) *Gool's* case established the common law position: - "…courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out."

(d) The Constitution imposes an added restraint, under the doctrine of separation of powers, that the court should consider carefully "whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government"; (i.e. "separation of powers harm").

(e) If the right sought to be enforced is derived from the Constitution an inquiry into its existence is redundant; but when considering the balance of convenience the court must consider the "probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of State against which the interim order is sought."

(f) The court will temporarily restrain the exercise of statutory powers only in the clearest of cases.

[32] It is worth observing that the test stated in *National Treasury* is consistent with the judgment of Kotze JA in *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others*, 1986 (2) SA 663 (A). This case concerns principles which were considered in *Airoadexpress*, where (at 676 A-D) it was held that the court could intervene where "a strong *prima facie* case is established" and where exceptional circumstances are present.

[33] The context in this case is quite different to the one under consideration in *National Treasury*. The respondent is ultimately an administrative functionary. It takes administrative decisions and the implementation of them is likewise administrative action. That is not in dispute. The provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") are engaged and its remedies available if the respondent deviates from the standard set by PAJA in taking administrative action.

[34] At the same time the provisions of s 26 of the Act are concerned with the performance of a statutory duty. The word "may" signifies that the

respondent is given a discretionary power to suspend registration. But it appears to me that the power given is one coupled with a duty to exercise it if the decision of the respondent is that the circumstances at hand require a suspension of registration. Allowing a provider of security services to continue unchecked despite the fact that the respondent has determined that a suspension of registration is required would constitute a dereliction of the respondent's duty. I have already dealt with the way in which our courts have described the performance of the respondent's duties as one fundamentally necessary and important in our society, and within the framework of the constitutional rights to be enjoyed by all. Failure in the performance of the respondent's duties is self-evidently of more significance, and is likely to be more detrimental to our society, than shortcomings in the performance of other more prosaic administrative functions.

[35] Nevertheless, I take the view that the present matter, when compared to the facts and circumstances under consideration in *National Treasury*, is not one which brings "separation of powers harm" to the fore. Professor Cora Hoexter (*Administrative Law in South Africa* 2 ed (2012) at 148) makes the point that:

'The discourse of deference is ineluctably bound up with the separation of powers and the area of competence associated with each of the three branches of government.' (Footnote omitted.)

In my view a court confronted with a case like the present must consider judicial deference, and must bring to account the fact that it is asked to countermand the performance of a statutory duty by a State functionary. These considerations have a bearing both on the merits of the case made by the applicants, and on an assessment of what in this case should properly be called the balance of harm (as opposed to the balance of convenience).

[36] Given the dearth of allegations in the founding papers supporting a claim that the applicants' rights to just administrative action under s 33 of the Constitution have been offended by the respondent, and the emphasis placed in the founding papers on the fact that the suspensions of registration interfere

with the applicants' right to trade, one might think that the applicants' case engages rights under s 22 of the Constitution which reads as follows:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

I do not propose to dwell on this for a number reasons. It is questionable as to whether the right in question is given to a company. The right is given subject to regulation by law. (See generally *Mukaddam & others v Pioneer Foods (Pty) Ltd & others* 2013 (2) SA 254 (SCA) paras 7 and 8 and para 72 of the judgment of the Constitutional Court in the same matter: - 2013 (5) SA 89 (CC); and *Law Society of the Transvaal v Machaka & others* (No. 2) 1998 (4) SA 413 (T) at 416C.) The regulatory provisions of the Act, and in particular s 26 of the Act, have not been challenged as to their constitutional validity. Whilst interference with trade is raised in the founding affidavit, s 22 of the Constitution is not.

[37] However the point is properly and well made by the applicants that the suspension of the registration of especially the first applicant causes considerable harm. It may be that, given the time of its endurance, it will bring about the demise of the first applicant. In the case of the second applicant, (and the other security personnel who were also suspended, but who do not feature in this litigation) rights to be gainfully employed in the security industry are suspended. The applicants point to the 400 jobs said to be at stake during the suspension of the first applicant, and the security interests of the first applicant's approximately 6000 customers or clients. Whilst these latter interests cannot be put aside as insignificant, there is no evidence at all that the security industry does not have the capacity to take up the slack generated by the suspension of the first applicant by servicing any client of the first applicant who may seek assistance elsewhere; which in turn suggests that work would be available for trained security guards in that area.

