THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO. 588/05

In the matter between:

PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY	**Appellant**

and

ANGLO PLATINUM MANAGEMENT SERVICES LTD	**First Respondent**
RUSTENBURG PLATINUM MINES LTD	**Second Respondent**
LEBOWA PLATINUM MINES LTD	**Third Respondent**
POTGIETERSRUS PLATINUMS LTD	**Fourth Respondent**

CORAM: **CAMERON, NUGENT, PONNAN, MAYA JJA et THERON AJA**
HEARD: **22 AUGUST 2006**
DELIVERED: **29 SEPTEMBER 2006**

Summary: Private Security Industry Regulation Act 56 of 2001 – the Minister may grant indefinite exemptions under the Act – the Act does not empower the Minister subsequently to make regulations which impose supervening limitations on such exemptions.

Neutral Citation: Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd [2006] SCA 129 (RSA)

JUDGMENT

MAYA JA

[1] This appeal, with leave of this court, concerns the validity of regulation 10(3) of the Regulations Relating to Appeals and Applications for Exemptions, 2003,[1] promulgated in terms of the Private Security Industry Regulation Act 56 of 2001 (the Act). Van Oosten J, sitting in the High Court in Pretoria, granted an order declaring (a) the regulation invalid and (b) two exemptions granted under the Act in favour of the respondents and some of their employees (which the regulation purported to amend and/or terminate) valid in the terms in which they were granted.

Background to the application

[2] The respondents are wholly owned subsidiaries of Anglo American Platinum Corporation Group Limited, a company listed on the Johannesburg Securities and London Stock Exchanges. Together, the subsidiaries and the holding company comprise the Anglo Platinum Group (the group), which is the world's leading primary producer of platinum group metals.

[3] The group's business operations include mining, smelting and refining precious metals in the Limpopo and North West provinces. It provides its own in-house security services which are rendered by the first and second respondents solely within the group. These two respondents employ security officers who render the security service,[2] including access and perimeter control, maintenance of security equipment, protection and safeguarding of persons and property. The first respondent, which 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 security services.

[1] Promulgated by GN 1253 published in GG 25394 dated 5 September 2003.
[2] 'Security service' and 'security officer' are defined extensively in the Act. The respondents and their employees fall within the purview of the definitions.

[4] The Act, which came into operation in February 2002 and has a much wider ambit than its predecessor, the repealed Security Officers Act 92 of 1987, brought about changes which had the potential to impact on the manner in which the first and second respondents conducted their security activities. The main change was the prohibition on provision of security services by unregistered persons contained in s 20(1)(a) of the Act, which provided that 'no person...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'. In its quest 'to regulate the private security industry and to exercise effective control over the practice of the occupation of security service provider in the public and national interest and the interest of the private security industry itself,[3] the Act thus imposed a new obligation on persons who provided commercial security services – to register as security service providers.[4]

[5] Section 44(6)(a) of the Act excluded 'any category or class of security service providers which was not obliged to be registered as security officers in terms of the repealed legislation immediately before the commencement of [the] Act, [from the operation of] the provisions of [the] Act or the Levies Act, until such date as the Minister [for Safety and Security] may determine by notice in the Gazette'. The date contemplated in this subsection (and by which the respondents would, therefore, have had to register as service providers) was subsequently determined as 1 March 2003.[5]

[6] For a security business[6] to be registered as a security service provider, 'all the persons performing executive or managing functions in respect of [the]

[3]Section 3 of the Act.
[4] Defined in s 1(1) of the Act as 'a person who renders a security service to another for a remuneration, reward, fee or benefit and includes such a person who is not registered as required in terms of this Act'.
[5]GN 1027 published in GG 23679 of 26 July 2002.
[6]Defined in s 1(1) of the Act as 'subject to ss (2), any person who renders a security service to another for remuneration, reward, fee or benefit, except a person acting only as a security officer'.

