IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

DATE 25/8/2017 SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 71328 / 2014

In the matter between:

ADRIANA SALOMINA VAN DER MERWE	1st Applicant
SIVIKELA LOSS CONTROL CC	2nd Applicant
and	
PRIVATE SECURITY REGULATORY AUTHORITY	1st Respondent
DIRECTOR GENERAL: DEPARTMENT OF LABOUR	2nd Respondent
SECURITY ASSOCIATION OF SOUTH AFRICA	3rd Respondent
PRIVATE SECURITY SECTOR PROVIDENT FUND	4th Respondent
MINISTER OF LABOUR	5th Respondent

IN RE:

ADRIANA SALOMINA VAN DER MERWE 1st Applicant

SIVIKELA LOSS CONTROL CC 2nd Applicant

JUDGMENT

BEFORE; HOLLAND-MÜTER AJ:

[1] The matter was argued before me on 25 May 2017 on the return date of an ***urgent ex parte application*** which was heard on the 2nd of October 2014. After hearing the matter, I dismissed the application with costs but indicated that comprehensive reasons would follow. The reasons are as follows: The interim relief obtained was as follows:

"A : (portion A of the ex parte application) the matter,

...

2. A declaratory order in the following terms:

2.1 That the 1st Applicant, a natural person who is a duly registered security provider, have in terms of section 22 of the Constitution of South Africa, Act 108 of 1996, a Constitutional Right to

choose her trade, occupation or profession freely, and may also choose freely whether she wants to render her skilled services to the 2nd Applicant as either an employee or a Contractor who assists in the business of the 2nd Applicant;

2.2 That the 2nd Applicant, a juristic person and a registered private security business, have the right to choose whether it wants to obtain the services of the 1st Applicant as either an Employee or a Contractor who assists in the business of the 2nd Applicant;

2.3 That it is impossible for the 1st Applicant to adhere to clause 20 of Sectorial Determination 6 for the Private Security Industry, in that the relevant institutions where the 1st Applicant is required to be registered at in terms of this clause, would not register her as an individual natural person, and that this clause 20 of Sectorial Determination 6 may therefore not be applied to the 1st Applicant as it, in its application, infringe the 1st Applicant's Constitutional Right to:

(a) Choose her trade, occupation and profession freely;

(b) To have freedom of choice as to whether she wants to con-

tract her skilled services in an open market society either as an employee or contractor;

(c) Not to be discriminated against; and

(d) To equal before the law and to receive the benefit of the law.

2.4 That the intended contract between the 1st Applicant and 2nd Applicant, as explained in the supporting affidavits, is in principle lawful, and the parties (1st and 2nd Applicants) may proceed to conclude the contract ... and perform their obligations in terms of the contract."

[2] Portion "B" of the Notice of Motion made provision for the service of the interim order on certain relevant institutions which led to the intervening by the now Respondents. I may mention that, although no longer an issue, the applicants made it rather difficult for the parties to be joined by raising several interlocutory objections with regard to non-compliance of time frames etc.

[3] I find this conduct by the applicants somewhat surprising as the result will have far reaching implications for the private security field. More so surprising that the applicants chose to approach to court ***ex parte*** in

view of the applicants' own reservations as to the legality of the contract under discussion.

[4] When the matter commenced, I requested Mr Bouwer, who appeared on behalf of the applicants, to address me on the following aspects that were not addressed in his heads of arguments:

(a) The question of jurisdiction because the matter is in principle a labour matter;

(b) In view of the ruling by Snyman AJ in the **FMW Admin Services CC** v **Jacobus Marthinus Stander and three Others, Case No J 2126/2014** in the **Labour Court,** judgment delivered on **16 September 2014,** whether the issue has not been resolved by a competent court; (see below that the persons involved in that matter and in this matter are virtually the same members);

(c) Why the applicants, with the knowledge of the **FMW** matter, decided to approach this court ***urgently on an ex parte*** basis **3 weeks** after the above mentioned **FMW** matter? The applicants, in particular the second applicant was well aware of the Labour Court decision as one of its members is also a member of FMW and the appli-

cants annexed a copy of the judgment to their application as **annexure ASM-6".**

(d) Mr Bouwer could not answer any of these questions satisfactory during his address.