[38] Whilst s 26 of the Act empowers the respondent to suspend the registration of a security service provider if there is a *prima facie* case of improper conduct, the existence of the *prima facie* case is not sufficient on its own to justify suspension. In my view it is undoubtedly implicit in the provision

that in deciding whether it is appropriate to impose the sanction of suspension, the respondent must:

(a) consider whether it is reasonably necessary for the performance of its functions and the achievements of its objects that a suspension should be imposed; and if it should decide that question in the affirmative

(b) balance the harm it seeks to avert against the harm that will befall the service provider if a suspension is imposed.

In doing so, however, it should not overlook that it is the respondent's statutory duty to ensure that security officers are "subject to proper disciplinary and regulatory standards"; to see to the avoidance of "any abuses which might be perpetrated by security officers against the vulnerable public" (*Anglo Platinum Management,* supra, para 24); and to see to close control and management of the industry and the adherence of the industry to appropriate standards (*Bertie Van Zyl,* supra, para 35).

THE ANSWERING AND REPLYING AFFIDAVITS

[39] I turn to what emerges from the answering and replying affidavits, following the approach set out in *Webster v Mitchell* supra.

[40] The respondent's answering affidavit reveals that a Mr Sarel Botha was appointed as the lead investigator into complaints received regarding the conduct of the first applicant and its employees. His investigation commenced in March 2019 when he was informed of three criminal investigations against the first applicant and some of its employees. The founding papers, without saying as much, create the impression that the first request for an explanation for the conduct of the applicants' business was by way of the letters of 23 April 2019 referred to earlier. However, a report by Mr Botha reveals that during his inspection on 12 March 2019 "the company was requested to provide detailed reports in respect of the various incidents and allegations against the security officers in its employ". Later in the same report it is recorded that the company was required to give a written reply in order to

justify its alleged involvement in a shooting incident at Phoenix Industrial Park, the matter of a rape suspect in Tongaat, an assault at Mount Edgecombe, a shooting at Eastbury, and a complaint of sexual assault at Phoenix Industrial Park. There is no record of a response. The first applicant's receipt of the report was acknowledged by a signature placed on the document on its behalf.

[41] In conducting his investigations Mr Botha liaised with various offices of the South African Police. In April 2019 he became aware of two complaints of attempted murder and one of murder and SAPS revealed complaints of compelled rape and armed robbery, one of common assault, and one of assault with intent to do grievous bodily harm. The investigations in April followed a meeting of the respondent's regulatory sub-committee on 27 March where the question was raised as to whether the first applicant was managing its employees correctly. The committee resolved that further investigation should be conducted. On 18 April 2019 the committee resolved to issue what the minutes called "intention to suspend" letters. Investigations in May revealed two further cases of assault being investigated by the police, one of which was with intent to cause grievous bodily harm. It appears that at about this time the allegation against the second applicant dating from 2010, concerning the illegal supply or possession of firearms, was revealed, and Mr Botha came under the impression that the charge would be resubmitted during June 2019.

[42] On 15 May 2019 the committee met again and requested Mr Botha's task team to confirm what progress had been made in the criminal matters. A decision on suspension was put off pending that report. A similar decision was made on 22 May 2019, presumably because Mr Botha's report was not yet complete.

[43] In the last week of May criminal complaints which appear to have been connected to the employment by the first applicant of unregistered security officers were laid against a number of persons. The decision to suspend registrations was then made on 7 June 2019.

[44] In its answering affidavit the respondent disclosed that it was unable in these proceedings to disclose all of the product of its investigation and all the evidence that it gathered. The deponent explained that a number of matters due to be dealt with in the improper conduct proceedings overlap with pending criminal investigations. The affidavit continued as follows:

'The respondent holds the well-founded apprehension that the publication of the identities of certain witnesses and detailed reference to evidence at this stage where the investigation has not yet been brought to finality, will endanger the lives of the relevant witnesses, subject them to possible intimidation (which forms part of the complaints directed at the first applicant and its employees) and the possibility of destruction of evidence.'

