VONNISSE

PRIVATE SECURITY LAW – EXEMPTION FROM REGULATORY PROVISIONS

Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd

[2006] SCA 129 (RSA)

1 Introduction and background

This judgment by Maya JA (with whom Cameron, Nugent and Ponnan JJA and Theron AJA concurred) deals with an exemption from the provisions of the Private Security Industry Regulation Act 56 of 2001 ("the Act") (see for an earlier discussion of the legal principles in general, Visser "Exemptions from the provisions of the Private Security Industry Regulation Act 56 of 2001" 2005 *De Jure* 127–132). *In casu* the court had to decide on the validity of regulation 10(3) of the Regulations Relating to Appeals and Applications for Exemptions, 2003 (published in *GG* 25394 dated 2003-09-05 – "the Regulations"). The effect of the judgment is that the relevant regulation, in requiring re-applications in respect of exemptions already granted, is invalid.

The respondents are wholly owned subsidiaries of Anglo American Platinum Corporation Group Limited. The subsidiaries and the holding company constitute the Anglo Platinum Group, which is the world's leading primary producer of platinum group metals (para 2). It provides its own in-house security services that are rendered by the first and second respondents solely within the group (see on in-house or internal security, Visser "Notes on the regulation of 'in-house' private security in South Africa" 2003 *TSAR* 147–150). These two respondents employ security officers who render the security service, including access and perimeter control, maintenance of security equipment, protection and safeguarding of persons and property. The first respondent, who acts as the administrative, financial and technical adviser to the group, also provides training and instruction to the security officers, conducts its own intelligence function and manages the rendering of the said security services (para 3). The respondents and their employees fall squarely within the scope of the Act and would thus, inter alia, have to be registered as security service providers.

However, it has become practice for businesses, especially mining companies such as the respondents, to apply for and be exempted from the registration requirement (see ss 1(2) and 20(5) of the Act; Notice R1427 in *GG* 25565 dated 2003-10-17). The rationale behind this is that the juristic persons in question are not really performing the functions of *security businesses* (even though they literally fall within the relevant statutory definitions), since they only make

security officers available to other entities within the same group and do not offer security services to the public in general. Through regulation 10(3) the Minister for Safety and Security wanted to introduce a system of renewal of exemptions broadly similar to renewal of registration as security service provider (s 22 of the Act) and to exercise improved control over persons who have been granted an exemption. The court *a quo* decided the matter solely on the retrospectivity of the regulations on the lapsing of exemptions. It held that the respondents had acquired a right after the exemption to provide security services free from the formal requirement of registration, that the Minister was *functus officio* after granting the exemptions and could not without following the processes in sections 3 and 4(1) of the Promotion of Administrative Justice Act 3 of 2000, amend the exemptions by limiting their duration.

2 The relevant statutory provisions

Section 20(1) of the Act provides that no person may in any manner render a security service for remuneration unless such a person is registered as a security service provider in terms of the Act. Registration brings with it certain legal duties that are generally intended to promote and achieve a legitimate security industry that does not harm the public or national interest. Two sections of the Act cover exemptions, namely sections 1(2) and 20(5). Although they appear to be very similar in wording (see also the remarks of the court in para 8 fn 11) there are indeed certain important differences (Visser 2005 *De Jure* 128–129 132 for a survey of the similarities and differences between the two provisions and the author's recommendation for a single, comprehensive statutory provision).

Regulation 8 of the regulations contain the principles regarding a renewal of exemptions:

> "(1) An exemption granted by the Minister in terms of section 1(2) or 20(5) of the Act lapses, subject to these Regulations, one year after the date on which the applicable notice was published in the *Gazette*, unless the Minister determined otherwise when the exemption was granted or the exemption has been renewed in terms of these Regulations.
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> (2) (a) Any person who wishes an exemption to be renewed, must apply for a renewal not earlier than 90 days and not later than 45 days before the date on which the exemption will lapse as contemplated in subregulation (1).
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> (b) An application for the renewal of an exemption is subject to the provisions, with the necessary changes, applicable to the submission and consideration of an application for exemption in terms of these Regulations.
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> (c) If an application for the renewal of an exemption has been submitted to the Authority in terms of these Regulations, the exemption remains valid, subject to these Regulations, until the application is decided by the Minister.
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> (3) The Minister may at any time review an exemption that has been granted or renewed in terms of the Act and, if there is a sound reason therefor –
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> (a) withdraw the exemption;
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> (b) amend or remove any condition to which the exemption is subject, or add the conditions that maybe necessary;
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> (c) amend the scope of the exemption; or
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> (d) take any other step permitted by law in regard to the exemption."

