

[1] **FACTUAL BACKGROUND**

[1.1] The first to the fourteenth applicants are refugees duly recognised in terms of the Refugees Act 130 of 1998 (“the Refugees Act”). They all come from various countries on the continent, inter alia, the Democratic Republic of Congo (DRC), Burundi, Rwanda and Angola.

[1.2] The fifteenth applicant is a voluntary association, described in Chapter 6 of its constitution as an unincorporated association of refugee women, whose main objects include the identification and solving of various difficulties facing refugee women and children.

[1.3] The first to the fourth respondents are all organs of state, who in one way or the other, have the duty and responsibilities to regulate and administer the registration of security officers in terms of the Private Security Industry Regulation Act 56 of 2001 (“the Security Industry Act”). The different roles, duties and responsibilities of the various respondents will be elucidated later in the course of this judgment.

[2] **THE NATURE OF THE APPLICATION**

[2.1] This application is primarily concerned with the rights of refugees who have been legally recognised as refugees in the

Republic of South Africa (RSA) to be registered as security service providers as defined in Section 1 of the Security Industry Act.

[2.2] In essence, this application is two-pronged. Firstly the applicants seek to review and set aside the decision made by first respondent to refuse their applications for registration as security service providers and/or to withdraw their certificates of registration as security service providers and secondly the decision by second respondent to dismiss their appeals lodged in terms of Section 30 (1) of the Security Industry Act against the decisions of the first respondent either to withdraw their registration or to refuse them registration as security officers on the basis that they are neither South African citizens nor permanent residents.

[2.3] The first to fourth applicants were originally registered as security service providers but their registration was subsequently revoked by first respondent in terms of Section 20 on the basis that they are neither South African citizens nor permanent residents. Furthermore their appeals against the decision of the first respondent in terms of Section 30 (1) of the Security Industry Act were dismissed by second respondent.

- [2.4] The fifth and sixth applicants also had their registration as security service providers revoked by first respondent. However, fifth and sixth applicants never lodged any appeal against their deregistration.
- [2.5] The seventh to eleventh applicants' applications to be registered as security service providers were refused by first respondent on the basis that they are neither South African citizens nor permanent residents. Their appeals against the first respondent's decision were dismissed by second respondent.
- [2.6] The twelfth to fourteenth applicants' applications for registration as security service providers were refused by first respondent, also on the same basis that they did not satisfy the requirement of citizenship or permanent residence. However these applicants never lodged any appeal with second respondent against the first respondent's decision.
- [2.7] The applicants aver that the actions of first respondent in refusing to register them or in revoking their registration as security service providers on the basis that they are not South African citizens or permanent residents in South Africa as envisaged by Section 23 (1) of the Security Industry Act, are inconsistent with Constitution of the Republic of South Africa Act

108 of 1996 (the Constitution) and should be set aside. In the alternative, the applicants seek a declarator to the effect that Section 23(1) of the Private Security Industry Regulation Act 56 of 2001 is inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 and therefore invalid.

[3] **THE STATUFORY FRAMEWORK**

[3.1] The registration of persons as security service providers is regulated by Section 20 (1) of the Security Industry Act which provides that

“No person, except a Security Service Provider contemplated in Section 199 of the Constitution (Act No 108 of 1996), may in any manner render a security service for remuneration, reward, a fee or benefit, unless such a person is registered as a security service provider in terms of this Act.”

[3.2] The requirements for registration as a security service provider are clearly set out in Section 23 of the Security Industry Act. The sub-section of the Act which is relevant to this application is Sections 23(1) (a) which provides that:

“Section 23 (1)

Any natural person applying for registration in terms of Section 2 (1), may be registered as a security service provider if the applicant is a fit and proper person to render a security service, and-

(a) is a citizen or has permanent resident status in South Africa;

[3.3] Of crucial importance is Section 23(6) of the Security Industry Act which provides clearly that:

“Despite the provisions of subsections (1) and (2), the Authority may, on good cause shown and on grounds which are not in conflict with the purpose of this Act, and the objects of the Authority, register any applicant as a security service provider.”