[45] The respondent has put up copies of extracts from the Facebook page of the first applicant. These extracts include photographs of persons who have been arrested, an example being one of a man lying on the ground, bloodied and handcuffed. They were undoubtedly loaded onto the page in order to illustrate what the first applicant presumably regards as the successful execution of its functions. Most of the comments generated on the Facebook page emanate from members of the community who take a view of the security industry which is somewhat different to what the Act and the Constitution embrace. Some comments are frankly disgusting. Examples mentioned in the answering affidavit go as follows:

'Shoot him again. We won't tell anyone.' and 'pity the community didn't kill them' and 'Reaction Unit South Africa, please advise why his face has not been rearranged'.

[46] The deponent to the answering affidavit points out that the Facebook profile is a public forum. There is no evidence of the first applicant or its management (and the second applicant must occupy the top of the list of its management) distancing themselves from the content of the page. The fact that comments of the type mentioned above were not taken down supports the conclusion that the first applicant sanctioned what the deponent calls "the level of incitement caused by the publications".

[47] I do not propose to dwell on the replying affidavits. The responses to the allegations of misconduct set out in the answering affidavit are very much of the "he said, she said" variety. What these responses have to commend them is the fact that in some respects, but not necessarily in all, they constitute an attempt to disclose what the applicants contend to be the true position regarding the matters under investigation by the South African Police and the respondent. Equally, however, those responses stand as testimony to the fact that until the replying affidavit was delivered, the accounts of the various events giving rise to the complaints were withheld from the respondent, which was treated with apparent disdain. The applicants disregarded their duties under the regulatory regime which governs them.

[48] As counsel for the respondent has pointed out, the right of appeal which is being exercised by the applicants is an appeal in the wide sense of the word. It is not for this court to decide whether the material concerning the complaints offered in the replying affidavit negates the conclusion the respondent reached in June 2019 that there was a *prima facie* case of breaches of the code of conduct which justified the suspension of the registrations of the applicants. That is a matter for the Appeal Tribunal appointed under the Act.

[49] This court must take into account the provisions of clause 6(1) of the code of conduct which reads as follows:

'A security service provider must, within his or her ability, render all reasonable assistance to and co-operate with the Authority to enable the Authority to perform any function which it may lawfully perform.'

For reasons which are apparent from what I have already said, I take the view that on these papers the applicants were in flagrant disregard of their obligations under clause 6(1) of the code of conduct prior to the decision by the respondent to suspend the registrations of the applicants. The first applicant was asked as early as March 2019, some three months before the decision to suspend was made, for written explanations concerning five of the complaints. None was forthcoming.

[50] The replying affidavit purports to introduce grounds of review which were not advanced in the founding affidavit. They have accordingly not been dealt with by the respondent. It is said that the decisions to suspend registrations were unreasonable, irrational, arbitrary, and taken without due regard to the *audi alterem partem* rule. It is however implicit in the respondent's answering affidavit that it contends that its decisions to suspend the registrations were not characterised by any such deviations from the requirements of just administrative action.

[51] I propose to pay no heed to generalised and speculative allegations in the replying affidavit, such as the contention that the respondent's decisions to suspend were motivated by outside forces, and in particular by a certain person previously employed by the respondent, who is exerting undue influence on the respondent to close down the first applicant's business.

CONCLUSION

[52] I have already made some comments concerning the balance of harm, with specific reference to the position of the applicants. As the regulatory authority the respondent is obviously fully aware of the implications of suspending the registration especially of a company like the first applicant. The respondent's minutes' reveal that it did not act precipitously; the matter served before the respondent over a period of some two and a half months, and it insisted on the investigations being completed before it took the decision to suspend the registrations. The respondent has pointed out that the applicants concede that the first applicant faces competition, and that there is no reason to suppose that the suspension of the applicants would deprive the community of security services.