This should be read with regulation 10, which was of direct relevance to the dispute *in casu*:

> "(1) With effect from the date of commencement of these Regulations, any appeal pending in terms of the repealed regulations must continue and be disposed of as though these Regulations have not been made, unless the interests of justice require otherwise.
> (2) The provisions of sub-regulation (1) apply, with the necessary changes, to any application for exemption.
> (3) An exemption granted before the date of commencement of these Regulations, lapses one year after such commencement, unless it has been renewed in terms of these Regulations."

In making the above regulations, the Minister purported to rely on section 35(1)(u) of the Act, which empowers him to make regulations, in addition to matters expressly listed, on any matter which it is necessary or expedient to prescribe for the attainment or better attainment of the objects of the Act or the performance of the functions of the Authority.

3 The court's reasoning

It is unnecessary for the purposes of this note to traverse all issues dealt with by the court in adjudicating upon the challenge that the regulatory provisions in question were invalid. The court quite appropriately pointed out that the challenge could not assume that the Minister exercised the same powers when he granted the exemption and when he made regulations intended to have all exemptions lapse unless renewed (para 16):

> "The Minister has at no stage purported, in the exercise of his powers to administer the Act, to withdraw the exemptions that he granted in the exercise of those administrative powers. What he has purported to do instead is to make regulations, in the exercise of his regulatory powers, that have the effect of terminating all exemptions generally, including those that are now in issue."

In the court's analysis, it had to decide whether the Minister was empowered to issue exemptions of an indefinite duration (as in the case of the respondents) and whether the Act authorised the Minister to make the regulations quoted in paragraph 2 above.

The court dismissed the argument that the Minister was not entitled to issue an exemption for an indefinite period (paras 21 and 22):

> "Clearly, the Minister has the power to grant an exemption with or without condition. Contrary to submissions made on the Authority's behalf in this regard, 'condition' must include the duration of an exemption, where one is fixed. If that be the case, one must then ask why the Minister should not have the power to impose an exemption without term. The answer must be that he does have that power. This is precisely what he did in the instant matter. The exemptions are indefinite. I do not believe that the exemptions conflict with the objects of the Act because they are indefinite. It must first be borne in mind that here, despite the grant of the exemptions, all the respondents' employees (except the twenty-two foreigners), including its executives, directors and managers actively engaged in the provision of security services, were still required to register in their individual capacities and did in fact register."

A further argument on which the court relied, is that the Code of Conduct for Security Service Providers, 2003 (see *GG* 24971 dated 2003-02-28; see for a discussion Visser "Legislative amendments to the regulation of the professional conduct of security service providers" 2004 *THRHR* 280–284) contain "comprehensive and stringent procedures and rules" that all in-house security officers and employers of in-house security officers must obey (unless exempted therefrom – which does not appear to be relevant in the present case). This

would, in the opinion of the court, constitute a sufficient measure of regulatory control by the regulatory authority – thus suggesting that the new mechanism of renewal of exemptions would not be necessary in any event. However, the court also confirmed the legitimate and compelling public interest in having control over the large and enormously powerful private security industry (para 24; referring to *PSIRA v Association of Independent Contractors* 2005 5 SA 416 (SCA); see for a discussion Visser 2005 *THRHR* 175–180 and 2006 *THRHR* 157–163). The court added that even though the appellant's concerns *in casu* may not be warranted – in advocating periodical renewals of exemptions – there was a need for the minister to exercise caution in granting exemptions and to use this power "sparingly" (para 25).

In dealing with the Minister's power to make the regulations in question, the court characterised the question as whether there was "implied authority" to do so since the Act does not *in eo nomine* confer such a power (para 27). (I shall revisit this categorisation of the problem in para 4 below.) The court's conclusion is that there is no reason why the Act cannot operate efficaciously without implying the power to revoke exemptions, bearing in mind that they are tailor-made for a specific, circumscribed group of in-house security service providers and that there are safeguards in the Act which remain in force (see also *Principal Immigration Officer v Medh* 1928 AD 451 458 which dealt with the power, not mentioned in law, of attaching conditions to an exemption). Of importance to the court in arriving at this conclusion, are also the other detailed provisions of the Act on the renewal of *registrations* – the opposite of exemptions (s 26). The implication is that exemptions should also have been dealt with in express terms. The appeal against the decision of the court *a quo* was thus dismissed.