security business [must be] registered as security service providers'[7] and, in the case of a security business which is a company, every director of the company must be so registered.[8] In view of the fact that the first and second respondents did not provide security services as their core business, their managerial, executive and directorial staff, who exceeded 35 in number, had not complied with any of the elaborate registration requirements, including a rigorous security training course.[9] Further, all contracts relating to the provision of security services by the respondents would be invalidated by the provisions of s 20(3) of the Act.[10]

[7] The provisions of the Act presented the second respondent with a further problem. In terms of s 20(1)(a) each security officer employed by the respondents was required to register in his individual capacity. Further, s 23(1)(a) of the Act requires an applicant for registration, *inter alia*, to be a South African citizen or have permanent resident status in South Africa. Twenty-two of the second respondent's security officers were foreign nationals, who had been in its employ for extended periods and were allowed to work in the country by virtue of bilateral agreements concluded between South Africa and its neighbours, Lesotho and Botswana. Sections 20(1)(1)(a) and 23(1)(a) effectively barred these employees from rendering security services in this country unless they were able to fulfil the new citizenship or permanent residence requirement.

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[7]Section 20(2)(a) of the Act.
[8]Section 20(2)(b).
[9]Regulation 3(3) of the Private Security Industry Regulations, 2002 requires 'every person contemplated in s 21(1)(a)(ii), (iii), (iv), (v), (vi) or (vii) of the Act, or a person who intends to render a security service contemplated in paragraph (l) of the definition of security service in s 1(1) of the Act, who applies for registration as a security service provider, must have successfully completed, at a training establishment accredited in terms of the law, at least the training course described and recognised as 'Grade B' in terms of the law and policy applied by the Board…'.
[10]Section 20(3) provides: 'Any contract, whether concluded before or after the commencement of this Act, which is inconsistent with a provision contained in subsections (1), (2) or section 44(6), is invalid to the extent to which it is so inconsistent'.

[8] The respondents accordingly applied to the appellant (the Authority), which is vested with statutory authority to administer and enforce the Act, for an extension of time within which to register to enable them to consider their options in the light of the new legal dispensation. Later they applied for exemptions and, acting in terms of sections 1(2) and 20(5) of the Act,[11] the Minister issued two notices in which he granted two exemptions. In one,[12] he exempted the second respondent's twenty-two foreign employees from the provisions of s 23(1)(a) on condition that 'they only render a security service within [the second respondent] …and… not for other security businesses' (the first exemption). In the other,[13] the Minister exempted the respondents from registering as security service providers in terms of s 20(1)(a) on condition that they 'do not deploy security officers outside the holding company, Anglo American Platinum Corporation Limited' (the second exemption). No other conditions attached to the exemptions and no time limits were imposed.

[9] After to the grant of the exemptions, the Minister, purportedly acting in terms of s 35 of the Act, which vests him with the power to make regulations relating to a wide array of issues, promulgated the Regulations. Part I, in regulations 5-7, deals with the procedures relating to the reproduction of records, lodging and prosecution of appeals. Part II sets out, *inter alia*, the procedure relating to the lodging of applications for exemptions and other relevant requirements. Regulation 8, which forms part thereof, provides for the lapsing, renewal and review of exemptions.[14]

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[11] Both sections contain exemption provisions which are very similar in wording. Section 1(2) empowers the Minister, after consultation with the Private Security Industry Regulatory Authority and as long as it does not prejudice the achievement of the objects of the Act, by notice in the Gazette, to exempt any service, activity or practice or any equipment or any person or entity from any or all the provisions of the Act. Section 20(5), on the other hand, empowers the Minister, after consultation with the Authority, by notice in the Gazette to exempt any security service provider or security service provider belonging to a category or class specified in the notice, either generally or subject to such conditions as may be specified in the notice, from the operation of any provision of this Act.

[12] GN R1119 published in GG 25278 dated 8 August 2003.

[13] GN R1500 published in GN 24119 dated 6 December 2003.

[14] Regulation 8: (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*,

[10] Of direct relevance to this appeal, however, is Part III. It embodies regulation 10, which provides:

'(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'.

