CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 39/06

THE UNION OF REFUGEE WOMEN	First Applicant
KINUGUBA MAGAMBO	Second Applicant
AIMABLE DO GRIO BANDANDAZA	Third Applicant
RICHARD RUGONDA	Fourth Applicant
SOLANGE MUKAMANA	Fifth Applicant
JEAN-MARIE BIPAMBA MIKADO	Sixth Applicant
JOSEPH MUBAMBEK	Seventh Applicant
BOSUMBE ELANGA	Eighth Applicant
POMPIDOU WEBBER	Ninth Applicant
PELAGIE NYIRANZARORA	Tenth Applicant
TSHALA CLAUDINE MBAYA	Eleventh Applicant
CHITERA MATEMBELA	Twelfth Applicant
DEUDONNE MASAKA NIZIGIYIMANA	Thirteenth Applicant

versus

THE DIRECTOR: THE PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY	First Respondent
THE CHAIRPERSON: THE PRIVATE SECURITY INDUSTRY APPEAL COMMITTEE	Second Respondent
THE CHAIRPERSON: THE COUNCIL FOR THE PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY	Third Respondent
THE MINISTER OF SAFETY AND SECURITY	Fourth Respondent

Heard on : 29 August 2006

Decided on : 12 December 2006

JUDGMENT

KONDILE AJ:

Introduction

[1] This application concerns the rights of refugees to work in the private security industry in South Africa. This industry is regulated by the Private Security Industry Regulation Act 56 of 2001 ("Security Act"). The matter reaches this Court in the form of an application for leave to appeal against the judgment of Bosielo J in the Pretoria High Court.

[2] The first applicant is the Union of Refugee Women, a voluntary association acting in the interests of its members and in the interests of the class of people to whom the applicants belong. The second to thirteenth applicants are refugees as defined in the Refugees Act 130 of 1998 ("Refugees Act").[1]

[3] The first respondent is the Director of the Private Security Industry Regulatory Authority ("Authority") established in terms of section 2(1) of the Security Act. The

[1] Section 1 of the Refugees Act defines a refugee as "any person who has been granted asylum in terms of this Act."

second respondent is the Chairperson of the Private Security Industry Appeal Committee ("Appeal Committee") provided for in section 30 of the Security Act.[2] The third respondent is the Chairperson of the Council for the Private Security Industry Regulatory Authority ("Council"). The Council was established in terms of section 5 of the Security Act. In terms of this section the Authority is governed and controlled by the Council.[3] The fourth respondent is the Minister of Safety and Security ("Minister"). In terms of section 11 of the Security Act, the Minister exercises overall supervision of the first respondent.[4]

The legislative framework

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[2] The relevant portions of section 30 of the Security Act provide:

> "(1) Any person aggrieved by—
>
> (a) the refusal by the Authority to grant his or her application for registration as a security service provider;
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> (b) the suspension or withdrawal of his or her registration as a security service provider by the Authority; or
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> (c) a finding against him or her, of improper conduct in terms of this Act, or the punishment imposed in consequence of the finding,
>
> may within a period of 60 days after service of the notification of the relevant decision contemplated in paragraph (a), (b) or (c), appeal to an appeal committee.
>
> (2) An appeal committee contemplated in subsection (1) is appointed by the Minister for every appeal and consists of—
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> (a) a person with not less than five years' experience as an attorney, advocate or magistrate, who is the presiding officer; and may also include
>
> (b) two other persons if it is considered appropriate by the Minister.
>
> (3) Every person serving as a member of an appeal committee must be independent from the Authority and may have no personal interest in the private security industry or in the affairs of an appellant."

[3] Section 5(1) of the Security Act.

[4] Section 11 provides that:

> "If the Council or the Authority cannot or does not maintain an acceptable standard in the fulfilment of one or more of its functions in terms of this Act or the Levies Act, the Minister may intervene by taking any appropriate step to ensure proper fulfilment of that function, including—
>
> (a) issuing a directive to the Council or the Authority, describing the extent of the failure and stating the steps required to remedy the situation;
>
> (b) assuming responsibility for the relevant function or duty to the extent necessary—
>
> (i) to maintain an acceptable standard; or
>
> (ii) to prevent the Council, the Authority or any person appointed by the Council or the Authority, from taking any action which is prejudicial to the objects of the Authority; and
>
> (c) dissolving the Council and appointing a new Council."

[4] Section 20 of the Security Act says that no person may render a security service for reward unless he/she is registered as a security service provider in terms of the Act. Section 23(1) of the Security Act provides as follows:

> "Any natural person applying for registration in terms of section 21(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 of or has permanent resident status in South Africa;
> (b) is at least 18 years of age;
> (c) has complied with the relevant training requirements prescribed for registration as a security service provider;
> (d) was not found guilty of an offence specified in the Schedule[5] within a period of 10 years immediately before the submission of the application to the Authority;
> (e) was not found guilty of improper conduct in terms of this Act within a period of five years immediately before the submission of the application to the Authority;
> (f) submits a prescribed clearance certificate, together with such other information as the Authority may reasonably require, if the applicant is a former member of any official military, security, police or intelligence force or service in South Africa or elsewhere;
> (g) is mentally sound;

[5] The Schedule lists the following offences: High treason; Sedition; Sabotage; Terrorism; Public violence; Arson; Malicious damage to property; Intimidation; Rape; Murder; Robbery; Culpable homicide involving the use of a firearm or any form of intentional violence; Kidnapping; Assault with the intention to cause serious bodily harm; Indecent assault; Child stealing; Fraud; Forgery or uttering of a forged document knowing it to have been forged; Breaking or entering any premises, whether in terms of common or statutory law, with the intention to commit an offence; Theft, whether in terms of common law or statutory law; Receiving stolen property knowing it to have been stolen; Extortion; Defeating the ends of justice; Perjury, whether in terms of common law or statutory law; An offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act 12 of 2004; An offence involving the illicit dealing in dependence-producing substances; Any offence in terms of statutory law involving an element of dishonesty; Any offence in terms of the Domestic Violence Act 116 of 1998; Any offence in terms of the Explosives Act 26 of 1956; Any offence in terms of the Regulation of Foreign Military Assistance Act 15 of 1998; Any offence in terms of legislation pertaining to the control over the possession and use of firearms and ammunition; Any offence in terms of the Interception and Monitoring Prohibition Act 127 of 1992; Any offence in terms of the Intelligence Services Act 38 of 1994; Any offence in terms of the Protection of Information Act 84 of 1982; *Crimen injuria*; Any offence in terms of statutory law involving cruelty to an animal; Any offence in terms of any law relating to illicit dealing in or possession of precious metals or precious stones; Any offence in terms of statutory law punishable by a period of imprisonment exceeding two years without the option of a fine and any conspiracy, incitement or attempt to commit any of the above offences.

(h) is not currently employed in the Public Service in circumstances where such registration may conflict with a legislative provision applicable to the applicant;
(i) has paid the relevant application fee; and
(j) is not a person referred to in subsection (5)."[6] (footnote added)

[5] In terms of section 23(2) of the Security Act:

"A security business applying for registration as a security service provider in terms of section 21(1), may be so registered only if—
(a) every natural person referred to in section 20(2) complies with the requirements of subsection (1) and is not an unrehabilitated insolvent; and
(b) such security business meets the prescribed requirements in respect of the infrastructure and capacity necessary to render a security service."

[6] Section 23(6) of the Security Act, however, provides:

"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."