4 Evaluation

The regulation in question which the court did not want to accept as valid, was evidently drafted and adopted to strengthen regulatory control over the vast and powerful private security industry – which, according to the court, has to be properly controlled. Private security officers, whether used in-house or as "contract security", wield immense *de facto* power in South Africa where the unacceptably high crime rate has led to a questioning of the general effectiveness of public policing and a migration to private security. It speaks for itself that a powerful and armed private force cannot be allowed to exist in a constitutional state based on the rule of law unless it is subject to stringent controls. Such control should obviously not be eroded by too many exemptions and proper control over exemptions is thus just as important as regulating registered security businesses and security officers. The court's oblique warning to the Minister to grant exemptions sparingly, is accordingly to be welcomed as appropriate and timely. It has become known that after this judgment the Minister generally grants exemptions only for a limited period of time and not indefinitely as in the past. While this is to be welcomed, it is still unacceptable that there are many exemptions which are of an indefinite duration. This situation can apparently now only be changed by amending the Act. The court's rather vague suggestion that an exemption may be revoked "if the relevant circumstances have changed" is not entirely clear and does not rest on any express provision of the Act or any regulation. Only implied power may be relevant and the court *in casu* expressed itself against implied authority to make regulations on renewal of exemptions.

The court's central argument that the Act does not permit the challenged regulations, is open to some doubt. The question is not really, as submitted by the court, whether the Act which does not expressly recognise such a power does so "impliedly". Reliance was placed by the appellants on section 35(1)(u) of the Act. This gives the Minister the power to make regulations on "any matter" as long as it is "necessary" or even "expedient" for the attainment or the "better" attainment of the objects of the Act. It is clear that the court did not properly inquire into the meaning and scope of section 35(1)(u). In fact, its analysis of this provision appears to be somewhat superficial. It is submitted that this provision does not really deal with implied powers but with express powers generally given – as long as they fall within the ambit of the provision correctly interpreted. Secondly, the court's reference to the general principle that a provision can only be read into an Act when it is a "necessary implication", while valid as a general principle, is not helpful in this context since the section in question also uses the word "expedient". Furthermore, the test is not, as suggested by the court, whether the Act can operate efficaciously without implied power, but simply whether the express requirements in section 35(1)(u) are met, namely whether the objects of the Act can be attained or even "better" attained through the contested regulation.

The court's casual and imprecise approach to the construction of section 35(1)(u) devalues the judgment as a whole. While it is perfectly acceptable to assume a relatively conservative approach in construing section 35(1)(u) – for example, by not reading matters into it already adequately covered by other provisions or founding onerous burdens on it – the court should have analysed this provision more carefully and not merely been led by general considerations regarding implied statutory powers. How could the respondents really be prejudiced *in casu* by the "duty" to apply for renewal of an exemption? Chances are that they would have been granted an exemption again and could have challenged a refusal based upon improper grounds or the use of an irregular or unfair procedure. An application would also better enable the Minister to ascertain whether the circumstances have really changed as alluded to by the court itself. In any event, the basic idea of renewal of a permission or licence received from the state is not new or inherently strange as everyone is familiar with the lapsing of a driver's licence or a licence to possess a firearm. Thus, section 35(1)(u) was not being misused by the Minister for a foreign or unjust purpose. Mention should also be made of the fact that equating an exemption with a right is somewhat suspect. An exemption is an entitlement of some sort, or a legally recognised freedom, but it would be interesting to undertake a comparative study of the exact nature of an executive exemption. In view of the purpose of the Act as a whole and the far-reaching effects of an exemption, the court should probably have been more open to accept the validity of a regulation limiting exemptions in general.

Finally, the argument that there are express provisions on renewal of registration but not on renewal of exemptions – and that the legislature should have provided for the latter in express terms – is not compelling. It cannot be used as an indication of a legislative intent that there can be no general curbs on exemptions already granted, since the court's submission about the general scope of the exemption sections in the Act can also be used to sustain the opposite conclusion: as there are no detailed provisions or qualifications relating to exemptions, it is clearly a matter that can fall under the general power to make regulations in section 35(1)(u). In any event, registration and exemptions are obviously fundamentally different matters.

It now appears that the only way to achieve the laudable goal of proper control over exemptions, is to amend the Act and abolish the preposterous notion of indefinite or non-renewable exemptions in the volatile and dynamic private security industry. The safeguards referred to by the court in the existing situation are not to be dismissed, but they probably do not address the real and potential problem comprehensively enough.

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