The respondents' challenge to the regulations

[11] In the court below, the respondents sought an order declaring that (a) regulations 5-8, 10(2) and 10(3) were unconstitutional, unlawful, invalid and of no force or effect, (b) the two exemptions were valid, of indefinite duration and not subject to the provisions of regulations 8(1) and (3), and (c) the respondents were not obliged to apply for the renewal of the exemptions in terms of regulation 8(2).

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unless the Minister determined otherwise when the exemption was granted or the exemption has been renewed in terms of these Regulations.

(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).

(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.

(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.

(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 -

(a) withdraw the exemption;

(b) amend or remove any condition to which the exemption is subject, or add the conditions that may be necessary;

(c) amend the scope of the exemption; or

(d) take any other step permitted by law in regard to the exemption'.

[12] The Authority raised several points *in limine* relating to joinder and legal standing, which were dismissed by the court below. The objections were persisted with on appeal. At the hearing of the appeal, counsel for the Authority was, however, constrained to concede, properly in my view, that they had no merit. In his judgment, the judge *a quo* dealt with them fully. I wholly agree with his reasoning and nothing more need, therefore, be said on this aspect.

[13] Regarding the merits, the respondents contended both in the court below and in this court that the grant of the exemptions, which conferred rights on the respondents, amounted to administrative action. Once the Minister granted the exemptions he became *functus officio* and could not revisit his decision in the absence of authority in the empowering statute for the revocation or amendment thereof, so the argument continued. They contended further that the regulations (a) offended against the rule of law as they purported to operate retrospectively, to deprive the respondents of their rights acquired under the exemptions when the Act empowered neither the Minister nor the Authority to amend or withdraw rights retrospectively, and (b) the Minister having promulgated them without granting the respondents or the public any form of hearing, violated the respondents' right to procedurally fair administrative action.

[14] The Authority's answer both in the court below and here was the following. The objects of the Act - to regulate the security industry - precluded the grant of indefinite exemptions. The exemptions in issue, which were mere indulgences, and thus created neither rights which could be breached nor a legitimate expectation that they would endure indefinitely, were thus not indefinite in nature and could be revoked by reasonable notice as the regulations did. It followed, in the Authority's argument, that regulation 10(3) did not operate retrospectively.

Decision of the court below

[15] The court below held that the matter fell to be decided solely on the question of 'retrospectivity of the regulations…created in regulation 10(3)' and that it was unnecessary to go beyond the question of the validity of this regulation except to consider the validity of the other impugned regulations as an alternative. It found that regardless of the nature of the exemptions, the respondents had acquired the right 'to provide security services free from the formal requirements relating to registration and the sanctions for non-compliance'. In its view, the Act did not empower the Minister, who became *functus officio* after granting the exemptions, 'to amend the exemptions by the introduction in the regulations of a time limit relating to their duration' and his failure to conduct the public consideration process contemplated in sections 3 and 4(1) of the Promotion of Administrative Act 3 of 2000 further served to render the regulation invalid. It found that the respondents were brought within the purview of regulation 8 (which was prospective in its operation and thus valid), by the provisions of regulation 10(3) which created retrospectivity and were invalid. It then concluded that the exemptions remained valid, indefinitely but would terminate if the security services were provided outside the group.

Determination of the issues

[16] It needs to be borne in mind that the Minister exercised quite different powers when he granted the exemptions, and when he made the regulations, respectively. He granted the exemptions in the exercise of the administrative power to grant exemptions in particular cases that was conferred upon him by sections 1(2) and 20(5). When making the regulations, however, he exercised the regulatory powers conferred on him to make subordinate legislation generally by section 35. 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.

[17] Thus, in my view, it assists to approach the matter in two stages: (i) Did the Act confer power on the Minister to issue exemptions that were of indefinite duration (which is what he purported to do)? This concerns the extent of the Minister's administrative power under the Act in implementing its provisions. (ii) If so, did the Act authorise the Minister to make regulations that terminated all exemptions generally (including those that are now in issue). This concerns the ambit of the Minister's regulatory powers – that is, his power to issue subordinate legislation – under the Act.