Relevant facts

[7] All the applicants except the first applicant applied to the Authority, in terms of section 21 of the Security Act,[7] to be registered as security service providers.

[6] Section 23(5) provides:
"Despite any provision to the contrary, a person in the permanent employ of the Service, the Directorate of Special Operations, the National Intelligence Agency, the South African Secret Service, the South African National Defence Force or the Department of Correctional Services may not be registered as a security service provider whilst so employed."

[7] Section 21 provides:
"(1) An application for registration as a security service provider must be made to the Authority in the prescribed manner and must be accompanied by—

Second to sixth applicants

[8] The second to sixth applicants were initially registered by the Authority as security service providers. On 20 December 2002, however, they all received notice of intention to withdraw their registration in terms of section 26(4)(c) of the Security Act[8] on the basis that they were granted registration in error inasmuch as they are neither citizens nor permanent residents of South Africa.

[9] The notice also contained an invitation to them to provide the Authority with all relevant information as to why, despite the requirements of section 23(1)(a) not having been met, the Authority should not withdraw their registration. The written representations had to be made within 21 days.

(a) a clear and complete set of fingerprints taken in the prescribed manner—
  (i) of the applicant, if the applicant is a natural person;
  (ii) if the applicant is a security business, of every natural person performing executive or managing functions in respect of such security business;
  (iii) of each director, if the applicant is a company;
  (iv) of each member, if the applicant is a close corporation;
  (v) of each partner, if the applicant is a partnership;
  (vi) of each trustee, if the applicant is a business trust; and
  (vii) of each administrator or person in control, if the applicant is a foundation.
(b) the application fee as determined by the Authority; and
(c) any other document or certificate required in terms of this Act or by the Authority to be submitted with an application for registration.

(2) Any person applying in terms of subsection (1) for registration as a security service provider, must furnish such additional particulars in connection with the application as the Authority may determine.

(3) If the Authority is of the opinion that the provisions of this Act have been complied with in respect of an application referred to in subsection (1), it may grant such application and register the applicant as a security service provider."

[8] Section 26(4)(c) provides that:

"The Authority may, subject to section 5(3), withdraw the registration of a security service provider by written notice served on the security service provider if the registration was granted in error or on the basis of incorrect information furnished by any person, including any department or organ of State, to the Authority".

[10] The second and fifth applicants' attorneys sent written submissions to the Authority, in essence stating that a person who is neither a citizen nor a permanent resident of South Africa may be registered as a security service provider under the Security Act in the light of the wording of section 23(6) of the Security Act.

[11] In March 2003 the Authority replied to the second and fifth applicants and advised that their written representations had been unsuccessful. At the same time the Authority formally withdrew the registration of the second to sixth applicants as security service providers.

[12] In June/July 2003 the second to fourth applicants appealed to the Appeal Committee against the decisions of the Authority on the grounds that the Authority, in finding section 23(1) to be the sole reason not to maintain registration, committed an error of law and its decisions amount to irrational and unlawful administrative action. It was also contended that the decisions take no account of the provisions of section 23(6) of the Security Act or the Constitution and in so doing unfairly and unjustifiably violate the applicants' rights to equality, non-discrimination and dignity. Further that the decisions are inconsistent with the Constitution and accordingly invalid. The point was also taken that the requirements for registration set by section 23(1)(a) when read together with section 23(6) allow the Authority to maintain the registration of these applicants as security service providers despite their being neither citizens nor permanent residents. The fifth and sixth applicants did not appeal.

[13] On 20 September 2003 the second to fourth applicants were advised that their appeals had been dismissed. The reasons given by the Appeal Committee were that it was common cause that the Authority had made an error in registering these applicants. They also found that these applicants, notwithstanding the fact that they had been given an opportunity to do so, had failed to show good cause, and on grounds which are not in conflict with the purpose of the Security Act and the objects of the Authority, why they should be registered. They therefore had failed to justify the application of section 23(6).

Seventh to thirteenth applicants

[14] The seventh to thirteenth applicants all applied to be registered as security service providers. The Authority advised that they had been rejected on the basis that they were neither citizens nor permanent residents of South Africa.

[15] The applications of the twelfth and thirteenth applicants were each supported by an affidavit which can be summarised as follows: the applicants are recognised refugees in terms of section 24 of the Refugees Act. They are aware of the requirements of sections 23(1)(a) and 23(6) of the Security Act and Regulations 2(2)(b), 2(2)(c) and 2(6) made under the Security Act. They are unable to provide police or official criminal record clearance certificates from the Democratic Republic of Congo and Burundi Embassies in South Africa respectively, as the officials at those embassies would not be able to render unbiased information. The officials are not trustworthy. Neither of the applicants had been found guilty of any offence specified

in the schedule nor had they been found guilty of improper conduct, nor had they been members of any national military, security, police or intelligence force or service, nor had they been employees of any of the national security services.

[16] The seventh to eleventh applicants lodged appeals to the Appeal Committee on grounds similar to those advanced by the second to fourth applicants. These appeals were dismissed for reasons similar to those furnished to the second to fourth applicants. The twelfth and thirteenth applicants did not appeal the decision of the Authority.

Decision of the High Court

[17] The applicants approached the High Court and sought to review and set aside the decisions of the Authority and the Appeal Committee. In the alternative they sought an order declaring section 23(1)(a) of the Security Act to be inconsistent with the Constitution and invalid. Their application was dismissed with costs.

[18] The High Court held that section 23(1)(a) does indeed grant South African citizens and permanent residents preferential treatment, but it emphasised that this section cannot be read in isolation. It thus reached the conclusion that section 23(1)(a) was sufficiently tempered by section 23(6) to render it constitutionally compliant. Reflecting on the rationale for section 23(1)(a), the High Court held that:

> "It is understandable, in my view, that due to the high level of trust required by . . . private security officers, there must be some strict criteria as to who can qualify for such positions so as to exclude undesirable persons."[9]

[19] Although it expressed sympathy for the plight of refugees, particularly given their vulnerable position in society, the High Court was of the view that the safety and security of the public and the need for effective control of the private security industry, justified the limitations on the rights of refugees imposed by section 23(1)(a), particularly as they were free to seek gainful employment elsewhere.

Leave to appeal to this Court

[20] The applicants now seek leave to appeal directly to this Court, in terms of Rule 19 of the Constitutional Court Rules,[10] against the judgment and order of the High Court. According to the applicants, the application is concerned with whether the Authority is entitled to refuse to register the applicants as security service providers or to withdraw certificates of registration erroneously issued, and whether the Appeal Committee is entitled to dismiss their appeals against the Authority's decisions, in either event, on the sole basis that the applicants are neither citizens nor permanent

[9] *Shabani Midemis Rutimba and Fourteen Others v The Director: The Private Security Industry Regulatory Authority and Others* TPD (per Bosielo J), case no 35986/2003, 26 May 2006, unreported at para 7.

[10] The relevant portions of Rule 19 of the Constitutional Court Rules:

> "(1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.
>
> (2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

residents of South Africa. The application is apparently also concerned with whether section 23(1)(a) is inconsistent with section 9(3) and section 9(4) of the Constitution.

[21] Leave to appeal directly to this Court will be granted if it is in the interests of justice to do so.[11] Each case is considered on its own merits.[12] The factors relevant to a decision whether to grant an application for direct appeal have been listed as including whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success. These must be balanced against the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal ("SCA") is bypassed.[13]

[22] The applicants submit that leave to appeal directly to this Court is appropriate in the light of the fact that they are all indigent members of society, lacking the necessary financial means required to fund any, let alone lengthy, legal proceedings. It appears that Lawyers for Human Rights have rendered all services to the applicants without charge and that counsel have rendered their services at reduced rates, and in some instances without remuneration.