[53] In my view the submissions made by the applicants about the harm or prejudice they face as a result of the suspensions overlooks the fact that a security business (which would ordinarily, like the first applicant, be a company) cannot claim on those grounds to be immune from the regulatory regime, and especially, in this case, the provisions for interim suspension set

out in s 26 of the Act. A company such as the first applicant is responsible for the conduct of its employees in the course and scope of their employment. It has an obligation both to train and discipline its employees so that the conduct of its security business is in accordance with the Act and the code of conduct. It cannot claim immunity, either for itself or for its employees, when it falls short of the required standard. The issue as to whether specific complaints evidence a failure by the applicants to meet the obligations of an employer in the security industry is one for the respondent, in which the expertise generated by experience in the field resides, and to which the legislature has allocated the decision making power. On the papers before me I cannot fault the respondent's decision. A consideration of the harm caused to the applicants by the respondent's decision must to some extent be tempered by the observation that, on these papers, the decision was generated not only by the complaints made with regard to criminal conduct, but also through the somewhat cavalier attitude adopted by the applicants to their obligations under the Act and the code of conduct.

[54] The importance of regulation of the security industry has already been mentioned earlier in this judgment. What this case illustrates is that the task is not only important but also difficult. It is not for courts of law to make it even more difficult by simply second guessing the decisions made by the respondent. In my view the founding papers in this matter invited the court to do just that. Having considered the answering and the replying affidavits I remain of the view that this is not a case in which the court should countermand the decisions made by the regulatory authority. That is to be done only in the clearest of cases, and this is not one of them.

[55] The answering affidavit reveals that the decision of the respondent was to suspend the applicants registration pending the conclusion of the improper conduct proceedings. The letters to the applicants of 10 June convey that the suspensions would also last until the conclusion of the criminal proceedings (see s 26(1)(b) of the Act), a period which might be considerably longer. In my view the error in the letters should be formally corrected.

[56] Finally I turn to something not yet mentioned, namely a conditional counter-application made by the respondent. In the counter-application the respondent seeks an order that the applicants be interdicted and restrained from performing any security services pending finalisation of the code of conduct inquiry, and asks for that order conditionally upon the dismissal of the main application and:

'a finding that the applicants notice dated 13 June 2019, to appeal the respondent's decision to suspend the applicants pending finalisation of the code of conduct inquiry to be instituted, is automatically suspended against the noting of such appeal'.

[57] In its replying affidavit the applicants asked for the conditional counter-application to be dismissed with costs "as it does not make/establish a case for the relief sought therein". Unsurprisingly, I heard no argument from the applicants' counsel for the proposition that the noting of the applicants' administrative appeal automatically suspended the respondent's decision to suspend the registration of the applicants. It is an implied premise of the main application that there is no such automatic suspension, as the main application would have been quite unnecessary if there was.

[58] On the respondent's side the view was expressed that the applicants were correct in proceeding on the basis that their appeal did not automatically suspend the respondent's decisions. I heard no argument from respondent's counsel to the effect that the lodging of the appeal did automatically suspend the decision of the respondent to suspend the registration of the applicants.

[59] As I have heard no argument on the central premise of the counter-application I propose to make no order on it. The costs occasioned by it are minuscule in the context of the entire case.

ORDER

I make the following orders:

1. The Rule Nisi granted by this court on 24 June 2019 is discharged.

2. The costs of the application, excluding only those incurred by the drafting, delivery and consideration of the notice of counter-application, shall be paid by the applicants, their liability being joint and several, the one paying the other to be absolved.

3. (a) There shall be no order on the counter-application.

(b) The costs incurred in the drawing, delivery and consideration of the notice of counter-application shall be paid by the respondent.

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Olsen J

Date of Hearing:	MONDAY, 22 JULY 2019
Date of Judgment:	FRIDAY, 06 SEPTEMBER 2019
For the Applicants:	Ms A Gabriel SC with Mr MC Tucker
Instructed by:	Godfrey and Associates Applicants' Attorneys Suite 6, Bagman Centre 301 Main Road Tongaat…KZN (Ref.: Mr GN Pillay/JN/R462) (Tel.: 032 – 945 3000) Email: godfrey6@mweb.co.za godconv@mweb.co.za
For the Respondent:	Ms A Annandale SC with Mr De Beer
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