

NOTES ON ASPECTS OF THE REGULATION OF THE PRIVATE SECURITY INDUSTRY IN PORTUGAL

1 Introduction

Private security is becoming increasingly important in South Africa and further legal reform regarding its proper regulation has been advocated (see eg Visser “Notes on the possible reform of aspects of the law relating to private intelligence agencies and private investigators” 2005 *THRHR* 628, “Exemptions from the provisions of the Private Security Industry Regulation Act 56 of 2001” 2005 *De Jure* 127 132, “A note on the suspension of the registration of private security service providers” 2005 *De Jure* 405–410; see generally on regulation in South Africa *idem* “Proposed changes regarding the nature and composition of the regulator of the private security industry” 2001 *De Jure* 358–363, “A note on aspects of the emergence of an independent regulator for the private security industry in South Africa” 2005 *TSAR* 587–594).

A comparison with foreign law may obviously lead to a better assessment of the quality of the South African regulatory law in the field of private security. In addition, a comparison with foreign legal systems is useful or even necessary for the further development of our statutory law and its application to the private security industry (see eg on foreign regulatory systems, Visser “Aspects of the legal framework in terms of which the private security industry is regulated in Germany” 2001 *De Jure* 564, “Proposed changes to the legal framework in terms of which the private security industry is regulated in France” 2001 *De Jure* 576, “Aspects of the legal framework in terms of which the private security industry is regulated in New South Wales” 2003 *THRHR* 270, “Aspects of the legal framework in terms of which the private security industry is regulated in Brazil” 2003 *De Jure* 155, “Aspects of the legal framework in terms of which the private security industry is regulated in Argentina” 2003 *De Jure* 425 and “Some noteworthy legal principles in terms of which the private security industry is regulated in Spain” 2005 *TSAR* 821).

This contribution deals briefly with the relevant legal principles in Portugal (see generally Otten *et al Recht und Organisation privater Sicherheitsdienste in Europa* (1999) 457–478 which has been used as primary source of information in view of the authoritative analysis contributed by Antonio Francisco de Sousa of the Law Faculty at the University of Porto). One aspect that makes Portuguese law in this area interesting is that Portugal has also experienced a transition to a democratic state in the recent past. There are other parallels with South Africa as well, such as the growing feeling of insecurity and the perception that the state police do not offer adequate protection against crime.

2 General remarks

Legal principles concerning safety and security are closely linked to the constitutional position in a country. The same is valid with regard to Portugal where democratisation commenced in 1974 through a revolution led by the military. The Constitution recognises, *inter alia*, fundamental rights to freedom and safety (s 27). In terms of the Constitution it is the function of the state police to protect the democratic order and safeguard the rights of citizens (s 272). However, there is no express reference to private security. Nevertheless, the Constitution refers to “internal security” that has the objective of guaranteeing public security and order against internal dangers (see Otten *et al* 459–460).

As Portugal is now a state based on the rule of law, this obviously also applies in regard to the powers of the state police. The police are subdivided into different categories such as the security police (the *Policia de Segurança Publica* ensuring public safety and cities), the *Gendarmerie* (the *Guarda Nacional Republicana* – rural police), the criminal police (the *Policia Judiciaria* dealing with organised crime, corruption, investigation into drug offences and commercial crime), the coastal police (*Policia Maritima*), the border police (*Serviço de Estrangeiros e Fronteiras*) and the security intelligence service.

The latest available statistics indicate that the general feeling of insecurity in Portugal has increased – especially in large cities like Lisbon and Porto. In the latter city a study undertaken in 1997 revealed that 63% of the population had “great anxiety” regarding their security (Otten *et al* 463). In general, more than 60% of individuals surveyed stated that their feelings of insecurity had grown.

The state police in Portugal (in the late 1990s) were said to number 46 000 while approximately 15 000 private security officers were deployed.

Apparently there has never been a significant debate regarding the purpose, powers and legal basis of private security. The regulation of private security in the modern sense is of relatively recent origin (like that in South Africa which only really started in 1990). The first noteworthy legislation was Law 282 of 1986 which has been replaced by Law 276 of 1993 and amended by Law 138 of 1994.