[11] See for example *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 28.

[12] See for example *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

[13] Id.

[23] The application invokes the equality clause and requires consideration of constitutional issues as envisaged by section 167(3)(b) of the Constitution. Moreover, this is an issue of public importance involving a vital regulatory authority as well as reportedly some thousands of refugees.

[24] In my view, there are important constitutional issues at stake and the issues involved are all of a constitutional nature. The Court is not called upon to deal with any ancillary, non-constitutional matters. In addition, direct appeal has the advantage of avoiding delays and reducing costs, which was one of the purposes for which section 167(6)(b) of the Constitution was enacted.[14] The question of the saving of costs is one which assumes considerable weight herein as the litigants involved are particularly vulnerable members of society with limited resources available to them. The applicants' argument in relation to the saving of costs is thus particularly persuasive in the circumstances of this case. Furthermore, the dispute between the parties has been ongoing since 2002. It is therefore in the interests of justice that leave to appeal directly to this Court be granted.

The applicants' submissions in this Court

[25] The structure of the oral argument presented on behalf of the applicants differed markedly from that of the written argument lodged on their behalf. It appears from their written argument that the applicants contend that the decisions of the Authority and the Appeal Committee were materially influenced by an error of law and/or were made in an irregular manner, alternatively, that section 23(1)(a) of the Security Act

[14] Id at para 29.

under which the decisions were made, is inconsistent with the Constitution and therefore invalid.

[26] During oral argument however, counsel for the applicants clarified that their primary challenge is to the constitutionality of section 23(1)(a). Should the Court uphold this section, the applicants seek administrative review of the decisions of the Authority and the Appeal Committee.

[27] This seems the preferable way to approach the issues. If this Court were to find that section 23(1)(a) of the Security Act is indeed invalid, then reviewing the decisions of the Authority and the Appeal Committee, which were made in terms of that very section, would be unnecessary. I thus turn to consider the constitutionality of section 23(1)(a) but first a word or two about refugees.

Vulnerability of refugees

[28] Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.

[29] The condition of being a refugee has thus been described as implying "a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse."[15] This is reflected in South African legislation governing the status of refugees. In terms of section 3 of the Refugees Act, which draws on the definition of "refugee" in the 1951 United Nations Convention Relating to the Status of Refugees ("UN Convention"), a person qualifies as a refugee if:

> "(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
>
> (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
>
> (c) is a dependant of a person contemplated in paragraph (a) or (b)."

[30] In South Africa, the reception afforded to refugees has particular significance in the light of our history. It is worth mentioning that Hathaway lists apartheid as one of the 'causes of flight'[16] which have resulted in the large numbers of refugees in Africa.[17] During the liberation struggle many of those who now find themselves

[15] Hathaway (ed) *Reconceiving International Refugee Law* (Martinus Nijhoff Publishers, London 1997) at 8.

[16] Along with civil war, state oppression, ethnicity, revolution and border disputes.

[17] Hathaway above n 15 at 90.

among our country's leaders were refugees themselves, forced to seek protection from neighbouring states and abroad.

[31] The applicants have referred this Court to statements in judgments of this Court and other courts relevant to the vulnerable position of foreigners in our society. I share the views expressed therein and empathise with vulnerable groups that are among us. The Security Act, however, concerns an industry which by its nature involves serious risks. It is not a negation of our international duties towards refugees. It affirms these obligations but reserves to the host country the right to set appropriate qualifications. At the same time, care must be taken to ensure that qualification is imposed by the Act in as flexible a manner as possible in order to be consistent with our international obligations.

The equality challenge

[32] The applicants contend that section 23(1)(a) of the Security Act is unconstitutional and consequently invalid, since it discriminates against them on the basis of their refugee status and consequently infringes their right to equality.

[33] The applicants accordingly seek an order declaring, among other things:

(a) that the omission of the words "or is a recognised refugee" after the words "is a citizen or has permanent resident status in South Africa" in section 23(1)(a) of the Security Act to be inconsistent with the Constitution and invalid; and

(b) that section 23(1)(a) of the Security Act is to be read as though the words "or is a recognised refugee" appear after the words "is a citizen or has permanent resident status in South Africa".

[34] The test to be used when assessing whether a particular law or act complies with section 9 of the Constitution was laid down in *Harksen v Lane*:[18]

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

[18] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 54; 1997 (11) BCLR 1489 (CC) at para 53.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) or section 9(4).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

[35] The first leg of the equality analysis thus involves determining whether the provision in question differentiates between categories of people. Section 23(1)(a) of the Security Act differentiates between citizens and permanent residents on the one hand, and all other foreigners, including refugees, on the other. This differentiation is clear; citizens and permanent residents may apply for registration as security service providers, all other foreigners are barred from doing so unless they come within the terms of section 23(6) of the Security Act.

Is there a rational connection between section 23(1)(a) and its purpose?

[36] With regard to the level of scrutiny required when determining whether a rational connection between a legislative provision and its intended purpose exists, this Court, in *Prinsloo v Van der Linde,*[19] explained:

> "In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In *Mureinik's* celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification'."[20] (footnotes omitted)

[37] It is important that the present case be considered in its proper context. The private security industry is a very particular environment. At stake is the safety and security of the public at large. Section 12 of the Constitution guarantees everyone the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. In a society marred by violent crime, the importance of protecting this right cannot be overstated.

[38] That is not to say that foreign nationals, including refugees, are inherently less trustworthy than South Africans. In a country where xenophobia is causing increasing suffering, it is important to stress this. It is not that the Authority does not trust refugees. Rather, it requires everyone to prove his/her trustworthiness. The reality is

[19] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

[20] Id at para 25.

that citizens and permanent residents will be more easily able to prove their trustworthiness in terms of the Security Act.

[39] The Security Act is designed to limit eligibility for registration to people whose trustworthiness can be objectively verified. The preamble to the Act acknowledges that the right to security of the person is fundamental to the well-being and to the social and economic development of every person. To this end, the Act aims to:

> "achieve and maintain a trustworthy and legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law, and is capable of ensuring that there is greater safety and security in the country".[21]

[40] The purpose served by stringent requirements for registration as security service providers, in an open and democratic society based on human dignity, equality and freedom, is articulated by Satchwell J in *Probe Security CC v The Security Officers' Board*:[22]

> "[Security service providers] are granted access to private dwellings, industrial premises, retail complexes, vehicles and a host of otherwise private or off-limits 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 a 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 to which security officers have been granted access but in the public sphere generally

[21] Preamble to the Act.

[22] *Probe Security CC v The Security Officers' Board and Another* WLD (per Satchwell J), case no 98/13943, 17 August 1998, unreported.

> 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 officer[s] 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."[23] (footnotes omitted)

[41] The remarks of Howie P, expressed in the *Private Security Industry Regulatory Authority* case,[24] are in a similar vein:

> "The private security industry has work for more people than the police and 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 . . . 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 Regulation Act 56 of 2001 . . . which requires security service providers to be registered."[25]

[42] Differentiating between citizens and permanent residents on the one hand, and all other foreigners on the other, therefore has a rational foundation and serves a legitimate governmental purpose.

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[23] Id at 20 - 21.