[18] The Authority's counsel conceded that the Minister had not erred in granting the original exemptions and that he did so properly in procedural and substantive respects. That was a necessary and unavoidable concession, for the Minister has not claimed that any irregularity tainted the grant of the original exemptions. Counsel for the Authority nevertheless argued first that the exemptions cannot be of indefinite duration as the Act does not empower the Minister to grant such an exemption.

[19] Secondly, he contended, indefinite exemptions militate against the main object of the Act, which is to regulate the security industry, since the Authority would lose its power to control a security service provider 'indefinitely and forever' once the exemption was granted. For example, so the argument developed, the respondents could appoint, as security service providers, persons who do not meet the requirements prescribed in s 23(1) of the Act; they could flout the requirements relating to infrastructure and capacity necessary to render a security service in terms of s 23(2)(b); or the foreign employees could

continue working for the respondents even where the bilateral agreements entitling them to work in the country were cancelled. In all these instances the Authority would be unable to exercise any of its regulatory powers set out in the Act, to the prejudice of the objectives set out therein.

[20] It was contended, thirdly, that the Minister has power, which he derives from the provisions of s 35 of the Act, to make regulations reviewing, amending or revoking the exemptions. Regulation 10(3), which gives reasonable notice of the contemplated termination of an exemption, operates prospectively and is therefore valid.

[21] I am unable to agree with the contentions on behalf of the Authority. The Act clearly does not prohibit the grant of indefinite exemptions. As previously indicated, s 20(5) empowers the Minister to grant an exemption from the provisions of the Act, 'either generally or subject to such conditions as [he may specify]'. 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.[15] 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.

[22] 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

[15] *Principal Immigration Officer v Medh* 1928 AD 451 at 458. There, the court equated the power to impose conditions with the capacity to impose limitations on duration.

in the provision of security services, were still required to register in their individual capacities and did in fact register.

[23] Further, the Authority's argument seems to ignore the existence of the Code of Conduct for Security Service Providers, 2003[16] contemplated in s 28 of the Act. The Code provides comprehensive and stringent procedures and rules that all security service providers and employers of in-house security officers must obey[17] in the conduct of their security duties, irrespective of whether or not they are registered with the Authority.[18] There is, therefore, absolutely no impediment to the appellant's ability 'to regulate the private security industry and to exercise effective control over the practice of security service providers in the public and national interest and in the interest of the private security industry itself'.[19] It is clear also in the case of the foreign employees that were the bilateral agreements to cease for any reason, their work permits would likewise lapse and they would be repatriated to the countries of their origin. As the respondent's counsel correctly submitted, no legal vacuum could be created by the grant of indefinite exemptions. The security service providers concerned clearly remained within the Act's reach and firmly under the Authority's regulatory control.

[24] It is so that there is a legitimate and compelling public interest in the control of the large and enormously powerful private security industry. This is to ensure, for example, that security officers have no links to criminal activities, are properly trained and are subject to proper disciplinary and regulatory standards and avoid any abuses which might be perpetrated by security officers against the vulnerable public.[20] There is therefore a compelling need for

[16]GN 305 published in GG 24971 of 28 February 2003.
[17]Section 1.
[18]Section 2(a).
[19]Preamble of the Code of Conduct.
[20]*PSIRA v Association of Independent Contractors* 2005 (5) SA 416 (SCA) para 1.

vigilance on the Authority's part to ensure that the objects of the Act are not undermined.

[25] The concerns raised by the Authority, even if unwarranted in this case, do therefore highlight the need for the Minister to exercise caution in granting exemptions; to apply his mind properly to the merits of the application and to use his power to exempt sparingly. However, one assumes that he will grant an exemption only in appropriate cases. That being so, it then becomes difficult to conceive any basis for a subsequent revocation of the exemption, particularly where none of the relevant circumstances have changed, as is the case here.