[4] **LEGAL SUBMISSIONS**

[4.1] Mr Kennedy SC appearing for the applicants launched a scathing attack against Section 23(1) (a) of the Security Industry Act on the basis that it discriminates unfairly against refugees, and is therefore inconsistent with sections 9 and 10 of the Constitution. He submitted with vigour that refugees by definition, are not and cannot be citizens or permanent residents. He proceeded to argue that a rigid and inflexible

application of this criterion will inevitably and without failure, result in a blanket exclusion of all refugees from the security service industry. Furthermore, he contended that such an approach is in conflict with section 27 (f) of the Refugees Act 130 of 1998 ("the Refugees Act") which provides that a refugee is entitled to seek employment. In the alternative, Mr Kennedy argued that the rigid manner in which the respondents apply Section 23 (1) (a) underpinned by its underlying policy as embodied in the memo attached to the papers as "Annexure SMR 6" is inconsistent with the spirit and purport of the Constitution and therefore invalid. A slavish adherence to or application of Section 23 (1) (a) as reflected in the Memo, 'Annexure SMR 6' is indicative of the fact that first and second respondents failed to consider each case on its own merits and therefore did not apply their minds to the real issue, so he submitted.

[4.2] In further amplification of his submissions, Mr Kennedy referred me to a number of decided cases. In particular, he placed great reliance on the judgment in the Minister of Home Affairs And Others v Watchenuka And Another 2004 (4) SA 326 (SCA) at p 339 para 27 where the learned Nugent JA stated the following:

"The freedom to engage in productive work – even where that is not required in order to survive – is indeed an

important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful."

Relying on the afore-quoted dictum, Mr Kennedy submitted with zeal that the exclusion of the applicants from the security service industry has the effect of unfairly denying refugees the right to work and has the effect of eroding their human dignity by denying them the right to engage in productive work to earn a living and sustain themselves, their families and dependants.

[4.3] Mr Trengove SC, appearing for the respondents denied vehemently that Section 23 (1) (a) of the Security Industry Act amounts to unfair and unjustified discrimination. He conceded, however that Section 23 (1) (a) favours citizens and permanent residents over non-citizens including refugees. However, Mr Trengove vigorously contended that there is a just cause for such differentiation and that in any event, section 23 (1) (a) was not rigid and inflexible as the applicants contended. He pointed out that section 23 (6) of the Security Industry Act makes provision for any person whose application for registration as security service provider has been refused on the ground that

he/she failed to meet the criteria set out in Section 23 (1) to make representations and show good cause for an exemption from strict compliance with Section 23 (1) and to be registered as a security service provider. I was furthermore referred to Paragraphs 7 and 8 of the Directive of the Council of the Private Security Industry Regulatory Authority dated 30 July 2002 in terms whereof the Director is mandated to prepare a memorandum to the Council wherein he/she must clearly set out the particulars of all applicants whose applications have been refused, the reasons(s) for such refusal, the defects in the applications which led to the refusal and the recommendation by the Director, whether such an applicant(s) should be registered or not, notwithstanding the fact that such an applicant or applicants failed to meet the criteria laid down in section 23(1) of the Security Industry Act. Based on this, Mr Trengove argued that it is disingenuous if not fallacious for the applicants to argue that the requirements laid down in Section 23 (1) of the Security Industry Act are applied slavishly, rigidly and inflexibly and without considering the individual merits of individual applicants. He contended further that there is incontrovertible evidence that each application *in casu* was properly considered on its own merits and that the respondents did indeed apply their minds to all the facts which were placed

before them in support of the applications and the subsequent appeals.

[4.4] Concerning the argument that Section 23 (1) (a) is inconsistent with the Constitution, Mr Trengove argued that Section 23 (1) (a) in fact finds its inspiration from the Constitution itself. In support of his submission, he cited various sections of the Constitution which expressly reserve certain rights, offices or privileges for citizens only, e.g. Section 174 (1), which regulates the appointment of judges of the Constitutional Court; Section 19 which provides for political rights; Section 22 which guarantees freedom of trade, occupation or profession to citizens only and a plethora of other sections. In support of his submission, he relied, quite interestingly, on the case of *Minister of Home Affairs And Others v Watchmenuka and Another* (supra) at p 339 para 29-31 where the learned Nugent JA succinctly and lucidly stated the following:

"[29] If the protection of human dignity were to be given its full effect in the present context- permitting any person at all times to undertake employment- it would imply that any person might freely enter and remain in this country so as to exercise that right. But as pointed out by the

United States Supreme Court over a century ago in

Nishimura Ekiu v The United States:

'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'

[30] *It is for that reason, no doubt, that the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by Sections 21 and 22 of the Bill of Rights. As pointed out in Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended text of the Constitution of the Republic of the South Africa, 1996 1997 (2) SA 97 (CC) (1997 (1) BCLR 1) at para [20], the restriction to citizens of the right to choice of occupation is in accordance with recognised international human rights instruments.*