Portugal occupies position number nine in an assessment of the nature and quality of regulation in 18 European countries. In terms of the criteria used for this purpose, regulation in Portugal is considered to be weaker or of lower quality than in Sweden, Belgium, the Netherlands, Norway, Denmark, Italy, Spain and Finland, but nevertheless better than in France, Luxembourg, Switzerland, Ireland, the United Kingdom, Austria, Germany, Greece and Hungary.

3 Some facts regarding the private security industry in Portugal

On 14 November 1997 there were 123 private security businesses in Portugal acting in terms of Law 276 of 1993, as well as 34 firms operating in terms of the previous Law 282 of 1986. At that date there were (probably) also 29 illegal operators known to the Ministry of the Interior. After the implementation of the new regulatory Law of 1993, 46 security businesses were closed down. In light of the worldwide growth in this sector it is safe to assume that the overall number of security businesses must have increased since then.

Public assessment of private security is generally positive in Portugal and some negative perceptions are apparently related to “private detectives”, whose operations, by their very nature, are not designed for transparency and attract many clichés, myths and suspicions.

The development of private security in Portugal has been swift and this is attributed to the growing feeling of insecurity and the perceived inadequate response from the public agencies responsible for safety and security. In Porto, where the feeling of insecurity is especially strong, the local government has attempted to conclude a contract with a private security business to guard certain public spaces and streets. However, this was resisted by the Ministry for the Interior on the ground that such activities do not fall within the permissible sphere of functions of the private security industry. Legal problems aside, this agreement between a public and a private organisation is probably an example of how matters may develop in many countries when more realistic principles of sound cooperation between public and private agencies are accepted. The notion that matters relating to safety and security are the exclusive domain of public policing agencies, has been outdated for a considerable time.

The largest security businesses in Portugal come from outside the country (but are still situated in the European Union). However, all these businesses must obviously comply with Portuguese law (see on this question in the South African context Visser “A comparative perspective on the attempted exclusion of foreign involvement in the South African private security industry” 2002 *THRHR* 419–423).

4 Some facts and principles regarding the regulation of the private security industry

The regulatory laws referred to above (para 1) have been extended through further legislation. For example, in terms of Proclamation 1257 of 1993 the activities of businesses providing security services must be approved by the Minister of the Interior. Proclamation 1258 of 1993 covers alarm monitoring while Proclamation 1259 of 1993 deals with identity certificates to be carried by private security personnel. There are also provisions regarding vehicles used for the transporting of money by private security businesses (see Proc 1260 of 1993).

Private security activities may be organised as security businesses (comprising natural persons or juristic persons, or for self-protection – presumably that which is known in South Africa as “in-house” or “internal” security; see Otten *et al* 470). In Portugal organisations that carry on banking or similar business are obliged to have prescribed security systems and must either have internal security or hired external security (see *idem* 467). The only apparent parallel with the position in South Africa can be found in the duty of owners of so-called key-points as defined in terms of the National Key Point Act 102 of 1980 to maintain a certain level of security.

A licence is required for the lawful rendering of a security service. This is furnished by the Ministry of the Interior when the relevant requirements are met. In South Africa there is no licensing but a system of registration managed by the Private Security Industry Regulatory Authority. The Portuguese licensing requirements, whether positive or negative, are as follows (Otten *et al* 474–475; see on the requirements in South Africa, s 23 of the Private Security Industry Regulation Act 56 of 2001):

- (a) Citizenship of Portugal, Brazil, a member state of the European Union or of a state in the European commercial zone.
- (b) The applicant must have reached majority.