[24] *Private Security Industry Regulatory Authority and Others v Association of Independent Contractors and Another* 2005 (5) SA 416 (SCA).

[25] Id at para 1.

Does the differentiation amount to discrimination?

[43] Once differentiation is established, the analysis then moves to the question of discrimination. Discrimination is a particular form of differentiation. Unlike "mere differentiation",[26] discrimination is differentiation on illegitimate grounds or on grounds that have historically been associated with patterns of disadvantage.[27] Section 9(3) of the Constitution contains an open-ended list of these grounds and this Court has held that differentiation on grounds that are analogous to those listed in section 9(3) will also constitute discrimination.[28]

[44] The applicants contend that they have been victims of discrimination on grounds analogous to those listed in section 9(3) in the sense that section 23(1)(a) differentiates between two classes of non-citizens: permanent residents and refugees. They submit that the discrimination is unfair because its impact on them is severe.

[45] Section 23(1)(a) does not, however, single out refugees. The differentiation is between citizens and permanent residents on the one hand, and all other foreigners, including holders of, for example, temporary residence permits, visitor's permits, study permits, relative's permits, work permits, retired person permits and exchange permits, on the other.[29] For purposes of analysis I will assume without deciding that

[26] *Prinsloo* above n 19 at para 25.

[27] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 42; *Harksen* above n 18 at para 49 SALR; at para 48 BCLR.

[28] *Harksen* above n 18 at paras 46 – 47 SALR; at paras 45 – 46 BCLR.

[29] See sections 10 to 22 of the Immigration Act 13 of 2002 ("Immigration Act").

the distinction between citizens and permanent residents on the one hand, and refugees who do not qualify for permanent residence on the other, amounts to discrimination on a ground analogous to those specified in section 9(3) of the Constitution. The question, then, is whether this discrimination is fair.

[46] In answering that question, the following factors have to be taken into account:

(a) Under the Constitution a foreigner who is inside this country is entitled to all the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens.[30]

(b) The Constitution distinguishes between citizens and others as it confines the protection of the right to choose a vocation to citizens.[31]

(c) In the final *Certification* case[32] this Court rejected the argument that the confinement of the right of occupational choice to citizens failed to comply with the requirements that the Constitution accord this "universally accepted fundamental right" to everyone. It held that the right of occupational choice could not be considered a universally accepted fundamental right.[33] It also held that the European Convention for the Protection of Human Rights and Fundamental Freedoms embodies no such right to occupational choice nor does the International Covenant on Civil and Political

[30] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 27.

[31] Section 22 of the Constitution.

[32] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

[33] Id at para 17.

Rights.[34] The distinction between citizens and foreigners is recognised in the United States of America and also in Canada. There are other acknowledged and exemplary constitutional democracies such as India, Ireland, Italy and Germany where the right to occupational choice is extended to citizens or is not guaranteed at all.[35]

(d) In *Watchenuka*,[36] Nugent JA held that it is acceptable in international law that every sovereign nation has the power to admit foreigners only in such cases and under such conditions as it may see fit to prescribe and held that it is for that reason that the right to choose a trade or occupation or profession is restricted to citizens by section 22 of the Bill of Rights.[37]

[47] Section 27(f) of the Refugees Act provides that "[a] refugee is entitled to seek employment". Section 23(1)(a) of the Security Act limits the refugees' right to choose employment only to the extent that they may not work in the private security industry. It in no way prevents them from seeking employment in other industries.

[48] The door to the private security industry itself is also not completely closed to the applicants. They may enter this single excluded industry if they successfully

[34] Id at para 18.

[35] Id at para 21.

[36] *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA); 2004 (2) BCLR 120 (SCA).

[37] Id at paras 29 - 30.

invoke the provisions of section 23(6) of the Security Act. In fact section 23(6) renders the provisions of section 23(1)(a) flexible and if properly applied will save it from the overbreadth criticism.

[49] It is also open to the applicants to apply to the Minister, in terms of section 1(2) of the Security Act, for the exemption of the service or activity of a car guard, for example, from the provisions of the Security Act.[38]

[50] The applicants may also, in terms of section 27(d) of the Immigration Act, read with section 27(c) of the Refugees Act, acquire permanent resident status in due course, like other refugees before them, thereby complying with the requirements of section 23(1)(a) of the Security Act and qualifying to enter the industry.[39] This occurs primarily when a refugee has been continuously resident in South Africa for five years after she/he was granted asylum and the Standing Committee for Refugee Affairs has certified that he/she will remain a refugee indefinitely.

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[38] Section 1(2) of the Security Act provides that:

> "The Minister may, after consultation with the Authority and as long as it does not prejudice the achievement of the objects of this Act, by notice in the *Gazette*, exempt any service, activity or practice or any equipment or any person or entity from any or all the provisions of this Act."

[39] In terms of section 27(d) of the Immigration Act:

> "The Director-General may issue a permanent residence permit to a foreigner of good and sound character who is a refugee referred to in section 27(c) of the Refugees Act, 1998 (Act No. 130 of 1998), subject to any prescribed requirement".

Section 27(c) of the Refugees Act in turn provides that:

> "A refugee is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely".

[51] The fairness enquiry also requires consideration of the provisions of section 22 of the Constitution. Even though the applicants, not surprisingly, forswore reliance on section 22, it is relevant to the analysis. This Court has held in many cases that the rights protected in Chapter 2 are mutually reinforcing and must be interpreted in that way.[40]

[52] In *Affordable Medicines Trust,*[41] in which section 22 was discussed in some detail, this Court held:

> "[T]wo constitutional constraints define the scope of the regulation of the practice of a profession which is permitted under s 22. Legislation that regulates practice will pass constitutional muster if (a) it is rationally related to the achievement of a legitimate government purpose; and (b) it does not infringe any of the rights in the Bill of Rights. What the Constitution therefore requires is that the power to regulate the practice of a profession be exercised in an objectively rational manner. As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate."[42]

[53] Furthermore Woolman[43] states:

> "Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate that her ability to exercise a fundamental right has been infringed. This demonstration itself has several parts. To begin with, the applicant must show that the activity for which she seeks constitutional protection

[40] See for example *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 BCLR (11) 1169 (CC) at paras 23 and 83.

[41] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[42] Id at para 77.

[43] Woolman "Limitation" in Chaskalson et al (eds) *Constitutional Law of South Africa* 1 ed Revision Service 2, 1998 (Juta, Cape Town 1996).

> falls within the sphere of activity protected by a particular constitutional right. If she is able to show that the activity for which she seeks protection falls within the value-determined ambit of the right, then she must show, in addition, that the law or government action in question actually impedes the exercise of her protected activity. This second showing may be satisfied by demonstrating that the law or government action either expressly intends to restrict the right or effectively restricts the exercise of the right.
>
> If the court finds that the law in question infringes the exercise of the fundamental right, the analysis may move to its second stage. In this second stage the government – or the party looking to uphold the restriction – will be required to demonstrate that the infringement is justifiable."[44] (footnotes omitted)

[54] The activity for which the applicants seek constitutional protection is the enjoyment of the right to choose a vocation. The activity does not, however, fall within a sphere of activity protected by a constitutional right available to refugees and other foreigners. In the circumstances, stage two cannot be reached. Accordingly, on this approach as well, the applicants must fail.