The court went on to say the following at para [21]:

'This distinction [between citizens and others] is in fact recognised in the United States of America and also in Canada. There are other acknowledged and exemplary constitutional democracies where the right to occupational choice is extended to citizens only, or is not guaranteed at all. One need do no more than refer to India, Ireland, Italy and Germany. [Constitutional Principle] II, as we made plain in the [Certification judgment], requires inclusion in a bill of rights of "only those rights that have gained a wide measure of international acceptance as fundamental human rights. "The fact that a right in the terms contended for by the objector, is not recognised in international and regional instruments referred to and in a significant number of acknowledged

constitutional democracies is fatal to any claim that its inclusion in the new South African Bill of rights is demanded by [Constitutional Principle] II.'

[31] Those considerations alone, in my view, constitute reasonable and justifiable grounds for limiting the protection that section 10 of the Bill of Rights accords to dignity so as to exclude from its scope a right on the part of every applicant for asylum to undertake employment- a limitation that is implied by Section 27 (f) of the Refugees Act, and that has been expressed in the Standing Committee's decision. (my own underlining)

[4.5] Regarding Section 27 (f) of the Refugee Act, Mr Trengove submitted that it does not entitle refugees, as of right, to be employed specifically in the security service industry or in whatever profession, trade or occupation they may prefer. All that it provides for is that refugees are entitled to seek employment without specifying the trade, industry or profession by name. Mr Trengove contended that the mere fact that refugees have to comply with section 23 (1) (a) of the Security Regulation Act does not necessarily mean that they cannot seek

employment in other industries of their choice. He contended with zeal, that the security service industry is a highly sensitive industry where extreme caution and circumspection is required to ensure that only persons who are trustworthy, reliable, and fit and proper are permitted to become members. He placed strong reliance on the as yet unreported judgment of Satchwell J in Probe Security CC v The Security Officers Board case number 98/13943 WLD, where the learned judge expounded the nature and importance of the private security industry as follows:

“These security officers are granted access to private dwellings, industrial premises, retail complexes, vehicles and a host of otherwise private or off-limit areas. The service is rendered for reward. It is without doubt an extremely public undertaking.... Those persons who render such security services by their very nature carry an air of authority vis-à-vis the public. They wear uniforms. They bear arms. They have all the outward appearances of having authority over lay people. Not only on premises but in the public sphere generally society as a whole is vulnerable to any abuses which might be perpetrated by such persons. Without doubt, society at large and the clients of the (security business) have an interest in the control (of) such a large private force and

*rely upon (the Security Officers' Board) to do so by, **inter alia**, ensuring that these armed men have training in the use of weaponry, are licensed to carry firearms; are not convicted felons, are registered as security officers and subject to the discipline and occupational standards imposed by the (Security Officers' Board). The hazards to the public if the standards applicable to security officers are not maintained and the practices of security officers are not regulated are considerable, indeed, life-threatening."*

In further amplification of the sensitivity of the private security industry and the concomitant hazards to the general public and the need for strict effective and proper control, Mr Trengove referred me to the case of Private Security Industry Regulatory Authority v Association of Independent Contractors 2005 (5) SA 416 (SCA) at p 418 para 1.

[5] **FINDINGS**

[5.1] It is clear to me that, at face value, Section 23(1) (a) of the Security Regulation Act appears to grant South African citizens and permanent residents preferential treatment as opposed to all foreigners, including refugees, concerning registration as security service providers. However, as Mr Trengove correctly pointed out Section 23 (1) (a), cannot be read in isolation. In

order to place it in a clear perspective, one must have regard to Section 23 (6) of the Act which provides that:

“Despite the provisions of subsections (1) and (2), the Authority may, on good cause shown and on grounds which are not conflict with the purpose of this act and the objects of the Authority, register any applicant as a security service provider.”