- (c) Domicile in Portugal.
- (d) Non-conviction of an intentional crime by a Portuguese or a foreign court.
- (e) The applicant may not be employed in the public service.
- (f) The applicant may not be a dealer or manufacturer of firearms.
- (g) The applicant may not exercise any other activity which, combined with the private security activities, could present a danger to the public order or to the internal security of the state.
- (h) The applicant may not, during the five years immediately preceding the application, have been a member of an organisation protecting the Constitution in terms of Law 30 of 1984.
- (i) The applicant may not be a member of a military unit or a unit in the internal security forces or in their current reserves.
- (j) In addition, the following requirements must be met: An applicant must have completed at least nine years of school education, be in good physical condition and have an appropriate psychological profile; appropriate skills in respect of the functions required from private security personnel are required.

Although there are many similarities between the requirements and disqualifications listed above and the position in South Africa (see s 23 of Act 56 of 2001), regulation in South Africa may probably benefit from the inclusion of some of these in its regulatory framework. For example, the requirements in paragraphs (f), (g) and (h) above could be usefully considered since they suggest an element of sophistication not yet achieved by our law.

Technical specifications are in place in respect of security businesses. For example, businesses involved in the protection of property or “cash-in-transit” must have support staff on duty or standby duty 24 hours a day. The establishment of a station receiving alarm signals and having TV monitoring screens in respect of alarms need a separate approval/licence from the Minister of the Interior. The establishment of alarm monitoring installations using the public communication network also requires a licence from the Portuguese communication authority. (For the position in South Africa regarding infrastructural requirements, see reg 5 of the Private Security Industry Regulations in *GG* 23120 of 2002-02-14.) The Portuguese Minister of the Interior may prescribe appropriate conditions in respect of every approval or licence granted. Licensing *conditions* are not known to South African regulatory law and registration is unconditional.

As the duty to ensure safety and security is that of the state police, private security in Portugal only has a subsidiary and complementary role to play. In fact, private security must stay out of the exclusive sphere of activity of the state police. Private security may cooperate with the police, especially when requested to do so. In some instances private security enterprises must place their staff and resources under the control of the public security agencies. These principles are not found in South Africa’s regulatory laws. While in some countries state or communal roles are said to have been transferred to private security companies, this is barred or not discussed in Portugal on political grounds.

Portuguese law does not envisage a transfer of the role of the state or the community to private organisations. As a consequence, private security may only provide the services permitted by legislation. The following functions may, for example, *not* be performed by private security personnel: The establishment of

security systems that directly or indirectly pose a danger to the life or health of persons; the use of technical means or equipment or the offering of personal services that endanger the physical safety or morals of the public or that threaten fundamental human rights; the protection of goods, services or persons involved in illegal acts or suspected of being so involved. These prohibitions are rather vague and insofar as illegal acts are concerned, licensing can in any event never be seen as sanctioning such conduct.

Private security may be involved in the following activities: Research (in order to protect persons and property adequately); handling of "security materials" (electrical or electronic) and security equipment; the installation of security material and security equipment; the installation and use of alarm systems; the protection of movable and immovable property; access and egress control in regard to places where the public is not allowed or only allowed to a limited extent; secured transport of money and similar valuables; and training of security staff performing guarding functions.

Private security businesses may not operate as "private detectives". It has been remarked that there is no need for such activities and that the activities in question invariably invade citizens' right to privacy. Although the latter may be true in many instances, the former is certainly not correct.

Private security staff have the same competencies regarding the carrying and use of firearms as ordinary citizens (which is also generally the position in South Africa). They must thus be licensed. However, when on duty, security personnel may only carry firearms for private defence with the written permission of the employer.

Monitoring of the private security industry is "coordinated" by a private security council (*Conselho de Segurança Privada*) and "guaranteed" by the general command of the *Gendarmerie* (see Otten *et al* 473). The public is encouraged to play a role in that (in terms of s 31 of Law 267 of 1993) any person may inform the Portuguese private security council of an alleged illegal exercise of functions by private security personnel. The five-person private security council has supervising and advisory functions and is constituted in the following manner: The minister of the interior acts as chairperson. The other members are the general commander of the *Gendarmerie*, the general commander of the "security police" and the general secretary responsible for internal administration. There are two further members who represent and are appointed by the committees and private security organisations. Administrative support is provided by the general secretariat of the interior ministry. The position in South Africa is quite different (see ss 6 and 7 of the Private Security Industry Regulation Act 56 of 2001; and Visser "Some thoughts on the reform of the law in terms of which the private security industry in South Africa is regulated" 2000 *Obiter* 307–324, "Proposed changes regarding the nature and composition of the regulator of the private security industry" 2001 *De Jure* 358–363 and 2005 *TSAR* 587–594).