Cases distinguished or compared

[55] In *Larbi-Odam*[45] this Court required the state to extend certain protection and benefits afforded to citizens to permanent residents as well. The Court reasoned as follows when distinguishing between permanent and temporary residents:

> "A distinction should be drawn between the impact of the regulations on permanent residents and their impact on temporary residents. In my view, the regulations clearly constitute unfair discrimination as regards permanent residents of South Africa. They have been selected for residence in this country by the Immigrants Selection Board,

[44] Id at 12-2 – 12-3.

[45] *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

> some of them on the basis of recruitment to specific posts. Permanent residents are generally entitled to citizenship within a few years of gaining permanent residency, and can be said to have made a conscious commitment to South Africa. Moreover, permanent residents are entitled to compete with South Africans in the employment market. As emphasised by the appellants, it makes little sense to permit people to stay permanently in a country, but then to exclude them from a job they are qualified to perform. . . .
>
> I hold that reg 2(2) constitutes unfair discrimination against permanent residents, because they are excluded from employment opportunities even though they have been permitted to enter the country permanently. The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner is a detraction from that commitment. Denying permanent residents security of tenure, notwithstanding their qualifications, competence and commitment is a harsh measure."[46]

[56] In *Khosa*[47] this Court required the state to extend the right of access to social security, previously limited to citizens, to permanent residents. Section 23(1)(a) of the Security Act already affords permanent residents the same protection and benefits as citizens.

[57] In *Watchenuka*[48] every asylum seeker was totally prohibited, by the conditions in his or her permit, from taking up any employment or studying, pending the outcome of an application for asylum. What the SCA understandably found unacceptable in *Watchenuka* was the total exclusion from employment thereby rendering the asylum seeker destitute. The position of the applicants herein is totally

[46] Id at paras 24 - 25.

[47] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

[48] *Watchenuka* above n 36.

different. The Refugees Act guarantees the applicants the right to seek employment. It is the *choice* of vocation that is reserved only for citizens and permanent residents.

[58] Lastly, I refer to the Canadian case of *Andrews*[49] which was brought by a permanent resident of Canada who had been excluded from the practice of law. The position there is unlike the position in section 23(1)(a) which ensures that the protection and benefits afforded to citizens are extended to permanent residents as well.

[59] I may add that in *Andrews*, Wilson J also acknowledged that equality may be limited and further expressed the view that in determining whether the limitation is reasonable, the object sought to be achieved by the impugned law must relate to concerns which are pressing and substantial in a free and democratic society.[50] It is not as if in Canada refugees would receive unlimited access to any kind of occupation.

[60] The qualifications or requirements for the activities of a security service provider and of a lawyer are different. Mr Andrews probably needed to spend five years qualifying himself for the practice of law. He satisfied all the requirements for admission as a lawyer.[51] It was not a case of Mr Andrews claiming qualification merely by virtue of being a foreigner and member of a vulnerable group.

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[49] *Law Society of British Columbia et al. v Andrews et al*. (1989) 56 DLR (4d) 1.

[50] Id at 33.

[51] Id at 6.

[61] It would seem that the private security industry has its own special requirements for qualification: trustworthiness, reliability, genuine devotion to and readiness to defend the paramount interest of the community or the public including life, limb and property. The legislature determined that it requires five years[52] within which to investigate and check on the background of the applicant and to verify information received against direct observation of actions and reactions in a variety of situations and thereafter to decide whether an applicant is a fit and proper person to render a security service.

International instruments

[62] South Africa is a signatory to the UN Convention. The applicants have relied on article 17(1) of the UN Convention which provides that signatory states "shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment."

[63] Article 6 of the UN Convention elaborates on the phrase 'in the same circumstances' as follows:

> "For the purposes of this Convention, the term 'in the same circumstances', implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling."

[52] See section 26 of the Immigration Act.

[64] The respondents contend that the obligation imposed by article 17(1) is not breached because permanent residents are the only foreigners treated more favourably than refugees. In the respondents' view, the question thus resolves itself into whether article 17(1) entitles refugees to be afforded the same treatment as permanent residents.

[65] Insofar as the application of article 17(1) in the present circumstances is concerned, the refugees *are* accorded the most favourable treatment afforded to a national of a foreign country in the same circumstances as regards the right to engage in wage-earning employment. The applicants may not be treated as permanent residents because they are not in the same circumstances for the simple reason that they have yet to meet the requirements for permanent residence.

[66] Accordingly, the discrimination in this matter, objectively determined, has very little, if any, potential to impair the essential content of the dignity of the applicants in any significant or substantial manner and is fair.

[67] I recapitulate, the discrimination is not unfair and does not breach the equality right at the threshold. This is particularly so if the entire statutory scheme of the employment qualification is taken into consideration. The scheme is for a limited fixed period; it is not a blanket ban on employment in general but is narrowly tailored to the purpose of screening entrants to the security industry; it is flexible and has the

capacity to let in any foreigner when it is appropriate and to avoid hardship against any foreigner. It permits blanket exemption of categories of work within the industry and permits departure from the strict requirements of section 23(1)(a) on "good cause shown". In short, the discrimination is a legitimate legislative choice on a highly prized public interest which is safety and security, in a country where security workers in this industry exceed the police and the army in number.

Do the respondents' decisions constitute administrative action?

[68] Should the argument pertaining to the constitutionality of section 23(1)(a) fail, as in my judgment it must, the applicants seek, in the alternative, judicial review of the individual decisions of the Authority and the Appeal Committee.[53] This takes us into the realm of administrative law. In terms of section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), any person may institute proceedings for judicial review of administrative action. The initial question is thus whether the decisions constitute administrative action in terms of PAJA. The applicants' contention is that these decisions constitute administrative action as defined in PAJA.

[69] The relevant part of the definition of administrative action in section 1 of PAJA reads:

> "'Administrative action' means any decision taken, or any failure to take a decision, by—
> (a) an organ of state, when—
> (i) . . .

[53] Which will be collectively referred to as the decisions.

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external, legal effect".

[70] The respondents have, in answering affidavits in the High Court, denied that the aforesaid decisions constitute administrative action. The denial is based on the assertion that the decisions do not have a direct external legal effect on the applicants. The assertion is erroneous. The refusal to register an applicant as a private security service provider is an adverse determination of the applicants' rights. The determination has an immediate, final and binding impact on the applicants, who have no connection with the Authority. The decisions therefore do have a direct, external, legal effect and constitute administrative action in terms of PAJA.

The right to institute judicial review

[71] As mentioned above, in terms of section 6(1) of PAJA, any person may institute proceedings for judicial review of administrative action. However, section 7(2)(a) provides that persons dissatisfied with an administrative action must exhaust their internal remedies before instituting proceedings for judicial review.[54] Notwithstanding this provision, section 7(2)(c) confers a discretion on a court to exempt an applicant for judicial review of administrative action, in exceptional

[54] Section 7(2)(a) provides that "[s]ubject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

[55] The fifth, sixth, twelfth and thirteenth applicants have not appealed to the Appeal Committee and consequently have not exhausted their internal remedies. Neither did they apply for exemption from the provisions of section 7(2)(a) in terms of section 7(2)(c). It is not necessary to come to a firm conclusion on this matter. Should these applicants so choose, they may approach the Authority in terms of section 23(6) as discussed below.

Reasons

[72] The applicants raise many grounds of review, allegedly flowing from reasons given by the respondents. However, the applicants base their grounds of review on reasons the applicants themselves gleaned from submissions made by the Authority to the Appeal Committee in response to the appeals lodged to the Appeal Committee, as well as on the reasons implied in a memorandum of the Authority dated 27 August 2002.