[5] The first applicant, Adriana Salomina van der Merwe, is a adult female and is a qualified security officer. She was unemployed during the time before the ex parte application until September 2014 when she approached the second applicant for ***employment.*** She met with Mr Frans Jacob Botha (hereafter referred to as "Botha"), a member of the second applicant. It should be mentioned here that a Mr W J Brits (hereafter referred to as "Brits"), a minority member of the second applicant, was at that stage also a member of another role player in the private security and management industry (FMW). The importance of Brits will be clear below. See par 3.5 p 121 AND THE **FMW case below.**

[5] Botha and Van der Merwe discussed various options of her rendering service to the second applicant, the result was that the second applicant offered to "contract her services" in the form of a service delivery contract and not an employment contract. See par 6.17.3 on p 15.

[6] A copy of the alleged contract is annexed as annexure "**ASM-4**". A copy of this agreement is on p 43 to 49. This agreement forms the basis of the ex parte application.

[7] The purpose of the application by the applicants is to obtain a declaratory order to declare the agreement valid to enable the first applicant to "choose her (my) own trade, occupation or profession freely and... whether she may render her skilled services to the second applicant as either an Employee or a Contractor ". See par 5.2.1 of the founding affidavit p 9.

[8] The first applicant avers that clause 20 of Sectorial Determination 6 of the Regulations for the Private Security Service makes it impossible for her to be registered as an individual contractor, therefore infringing on her constitutional right in terms of Section 22 of the Constitution. Section 22 of the Constitution is as follows: "***Every person has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".*** (My underlining).

[9] Sectorial Determination 6 was promulgated by the Minister of Labour in terms of section 51 of the Basic Conditions of Employment Act, 75 of 1997. The Determination provides for the utilization of Contractors in the

security service. Clause 20(2) of the Determination however states that Employers may not use the services of "Independent Contractors" if such contractors is not in compliance with:

(a) Sectorial Determination 6;

(b) The Unemployment Insurance Act;

(c) The Compensation for Occupational Injuries and Diseases Act;

(d) SARS, and in possession of an IT 30 tax certificate; and

(e) The Rules of the Private Security Sector Fund,

[10] Mr Bouwer, on behalf of the Applicants contended that the aim of the applicants is to have Sectorial Determination 6 declared unconstitutional (as per par 2.2 of the Applicants' Supplementary Practice Note dated 15 May 2017) only if the view expressed by the third respondent that Sectorial Determination 6 was applicable to the first applicant. In this Supplementary Practice Note in par 2.3.2 Mr Bouwer states that the first Applicant's application is based on contractual principles and not on any Labour Legislation nor Fundamental Employment Laws or Employment Rights. This argument wants to divorce the application from all well recognized and applicable labour aspects.

[11] He further contends that the first Applicant's application is based on the

Law of Contract (Including the fundamental right of freedom of contract). This absolute vague and unsubstantiated argument is with respect totally unfounded and without any substance.

[12] The agreement the applicants seek to be sanctioned by the court (annexure ASM-6) in it's annexure "A" on p 48, clearly expects from the ***self employed security officer*** to renounce <u>all</u> statutory benefits enshrined in the Basic Condition 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 held in the **FMW case** above, a clear attempt to exploit vulnerable individual security guards desperate for work. See Par 53 in **FMW**, p 77.

[13] It is significant that a member of **FMW** (Brits) is also a member of the second applicant before this court. It is significant the first applicant was and is well aware of the judgement in the **FMW** case. See her founding affidavit par 6.26. It is significant that the second applicant was and is well aware of the judgement and that according to an opinion by Jones & Du Plessis Labour Consultants the envisaged practice of Independent Contracting in the security field was illegal. See par 6.1.1 by the second

applicant on p 35.

[14] Despite the above, the applicants continued to approach this court on an ***urgent ex parte application***. This was one of the questions posed to Mr Bouwer at the beginning of the matter which remained unanswered.

[15] The correct route in my view would have been to take the **FMW** judgement on appeal to the Labour Appeal Court for clarification. This aspect also remained unanswered.

[16] Mr Bower's 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 second applicant's exploitation of vulnerable individual security officers trying to avoid the protection in the LRA and BCEA specifically for employees against ruthless employers. This proposed practice cannot be allowed. To find for the second applicant is to nullify the whole labour practice protecting the exploitation of employees by employers.

SECTION 22 OF THE CONSTITUTION, ACT 108 OF 1996:

[17] Section 22 of the Constitution states that: "*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"*** *(* my italics).

[18] The occupation of the security service providers is regulated by the Private Security Industry Regulator Authority Act, 56 of 2001 (hereafter referred to as "PSIRA"). A Regulatory Body is created and in terms of section 3 of PSIRA regulates the private security section. In terms of section 3 of PSIRA, the primary object of the Authority is to regulate the private security industry and to exercise effective control over the practice of the occupation of security service providers... and

(a) ...

