Private Security Industry
Regulatory Authority
420 Witch-Hazel Avenue, Block B Eco Glades 2 Office Park Highveld Ext 10
Tel. 086 10 (PSiRA) 77472
Int. +27 12 337 5500
Fax no.: 086 242 7180 / 086 246 7750
Email: info@psira.co.za
Website: www.psira.co.za

INDUSTRY CIRCULAR

To	:	**ALL SECURITY SERVICE PROVIDERS**
From	:	**MANABELA CHAUKE** **DIRECTOR**
Date	:	**20 November 2017**
Subject	:	**INDEPENDENT CONTRACTOR OR "SELF EMPLOYED SECURITY OFFICERS" – JUDGMENT**

With reference to the scathing judgment previously handed down in 2014 by Acting Judge A.J. Snyman of the Labour Court (Case No: J2126/2014) on the use of so called independent contractors or "self-employed security officers" by FMW Admin Services CC (FMW), a security business (which is also owned by a member of FMW) and a security officer, brought an *ex parte* application in the High Court of South Africa (Gauteng Division) and obtained interim relief.

The urgent application was brought on, inter alia, the following basis:

1. That a security officer has, in terms of section 22 of the Constitution of South Africa, 1996 a Constitutional right to choose her/his trade, occupation freely, and whether a person wants to render his/her skilled services as either an employee or a contractor (self-employed security officer) to assist a business;

2. That a security business has the right to choose whether it wants to obtain the services of a security officer as either an employee or a contractor to assist the business; and

3. That the provisions of Sectoral Determination 6 infringes on the Constitutional right of a security officer to choose his/her trade, occupation and profession freely, to have freedom of choice whether a security officer can contract his/her skilled services in an open market society either as an employee or contractor, not be discriminated against and to be equal before the law and to receive the benefit of the law.

In essence, the aim of the application was to have Sectoral Determination 6 declared unconstitutional and for a security officer to enter into an agreement with a security business to make his/her services available on an independent contract basis and divorce both the parties from labour legislation.

Judge Holland-Müter AJ handed down a written judgment on the matter on 25 August 2017 (Case no: 71328/2014). In dealing with the independent contracting model designed by FMW Admin Services CC, Judge Holland-Müter AJ stated, *inter alia*, the following:

[12] *"The agreement the applicants seek to be sanctioned by the court (...) clearly expects from the **self-employed security officer** to renounce all statutory benefits enshrined in the Basic Conditions of Employment Act (BCEA) and the Labour Relations Act (LRA), those benefits applicable on employees. This can be nothing more than a calculated attempt to get around the provisions of the LRA and BCEA. It is, as was in the **FMW case** above, a clear attempt to exploit vulnerable individual security guards desperate for work"*

[16] *"...explanation that the Individual Security Contractor and not the Security Firm outsourcing the contractor, where the contractor causes damage to the third party while performing outsourced duties, would be liable for such damage, is another clear indication of the seconds applicant's exploitation of vulnerable individual security officer trying to avoid the protection in the LRA and BCEA specifically for employees against ruthless employers. The proposed practise cannot be allowed. To find for the second applicant is to nullify the whole labour practise protecting the exploitation of employees by employers."*

As far as the Constitutionality of the Sectoral Determination is concerned, Judge Holland-Müter AJ stated *inter alia*, the following:

[22] *"The determination in question in my view is not infringing on any protected rights of the first applicant and the limitation as provided for in Section 22 of the Constitution is fair and in the interests of all role players in the private security industry."*

[23] *"I have no hesitation, like Snyman AJ in the **FMW** judgment that the business model by the second applicant in the proposed agreement (....) is a sham to avoid compliance with the provisions of the LRA and BCEA. If sanctioned, it will undoubtedly lead to widespread exploitation of individual security officers by now employers. Desperate security guards will be at the mercy of employers to renounce all labour protection of the individual security guards and that can never be in the interest of justice."*

[25] *"I am of the view that the limitation in Section 20 of the Sectoral Determination 6 is in the interest of the general public and the limitation of the individual right(s) of the first applicant is just. The broader structure of the whole of the private security industry is at stake and there are far too many individual employed security officers whose labour protection will be curtailed or completely exploited by the employers in the profession. The limitation is there for the protection of the broader profession and the individual and her rights are subject to that broader profession and therefore justifiable"*

[26] *"The relationship was and will always be one of employment irrespective of how it is worded or styled. Section 198(3) of the LRA deals with security businesses that provide self-employed security officers to its' clients. Section 198(1) & (2) of the LRA creates an irrevocable presumption of employment of the personnel of the temporary service provider and whether styled as an independent contractor, it will always be one of employment.* ***See FMW (supra) [57] & LAD BROKERS (Pty)Ltd v Mandla (2001) 22 ILJ 1813 (LAC) at par 26"***

As far as the ex parte application is concerned and the reason why the applicants did not appeal the Labour Court judgment in the FMW case in the first place, Judge Holland-Müter AJ Highlighted in his judgment that the applicants knew that they would not be successful in the Labour Court following on from the scathing judgment of the "self-employed officer" model by Acting Judge A.J. Snyman and that they abused the urgent court and the procedure (*ex parte*) to circumvent the Labour Court. In this regard, the application was also dismissed with costs.

Following on from the above judgment handed down, the applicants filed a notice of application for leave to appeal, which application was also dismissed, with costs.

With reference to the foregoing, the Authority is aware that a number of security businesses are continuing to use the independent contractor or "self-employed security officer" system of FMW Admin Services CC as well as other independent contractor models to circumvent labour legislation. Once again, as was the case in the Labour Court judgment, this system was declared an unlawful sham by the High Court and this practise cannot be allowed.

It is PSiRA's object to promote a legitimate private security industry, which acts in terms of principles contained in the Constitution and other applicable law. We can therefore not accept a system to be used in the private security industry, which has been declared unlawful by both the Labour Court and High Court. The Authority will not allow that some businesses within the industry continue to flout the law with only one motivation in mind, and that is to maximise profits at the expense of vulnerable security officers and other law abiding security businesses.

Interested parties are welcome to obtain a copy of the previous Labour Court judgment as well as the latest High Court judgment on our website at www.psira.co.za.

Yours faithfully

MANABELA CHAUKE
DIRECTOR