[73] There seems to be some confusion between the parties as to whether the applicants were in fact given reasons for the decisions of the Authority and the Appeal Committee. The applicants seem to be of the view that reasons were given by the Appeal Committee at least. In their written argument, the applicants refer twice to reasons given by the Appeal Committee. The respondents on the other hand, take the

[55] Section 7(2)(c) provides that:

> "A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

position that no reasons were given until the following reasons were provided in the course of this litigation:

(a) The applicants failed to comply with the requirement of citizenship or permanent residence in terms of section 23(1)(a); and

(b) The applicants did not, in terms of section 23(6), show good cause for exemption from these requirements.

[74] It must be pointed out that even if review were to be based on the grounds of review relied upon by the applicants, most of these grounds[56] seem to be directed more at the validity of section 23(1)(a) itself than at the validity of the decisions. Once it is accepted, as has been done above, that the requirement enshrined in section 23(1)(a) is rationally connected to a legitimate government purpose and does not amount to unfair discrimination, then absent some other problem with the decisions made, they have been correctly made under the relevant empowering provision which in this case is section 23(1)(a).

Section 23(6) of the Security Act

[75] The applicants challenge the approach of the Authority that exercises its discretion in terms of section 23(6) only when it is specifically asked to do so. They submit that the Authority should, in every case in which an applicant does not comply with any of the requirements of section 23(1), consider exemption in terms of section

[56] Primary among them being alleged irrationality and an alleged infringement of equality.

23(6) of its own accord, even when the applicant has not asked it to do so and has not advanced any good cause for exemption.

[76] The submission that the Authority should consider exemption even when the applicant has not advanced good cause for it is misconceived. In terms of section 23(6) of the Security Act, the Authority dispenses with the requirements of sections 23(1) and (2) of the Security Act "on good cause shown". Therefore, if the applicants in this case required exemption in terms of section 23(6), it was incumbent upon them to advance good reasons for it.

[77] The applicants misunderstand the kind of discretionary power conferred on the Authority by section 23(6) of the Security Act. As noted by Professor Yvonne Burns, there is a distinction between the discretion proper and conditions precedent to the exercise of a discretion. A discretion proper is the power to choose between legally valid but different courses of action. The official "has a free choice within limits set by law, and that choice determines the legal consequences of the action."[57]

[78] The conditions precedent are those facts that must be complied with before the discretion may be exercised. They are determined by the legislature. The official has no choice in respect of these conditions.[58] The exercise of a discretionary statutory power by an administrative official therefore, must be linked to compliance with the

[57] Prof Burns *Administrative Law under the 1996 Constitution* 2 ed (Butterworths, Durban 2003) at 115. Compare in regard to judicial discretion, *Trevor B Giddey NO v JC Barnard and Partners* (per O'Regan J), case no CCT65/05, 1 September 2006, as yet unreported at para 19, fn 16 and the authorities cited therein.

[58] Burns id.

conditions precedent. The official must be satisfied that the conditions precedent or jurisdictional facts are present before exercising the discretionary power. In the circumstances of this case, the existence of good cause shown functions as a condition precedent to the exercise of the discretion conferred on the Authority by section 23(6). If good cause is not shown therefore, the Authority cannot invoke its discretion under section 23(6) of the Security Act. What will constitute good cause in any particular case is discussed below.

[79] One of the problems associated with this case is the apparent lack of information and assistance provided by the Authority to refugee applicants in relation to their applications. The applicants submit that, at the absolute least, the respondents could and should have informed the applicants and other refugees wishing to apply for registration that they must submit applications in terms of section 23(6) if they wished to be exempt from the provisions of section 23(1)(a). This expectation is well founded in the light of the extent of refugee participation in this industry at the time of the introduction of the regulatory scheme. Is the provision of this information not an element of procedurally fair administrative action envisaged in section 3 of PAJA?

[80] In fact it is not at all clear how an applicant is required to apply for exemption in terms of section 23(6) if that is what they wish to do. The standard application form makes no mention of section 23(6). Mr Seth Mogapi, Director of the Authority and deponent to the first respondent's answering affidavit in the High Court, says of the application form that:

> "The purpose of such form is not to invite submissions in terms of Section 23(6) of the Act but to determine whether an applicant for registration complies with the standard and general statutory criteria for registration".

There is no evidence of information about applications for exemption in terms of section 23(6) being provided to refugee applicants, nor about the possibility of exemption in terms of section 1(2) of the Security Act.[59]

[81] The Authority has indicated that a supplementary application is needed to invoke section 23(6). In response to an appeal launched by a refugee applicant, Mr Rutimba, the Authority stated that:

> "It may be argued that if an application does not *prima facie* meet the requirements for an application (or any other registration requirements), but is accompanied by a further substantive application – which Appellant did not do – setting out a case in terms of section 23(6) of the PSIRA Act, the Respondent will have no choice but to accept and consider such application in terms of the relevant provisions. For example a refugee submits an application not accompanied by proof of permanent resident status, but also submits a document containing representations intended to indicate that Respondent should act in terms of section 23(6) of the PSIRA Act and grant registration. The deficient application is then accompanied by a further application."

[82] It is noted that the information about a supplementary application for exemption is provided only in response to an appeal launched by an applicant against the withdrawal of registration. It does not appear to be information available to applicants in general, nor to refugees specifically, who are internationally and nationally

[59] See section 1(2) of the Security Act above n 38.

recognised as a vulnerable group in society, with limited resources to secure the protection of their rights.

[83] According to section 195(1)(g) of the Constitution, transparency must be fostered in public administration by providing the public with timely, accessible and accurate information. The least that can be done by the Authority is to furnish the refugee applicants with information regarding the existence of various categories of security activities and information regarding the possibility of exemptions and the procedure for applying for them. Of course, for his/her part, an applicant or his/her legal adviser must also be co-operative, providing the material in the form needed.

[84] At least some of the applicants invoked section 23(6) in their appeals to the Appeal Committee[60] but none of the applicants applied for exemption directly to the Authority. This failure is understandable given the paucity of information emanating from the Authority as to the existence of the possibility of exemption and the procedure for applying for it.

[85] The real issue, which is whether or not there are facts which should have been provided and considerations which should have been taken into account in judging whether "good cause" has been shown within the meaning of section 23(6) of the Security Act, has been overshadowed by the question of at whose instance section 23(6) should be raised. It should be emphasised that section 23(6) expressly

[60] As has been mentioned previously, these applications to the Appeal Committee were unsuccessful.

contemplates that at times the requirements of section 23(1) will not be met by a particular applicant but that nevertheless that applicant may be entitled to be registered as a security service provider. It is not open to the Authority therefore, in refusing to grant exemption in terms of section 23(6), simply to point to the fact that a particular applicant is not a citizen or permanent resident of South Africa. The Authority needs to consider all relevant facts placed before it by the applicant and decide whether those facts amount to "good cause" for the purposes of section 23(6).

[86] The Security Act does not specify the factors which are relevant to determining whether "good cause" exists for purposes of section 23(6). Ordinarily, "good cause" will depend on the particular circumstances of each case. However, it seems clear that important considerations will include: the personal circumstances of the applicant seeking employment in the private security industry; the length of his/her stay in the country as a refugee; the character of the work applied for; whether the applicant has previously worked in a similar or comparable industry and whether he/she has earned the requisite trust in other ways. It appears so that the spectrum of security service providers extends from car guards without weapons to cash-in-transit security guards with weapons. This feature of the industry indicates that the Authority must exercise a reasonable measure of flexibility. This will avoid a blanket exclusion of refugee applicants without properly weighing whether their employment is likely to frustrate the objects of the Security Act. Should the Authority fail to do so, it would be acting in a manner inconsistent with the power given to it by the provisions of section 23(6).