(f) determine and enforce minimum standards of occupational conduct in respect of security service providers;

(l) encourage equal opportunity employment practices in the private security industry;

(o) to protect the interests of the users of security services;

[19] PSIRA does not preclude a natural person to render a security service in

terms of section 20 (1) (a) of PSIRA. There is however no Bargaining Council for the security industry and the Minister of Labour is authorized to promulgate Sectorial Determinations for the industry. One such determination is Sectorial Determination 6 published under GN R1250 in GG 22873 dated 30 November 2001 as amended in terms of BCEA. This sectorial determination applies to ... *"every employer and employee in the private security sector that guards or protects fixed property, premises, goods ..."*. The Sectorial Determination also presumes that any person on contract performing the duties of a security officer.. "to be employees", precisely what the second applicant wants to be overruled.

[20] This regulatory process by the Minister and the PSIRA Regulatory Authority is done in terms of the proviso in Section 22 of the Constitution. If I am correct and as further stated by Mr Bouwer in his supplementary practice note, the constitutional attack is only if the provisions of Sectorial Determination be applicable to the first applicant. The argument is that it is impossible for a natural person to comply with Section 20 of Sectorial Determination 6. The complaint is that Section 20 states that the *employer* may not use the services of a temporary employment services or independent contractor *unless* the temporary employment

service or independent contractor complies with inter alia the Unemployment Insurance Act, Compensation for Occupational Injuries and Diseases Act and SARS IT 30 tax clearance.

[21] There are reasons for these prerequisites to be complied with. Mr Bouwer's response on the question as to what will happen should the independent contractor be injured and cannot perform under the contract, who is burdened with the loss suffered. His answer was that the loss was that of the independent contractor. Damages caused by the independent contractor according to Mr Bouwer is also for the account of the independent contractor. This is clearly indicative that the employer (the second applicant) intends exploiting the vulnerable employee (the first applicant). The second applicant wants the first applicant to renounce all labour protection with regard to minimum wages, hours, working conditions, unemployment protection etc. this can never be in the interest of the private security workers/employees/individual contractors.

SECTORIAL DETERMINATION 6:

[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 interest of all role players

in the private security industry.

[23] I have no hesitation, like Snyman AJ in the **MWF** judgment that the business model by the second applicant in the proposed agreement in annexure ASM-6 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. I cannot sanction the proposed agreement as requested in prayer 2.4 of the Notice of Motion.

[24] The Constitutional Court has ruled on the restrictions in Section 22 of the Constitution in **Affordable Medicines Trust and others v Minister of Health of RSA 2006 (3) sa 247 CC [59]-[60]:**

"What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has the right to take up any activity which he

or she believes himself or herself prepared to undertake as a profession and to make that the very basis of his or her life. And there is a relationship between work and human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence. Though economic necessities or cultural barriers may unfortunately limit the capacity of individuals to exercise such choice, legal impediments are not to be countenanced unless clearly justified in terms of the broad public interest. Limitation on the right to freely choose a profession are not to be lightly tolerated".

[25] I am of the view that the limitation in Section 20 of the Sectorial 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 to 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 of the broader profession and therefore justifiable. See **Ex Parte HPP and Others; Ex Parte**

DME and Others [2017] All SA 171 (GP) [49]-[51].

[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 LPA 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.**

[27] The question as to why the Labour Court was not approached, more so in view of the **FMW** judgment three (3) weeks earlier has also not been answered. In view of the dual membership of Brits in FMW and the second applicant, the only reasonable inference is that the second applicant, was aware of the FMW judgment and the opinion obtained from Jones & Du Plessis Labour Consultants, that the application will not be successful in the Labour Court. This led to the applicants abusing the urgent court and the procedure (ex parte) to circumvent the Labour Court. This practice should be discouraged.

[27] I am of the view that the application should be dismissed with costs. The rule nisi obtained in the urgent court is discharged and the application is dismissed. I have no doubt that the second applicant unduly influenced the first applicant and abused her vulnerability to bring the application. In view of her precarious and desperate situation it would only be fair that the second applicant be ordered to pay all the parties' costs.

[28] I make the following order:

1. The Rule Nisi is discharged;

2. The application is dismissed with costs, the second applicant to pay the costs of all parties.

J HOLLAND-MÜTER
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

BY ORDER OF COURT

Heard on 25 May 2017.
Written judgment handed down on August 2017.

COUNSEL AND ATTORNEYS:

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