In my view, it should be abundantly clear that Section 23 (6) authorises the Authority to exempt suitable applicants from having to comply with the criteria set out in Section 23 (1) of the Act. This, however, can only be done where an applicant has shown that there exists good grounds for such an exemption and further that such registration will not be in conflict with the objects and inimical to the main purpose of the Act and the objects of the Authority. Contrary to the submissions made by Mr Kennedy, I am inclined to agree with Mr Trengove that a duty lies on the applicant who seeks to be exempted from having to comply with any of the criteria laid down in Section 23 (1) and (2) of the Act, to apply for such exemption and to furnish good reasons for such an exemption. Furthermore such an applicant will have to satisfy the Authority that his/her exemption will not be in conflict with the purpose of the Act and the objects of the Authority. Self-evidently, it is the applicant who can furnish such essential information as such

crucial information will, in most cases, be within his/her peculiar knowledge. Speaking for myself, I find it difficult to understand how the first respondent can be expected to take the initiative to *mero motu* apply for exemption for an applicant.

[5.2] In my view, Section 23 (6) of the Act was intended to counteract the effects of Section 23 (1) (a). I am furthermore of the view that section 23 (6) and Paragraphs 7 and 8 of the Directives show clearly that it is not a blanket and inflexible policy of the Authority to exclude, willy-nilly, all applicants who are neither South African citizens nor permanent residents from being registered as security service providers. Based on the aforesaid, I am unable to agree with the applicants that Section 23 (6) (a) of the Act is inconsistent with the Constitution.

[6] In any event, it is clear to me that paragraphs 7 and 8 of the Directive of the Council of the Private Security Industry Regulatory Authority directly refutes the allegation by the applicants that the Authority's policy regarding the registration of refugees as private security providers is inflexible. This directive makes clear provision for an exemption from any of the criteria embodied in Section 23 of the Act. Paragraph 8 provides expressly as follows:

"[8] If the Director is of the opinion that an applicant for registration who does not meet all the

requirements for registration contemplated in 23 of the Act and in the Private Security Industry Regulations should nevertheless be considered for registration in terms of Section 23(6) of the Act read with regulation 2 (8) of the Private Security Industry Regulations, the Director must, subject to this Directive, as soon as possible, prepare and submit a document to the Council containing at least the following:

- [1] The name and personal particulars of the applicant as contained in the application for registration.*
- [2] The registration requirements not met by the applicant.*
- [3] The facts and considerations which should be taken into account in judging whether the requirements of Section 23 (6) of the Act are satisfied.*
- [4] Any other relevant information regarding the applicant and the application.*
- [5] The recommendation of the Director on whether the applicant should be registered or not."*

[7] Concerning the issue whether Section 23 (1) (a) is inconsistent with the Constitution by excluding refugees in contravention of Section 9 (3) of the Constitution, I am of the view that there is no substance in this contention. I am inclined to agree with Mr Trengove that Section 23 (1) (a) is not peculiar. There are many other sections in the Constitution which make clear provision for differentiation between citizens and non-citizens. As Mr Trengove ably pointed out, it is generally accepted that certain offices can be occupied by South African citizens only e.g. the office of judges of the Constitutional Court (Section 174 (1)), the Public Protector (Section 193 (1) (a)); members of the Human Rights Commission (Section 193 (1) (a)), members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Section 193 (1) (a)); members of the Electoral Commission (Section 193 (1) (a)); the Auditor-General (Section 193 (3)); members of the Public Service Commission (Section 196 (10) (a)). It is furthermore instructive to note that for one to qualify to become a member of the South African Police Service (SAPS), one needs to be a permanent resident of the Republic of South Africa (RSA). It is understandable, in my view, that due to the high level of trust required by the above-stated offices, including that of private security officers, there must be some strict criteria as to who can qualify for such positions so as to exclude

undesirable persons. As the learned Howie P correctly stated in PSIRA v Association of Independent Contractors 2005 (5) SA 416 at p 418 par 1:

"Para 1: The private security industry has work for more people than the police and the 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 Private Security Industry Act 56 of 2001 (the Act) which requires security service providers to be registered." (my own underlining).

- [8] In any event, the issue raised herein is not a *res nova*. Both our Supreme Court of Appeal and the Constitutional Court has had

occasion to deal with rights enshrined in Section 22 of the Constitution and any limitations to be imposed thereupon. In the matter of Minister of Home Affairs and Others v Watchenuka and Another (supra) at p 339 par [30] the Supreme Court of Appeal through the learned Nugent JA, stated the following:

*"[30] It is for that reason, no doubt, that the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by sections 21 and 22 of the Bill of Rights. As pointed out in **Ex parte Chairperson of the Constitutional Assembly: I re Certification of the Amended Text of the Constitution of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC) (1997 (1) BCLR 1)** at para [20], the restriction to citizens of the right to choice of occupation is in accordance with recognised international human rights instruments. The Court went on to say the following at para [21]:*