[87] An application for exemption to the Authority is an internal remedy still available to the applicants. It is only fair, now that the applicants are aware of what is expected as regards an application for exemption, and the Authority has the guidance of this judgment at its disposal when considering exemption applications, that they be given an opportunity to so apply. Accordingly, in terms of section 7(2)(a) of PAJA, this Court is not called upon to make any determination on the granting of exemption. This decision is strengthened by the fact that the correctness or otherwise of the particular administrative decisions was not pronounced upon by the High Court. It should be added however, that in considering the applications, the Authority is obliged to do so in the light of the considerations relevant to "good cause" set out above.

[88] Since preparing this judgment, I have had the opportunity to read the thoughtful and eloquent judgment of my colleague Sachs J. I would like to express my support for the spirit and tenor of his judgment.

Costs

[89] The applicants are indigent people in a particularly vulnerable position in society. While the application for a declaratory order that section 23(1)(a) is unconstitutional was not successful, they have raised important constitutional issues of practical relevance to the functioning of an industry which is becoming increasingly important in South Africa. The applicants had to resort to constitutional litigation to clarify practical aspects of the operation of the regulatory scheme due to the lack of information and guidance on the part of the respondents. It is thus appropriate to

order the respondents to bear the costs of the applicants including the costs attendant on the employment of two counsel in the High Court and this Court.

Order

[90] The following order is therefore made:

1. Leave to appeal is granted.
2. The challenge to the constitutionality of section 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001 is dismissed.
3. The second to thirteenth applicants be given an opportunity to apply for exemption in terms of section 23(6) of the Private Security Industry Regulation Act 56 of 2001.
4. The respondents must ensure that all applicants and potential applicants for exemption as security service providers are made aware of the nature of the information that must be furnished in their applications for exemption in terms of section 23(6) of the Private Security Industry Regulation Act 56 of 2001.
5. All applications for exemption referred to in paragraphs 3 and 4 of this order must be considered in the light of this judgment.
6. The respondents are ordered to pay the applicants' costs jointly and severally, the one paying the others to be absolved, including the costs of two counsel in the High Court and this Court.

Moseneke DCJ, Madala J, Nkabinde J, Sachs J and Yacoob J concur in the judgment of Kondile AJ.

MOKGORO J and O'REGAN J:

[91] We have had the pleasure of reading the judgment prepared in this matter by Kondile AJ. We have one substantive disagreement with his judgment and that relates to whether section 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001 (the Act) is inconsistent with section 9(3) of the Constitution. Kondile AJ concludes it is not. We cannot agree.

[92] Section 23(1)(a) provides that:

> "Any natural person applying for registration in terms of section 21(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".

The further qualifications for registration contained in section 23(1) include that the applicant must be at least 18 years old,[1] must have completed the prescribed training

[1] Section 23(1)(b) of the Act.

requirements,[1] must not have been found guilty of any offence[2] specified in the Schedule to the Act within a period of ten years of the application,[3] must submit a prescribed clearance certificate if the applicant has formerly been a member of any official military, security or police force in South Africa or elsewhere,[4] and be mentally sound.[5] It is clear from this list that an applicant must satisfy the Private Security Industry Regulatory Authority (the Authority) that he or she complies with these requirements. Of particular note is the requirement that an applicant must show that he or she has not been convicted of a criminal offence in the previous ten years. In the case of those applicants who have not been resident in South Africa for the last ten years, the regulations promulgated under the Act by the Minister for Safety and Security, provide for an applicant to lodge an "original police or other official clearance certificate on his or her criminal record status from every country outside South Africa where he or she has been resident within the relevant period".[6]

[93] A "security service provider" is defined in the Act as a person who renders a security service to another for reward.[7] A "security service" is also widely defined, to mean –

[1] Section 23(1)(c) of the Act.

[2] The offences listed in the Schedule to the Act include high treason, sedition, public violence, arson, malicious damage to property, rape, murder, robbery, culpable homicide involving the use of a weapon, kidnapping, assault with intention to cause serious bodily harm, and a variety of other offences.

[3] Section 23(1)(d) of the Act.

[4] Section 23(1)(f) of the Act.

[5] Section 23(1)(g) of the Act.

[6] Regulation 2(6) of Regulations made under the Private Security Industry Regulation Act, 56 of 2001 dated 14 February 2002 published in GN 23120, Regulation Gazette 7279.

[7] Section 1 of the Act provides that a security service provider means "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."

"one or more of the following services or activities:

(a) protecting or safeguarding a person or property in any manner;

(b) giving advice on the protection or safeguarding of a person or property, on any other type of security service as defined in this section, or on the use of security equipment;

(c) providing a reactive or response service in connection with the safeguarding of a person or property in any manner;

(d) providing a service aimed at ensuring order and safety on the premises used for sporting, recreational, entertainment or similar purposes;

(e) manufacturing, importing, distributing or advertising of monitoring devices contemplated in section 1 of the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992);

(f) performing the functions of a private investigator;

(g) providing security training or instruction to a security service provider or prospective security service provider;

(h) installing, servicing or repairing security equipment;

(i) monitoring signals or transmissions from electronic security equipment;

(j) performing the functions of a locksmith;

(k) making a person or the services of a person available, whether directly or indirectly, for the rendering of any service referred to in paragraphs (*a*) to (*j*) and (*l*), to another person;

(l) managing, controlling or supervising the rendering of any of the services referred to in paragraphs (*a*) to (*j*);

(m) creating the impression, in any manner, that one or more of the services in paragraphs (*a*) to (*l*) are rendered".

[94] It can be seen from this definition that a wide range of security services are included. The definition embraces unarmed people who guard parked cars as well as armed bodyguards. The Act prohibits the provision of any of these services by any person who is not registered as a security service provider in terms of the Act.[8] It does not appear expressly from the terms of the Act that the Authority may register a

[8] Section 20(1)(a) of the Act.

security service provider for a narrow range of security duties, for example, as an unarmed security service provider. In our view, it would be practical if the Authority were able to register security service providers for specific forms of security service. It is not necessary to decide in this case whether the Act does permit this or not.

[95] An application to be registered as a security service provider is made to the Authority. The Authority may refuse the registration of an applicant if, at the time of the consideration of the application, the applicant is under investigation in respect of an offence included in the schedule[9] or even if the applicant was convicted of such an offence more than ten years prior to the application.[10] The Authority may, despite the provisions of section 23(1) and (2), on good cause shown and on grounds not in conflict with the purposes of the Act, register a person as a security service provider.[11] In our view, Kondile AJ is correct when he concludes that section 23(6) must be read to mean that a person who does not comply with all of the provisions of section 23(1) and (2) may nevertheless be registered if good cause is shown for such registration.[12] As Kondile AJ therefore holds, the Authority may not simply rely on non-compliance with a requirement under section 23(1) or (2) when reaching its conclusion that "good cause" has not been shown for the purposes of section 23(6).

[9] Section 23(4)(a) of the Act.

[10] Section 23(4)(b) of the Act.

[11] Section 23(6) of the Act provides 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."

[12] Kondile AJ at paras 85 - 86.