The functions of the private security council are aimed at "quality assurance" (Otten *et al* 473). Examples of the supervising functions are the selection of personnel by security businesses, consideration of activity reports submitted by security businesses, hearing of complaints concerning irregular conduct by security businesses, recognition of training centres and approving training programmes. The council's "advisory functions" are relevant in, for example, the issuing of licences to those who wish to render security services, conditions regarding the use of alarm monitoring facilities, minimum specifications concerning cash-in-transit

activities, punishment in respect of transgressions and withdrawal of licences. The council produces a brief annual report on the activities of private security businesses.

Private security organisations must offer training to security personnel (on the position in South Africa, see reg 4 of the Private Security Industry Regulations).

Private security personnel must carry a certificate of identification and identify themselves to the state security forces when so requested. This certificate must contain a name, official number and the name of the security employer (see reg 9(1) of the Private Security Industry Regulations regarding broadly similar provisions in SA).

Personnel that perform the following tasks must wear a uniform: The protection of movable and immovable property; the transport of money and similar valuables; and access control regarding persons and vehicles. In South Africa, there is a uniform requirement in respect of security officers protecting persons or property (unless an officer is merely a personal bodyguard), providing a reactive or response service and ensuring safety and security on premises used for sporting, recreational, entertainment or similar purposes.

Portuguese law applicable to the private security industry does not expressly foresee the possibility that security businesses may be organised in associations (in SA there are many associations to which security businesses may or do belong and the matter is not regulated at all). However, this may occur in terms of the constitutional right of freedom of association for peaceful and lawful purposes. Nevertheless, the Constitution expressly prohibits the formation of armed associations that are of a military or a paramilitary nature.

Certain forms of cooperation by private security with state security forces are legally compulsory (on this position in SA, see reg 7 of the Code of Conduct for Security Service Providers, 2003 published in *GG* 24971 of 2003-02-28). In addition, all security firms must in January every year submit a report of their activities to the private security council referred to earlier. Moreover, they must report information of an executed or planned offence to the police without delay. In the performance of their functions, private security businesses must avoid an entanglement of their activities with those of the state security forces.

Although the legislature has acknowledged that regulatory laws in Portugal should be improved, no important initiatives have actually been undertaken in this regard (Otten *et al* 477). It has been remarked that reform is urgently necessary in respect of personnel training and the guarding of persons. In addition, the differentiation between public and private policing has to be made clearer (*ibid*).

5 Conclusions

A survey of Portuguese regulatory law reveals that there are areas where its regulatory system is not as well-developed as that in South Africa, areas where it is more or less on par with our system, and a few instances where it surpasses our law.

For example, Portuguese regulatory law does not offer a proper example to South Africa through its exclusion of “private detectives”. This is simply not realistic – even though the effective regulation of private investigators is a daunting task (see generally Visser 2005 *THRHR* 628).

There are certainly aspects where Portuguese law as it stands (with its admitted deficiencies) could provide examples for legal reform in South Africa. For example, the idea of limiting or restricting the activities of private security to certain functional areas is something which should be considered by South African policy makers. However, such restriction should not be based on the outdated notion that prevention and investigation of crime falls within the exclusive jurisdiction of the state. Nowadays a democratic state is simply not in a position to offer all the services relating to safety and security required by its people and private security has thus become indispensable and probably a permanent institution. This does not mean an abandoning of the state's primary position as guarantor of fundamental rights and safety, security and public order in general, but a redirection of its responsibilities. The more important private security becomes, the more sophisticated and detailed its state-led regulation should thus be.

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