This distinction [between citizens and others] is in fact recognised in the United States of America and also in Canada. There are other acknowledged and

exemplary constitutional democracies where the right to occupational choice is extended to citizens only, or is not guaranteed at all. One need do no more than to refer them to India, Ireland, Italy and Germany. [Constitutional Principle] II, as we made plain in the [Certification judgment], requires inclusion in a bill of rights of "only those rights that have gained wide measure of international acceptance as fundamental human rights." The fact that a right, in the terms contended for by the objector, its not recognised in the international and regional instruments referred to and in a significant number of acknowledged constitutional democracies is fatal to any claim that its inclusion in the new South African Bill of rights is demanded by [Constitutional Principle] II.'

[31] Those considerations alone, in my view, constitute reasonable and justifiable grounds for limiting the protection that section 10 of the Bill of Rights accords to dignity so as to exclude from its scope a right on the part of every applicant for asylum to

undertake employment – a limitation that is implied by section 27 (f) of the Refugees Act, and that has been expressed in the Standing Committee’s decision.” (my own underlining).

Our Constitutional Court, when presented with an opportunity to interpret section 22 of the Constitution, stated the following through Ngcobo J (writing for the court) in the matter of Affordable Medicines Trust And Others v Minister of Health of RSA and Another 2005 (6) BCLR 529 (CC) at p 549 para [59] – [61]

“[59] 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 a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the 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".

[60] *Though economic necessity 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. Limitations on the right to freely choose a profession are not to be lightly tolerated. But we live in a modern and industrial world of human interdependence and mutual responsibility. Indeed we are caught in an inescapable network of mutuality. Provided it is in the public interest and not arbitrary or capricious regulation of vocational activity for the protection both of the persons involved in it and of the community at large affected by it, is to be both expected and welcomed. These considerations are reflected in the text of Section 22. (my own underlining).*

[61] *It is against this background that section 22 must be understood and construed.]*

It should be abundantly clear from the two judgements referred to above that the right guaranteed in terms of Section 22 of the Constitution is not absolute. Like all other rights it is subject to

some limitations provided such limitations are reasonable, rational and justifiable in an open and democratic society, based on human dignity, equality and freedom and taking into account all relevant factor as set out in Section 36 (1) (a)- (e) of the Constitution. Although I have my profound sympathies for refugees, particularly because of their peculiar vulnerable position, I am of the view that the public interest, particularly if viewed against the security and safety of the public and the effective and proper control of the security service industry, adequately justifies the limitations imposed by section 23(1) on the right of the refugees to be registered as security service providers. I am fortified in my view by the undisputed fact that the security service industry is not the only industry, trade, profession or vocation where refugees can seek employment and earn a living. Refugees are free to seek alternative gainful employment in other industries, trades or professions where the security of the public will not be compromised.

[9] **CONCLUSION**

Having given this matter the best consideration possible, I am of the view that the criteria laid down in Section 23 (1) (a) of the Act is lawful, justifiable and rational. I am furthermore of the view that the harsh effects following on the literal and strict application of Section 23 (1) (a) are sufficiently tampered with

or ameliorated by Section 23 (6) of the Security Regulation Act and Paragraph 8 of the Directive of the Council to an extent that they make section 23 (1) (a) not to be inconsistent with the Constitution. It is clear to me that section 23 (1) (a) read with section 23 (6) of the Security Regulation Act and Paragraph 8 of the Directive of the Council creates a flexible machinery in terms whereof, in appropriate circumstances and after due considerations, even refugees can be registered as security service providers, provided that their registration is not inimical to the objects of the Act or in conflict with its purpose, amongst which is the necessity to achieve and maintain a trustworthy and legitimate private security industry which shall ensure adequate protection of fundamental rights to life and security of the people and their properties.

In the result, I find that the applicants have not made out a case entitling them to the relief they seek. Consequently the applicants' application is dismissed with costs.

L.O. BOSIELO
JUDGE IN THE HIGH COURT

FOR THE APPLICANT: ADV. KENNEDY SC ASSISTED BY ADV. A KATZ
INSTRUCTED BY: LAWYERS FOR HUMAN RIGHTS
FOR THE RESPONDENT: ADV. W TRENGOVE SC ASSISTED BY ADV. S. HASSIM
INSTRUCTED BY: MESSRS
DATE OF JUDGMENT: 26 MAY 2006
HEARD ON: 14 AND 15 MARCH 2006