[26] Since, as I have found, the Minister exercised his administrative authority under the Act regularly and properly in granting indefinite exemptions, the question then is: Does the Act confer on him the power to issue regulations which terminate those exemptions? The Act contains no express provision conferring such a power. The Authority contended that since the Act gives the Minister the power to grant an exemption, it must, by necessary implication, clothe him with a comparable power to revoke it. As indicated above, the Authority relies for this contention on the wide, general provisions of s 35 (1) (a), (b) and (u) which read:

'(1) The Minister may make regulations relating to-

(a) any matter which in terms of this Act is required or permitted to be prescribed;

(b) the registration by the Authority of security service providers;

. . .

(u) generally, 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'.

[27] The question whether or not legislation impliedly provides authority (for revocation in this case) ultimately depends upon an interpretation of the statute concerned. As mentioned earlier, the Act confers no express power of this kind.

Does it do so impliedly? A provision can only be read into a statute when it is a necessary implication. The test for implying the provision, therefore, is whether it is necessary for the efficacious operation of the statute.[21] In my view, there is no reason why the Act cannot operate efficaciously without implying the power to revoke the exemptions in issue, bearing in mind that they were tailor-made for a specific, circumscribed group of in-house security service providers and the safeguards provided by the Act mentioned in paragraphs [21] and [22] above.

[28] I agree with the respondents that the power contended for by the Authority should have been expressly conferred and cannot be implied. As stated in *Principal Immigration Officer v Medh*:[22]

'The powers of the Minister must be found within the section creating them, and according to that section the Minister only has power either to exempt or not: there is no third course. In the absence of specific provisions to that effect, such power cannot be construed as embracing the wider power of attaching conditions. If it had been the intention of the Legislature to confer upon the Minister the additional power of attaching conditions to the exemption, it should have said so, as it has done in the case of temporary permits …'

[29] There is moreover strong indication in the Act that the legislature was well aware of the need to confer powers to withdraw, revoke or amend exemptions granted thereunder. Indeed, the Act contains, for example, s 26 which provides comprehensively for the lapsing, withdrawal and suspension of registration. Of significance also in this regard is s 22 which expressly empowers the Minister to regulate the periodic renewal of registration. The rest of the provisions contained in s 35 itself are very specific about the matters in respect of which the Minister may make regulations. Yet the only mention of exemptions anywhere in the Act is in sections 1(2) and 20(5), which as already

[21] *South African Medical Council v Maytham* 1931 TPD 45 at 47; See also *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557B-C.
[22] 1928 AD 451 at 458.

explained provide the Minister with express power to afford exemptions either with or without condition, or for a definite or indefinite period.

[30] The provisions of s 35, in my view, do not assist the Authority. The Minister did not have the power to make regulation 10(3) and, as the court below found, it is invalid. In view of this conclusion, it is unnecessary to deal with the other issues.

[31] There is an outstanding issue relating to a costs award made by the court below in an interlocutory application during the proceedings. In response to the *in limine* objection relating to non-joinder, the foreign employees had filed confirmatory affidavits in which they supported the respondents' case, disavowed any need or desire on their part to be joined as respondents in the application and waived any corresponding right they may have had to demand to be joined. They, however, launched an application in terms of Uniform rule 12 for intervention in the proceedings, conditional on a finding by the court below that their waiver was inadequate to relieve the second respondent of an obligation to join them in the proceedings. The Authority delivered a notice to oppose the application but filed no opposing affidavit. The judge *a quo* consequently found it unnecessary to decide the application. He merely made a costs award against the Authority on the basis that the objection was misconceived and the foreign employees' action warranted in the circumstances. This award remained an issue on appeal although it was not pursued with any particular vigour. More importantly, it was not contended that the court below exercised its discretion unjudicially in making the costs award. This court thus has no basis to interfere in this regard.

[32] For these reasons, the appeal is dismissed with costs, such costs to include the costs of two counsel.

MML MAYA
JUDGE OF APPEAL

CONCUR:

CAMERON JA
NUGENT JA
PONNAN JA
THERON AJA