[96] If an application is refused by the Authority, the unsuccessful applicant may appeal to an appeal committee within 60 days of receiving notice that the application has been refused.[13] The appeal committee is independent of the Authority and the members of the appeal committee may have no interest in the private security industry.[14] Eight of the applicants in the present proceedings lodged appeals against the decisions of the Authority, three in respect of the withdrawal of their registration as security service providers,[15] and five in respect of the refusal to register them as security service providers.[16] All these appeals were unsuccessful.

[97] The simple question is whether section 23(1)(a), in excluding recognised refugees from being registered as security service providers, constitutes unfair discrimination within the meaning of section 9(3) of the Constitution.[17]

[98] Before turning to consider the status of refugees, it is important to note that the differentiation drawn in section 23(1)(a) is between citizens and permanent residents on the one hand and all foreign nationals on the other. The only issue that arises in this case, however, is whether the provision to the extent it excludes "refugees" from its scope is unconstitutional. The constitutionality of the exclusion of all other foreign nationals by section 23(1)(a) does not arise for decision in this case. This group

[13] Section 30(1)(a) of the Act.

[14] Section 30(3) of the Act.

[15] Second, third and fourth applicants.

[16] Seventh, eighth, ninth, tenth and eleventh applicants.

[17] Section 9(3) provides that:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

includes foreign nationals who have rights to reside in South Africa; that is foreign nationals who are in South Africa on temporary work permits or study permits or even tourist visas, and foreign nationals who are in the country unlawfully.

[99] Refugees who have been granted asylum are a special category of foreign nationals. They are more closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only. Permanent residents have a right to reside in South Africa and enjoy "all the rights, privileges, duties and obligations" of citizens save for those which a law or the Constitution explicitly ascribes to citizenship.[18] Recognised refugees also have a right to remain in South Africa indefinitely in accordance with the provisions of the Refugees Act[19] so their position is closer to that of permanent residents than it is to foreign nationals who have only a temporary right to be in South Africa or foreign nationals who have no right to be here at all. To understand the special position of refugees, it is important to understand how refugee status is conferred in our law, as well as South Africa's international obligations in respect of refugees.

[18] Section 25(1) of the Immigration Act 13 of 2002 provides that:

> "The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship."

See *also Larbi-Odam v MEC for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

[19] Section 27(b) of the Refugees Act 130 of 1998, cited below at para 103.

[100] Refugee status may be conferred upon a person in terms of the Refugees Act. Section 3 of that Act provides that a person will qualify for refugee status if that person –

> "(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
> (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere.". [20]

[101] A reading of these provisions gives some understanding of the predicament in which refugees generally find themselves. Refugees have had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there. Often refugees will have left their homes in haste and find themselves precariously in our country without family or friends, and without any resources to sustain themselves.

[20] The text of subsection (a) is based broadly on the provisions of article 1A(2) of the United Nations Geneva Convention Relating to the Status of Refugees (1951) (the UN Convention); and the text of subsection (b) is based broadly on the provisions of article 1(2) of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention). The successor organisation to the OAU is the African Union. To avoid confusion we refer to the Convention as the OAU Convention.

[102] Not every person who flees their home in the circumstances referred to in section 3 of the Refugees Act will obtain refugee status in South Africa. A prospective refugee needs to apply for refugee status. People will be excluded from refugee status if they have been guilty of serious crimes or war crimes. Section 4 of the Refugees Act provides –

> "(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she –
>
> (a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
>
> (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or
>
> (c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or
>
> (d) enjoys the protection of any other country in which he or she has taken residence."[21]

The first step in the process is to make an application for an asylum-seeker permit.[22] Thereafter, an applicant applies for asylum. Once a person has satisfied the authorities that he or she qualifies for refugee status, asylum will be granted, and he or she is then deemed to be a refugee for the purposes of the Refugees Act.[23]

[103] A recognised refugee has a range of rights. These rights are to be found in section 27 of the Refugees Act but many of them arise from the obligations South

[21] This provision is broadly based on article 1(5) of the OAU Convention.

[22] See chapter 3 of the Refugees Act.

[23] See definition of "refugee" in section 1 of the Refugees Act.

Africa has undertaken in terms of international law. Section 27 provides that a refugee –

> "(a) is entitled to a formal written recognition of refugee status in the prescribed form;
> (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;
> (c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;
> (d) is entitled to an identity document referred to in section 30;
> (e) is entitled to a South African travel document on application as contemplated in section 31;
> (f) is entitled to seek employment; and
> (g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time."

[104] As many of these rights arise from international law, they need to be understood in the light of our international obligations arising under the Refugees Convention and the 1967 Protocol relating to the Status of Refugees.[24] The long title to the Refugees Act acknowledges that the purpose of the Act is to –

> ". . . give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees. . . ."

And the Preamble to the Act provides that –

[24] The 1951 Convention Relating to the Status of Refugees. South Africa acceded to this Convention on 12 January 1996. The 1967 Protocol Relating to the Status of Refugees was ratified on the same day. It acceded to the OAU Convention on 15 December 1995.

> "Whereas the Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law."

[105] The circumstances that qualify an applicant for refugee status in section 3 of the Act are drawn from the provisions of the 1951 UN Convention and the OAU Convention.[25] It is important to note that political events on our continent have resulted in many people becoming refugees. South Africa has played its own tragic role in this history. Many South Africans fled South Africa during the apartheid era to avoid persecution at home. They were welcomed warmly and given support and sustenance by countries all over our continent and elsewhere. Africa's special refugee problem was recognised in the late 1960s by the Organisation of African Unity which led to the adoption of the OAU Convention regulating refugees.[26]

[106] The rights of refugees provided for in section 27 of the Refugees Act are based on the provisions of the UN Convention and need to be understood in terms of that Convention. Where there is any doubt as to the meaning of these provisions, preference should be given to a meaning which is consistent with our international obligations, for section 233 of our Constitution provides that –

[25] Id.

[26] See note 20 above

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

In addition, the Constitution enjoins us to consider international law when interpreting the rights in the Bill of Rights.[27] Our international law obligations are therefore relevant to the interpretation both of the legislation under consideration in this case, and of interpreting section 9(3) of the Constitution.

[107] One of the most important obligations of a state in relation to refugees relates to the refugees' right to work. This is of particular importance in South Africa as no form of grant or social assistance is available to refugees and a refugee will generally have no other way of providing for the basic necessities of life unless he or she is able to find work. Article 17 of the 1951 UN Convention provides that –

> "(1) The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.
> (2) In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:
>
> (a) He [or she] has completed three years' residence in the country;
>
> (b) He [or she] has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his [or her] spouse;

[27] Section 39(1)(b) of the Constitution provides that:
"When interpreting the Bill of Rights, a court, tribunal or forum –
. . . .
(b) must consider international law".

> (c) He [or she] has one or more children possessing the nationality of the country of residence."

[108] Article 17 is not easy to interpret. Subsection (1) provides that refugees must be accorded "the most favourable treatment accorded to nationals of a foreign country in the same circumstances" as refugees. One of the difficulties with this formulation is that, whatever the situation may be in other countries, there are no nationals of a foreign country in South Africa who are identically situated to refugees. The status of being a refugee is unique in our law and not identical to any of the other categories of foreign national. Yet if article 17(1) were to have application only where the situation of refugees is identical to the situation of other foreign nationals in South Africa, the effect would be that article 17(1) would accord little or no protection to the right to work for recognised refugees in South Africa, as there would be no comparator group to which refugees could compare themselves. Such an approach would be inconsistent with the spirit and purport of the international convention which clearly seeks to confer, at the very least, a limited right to work on refugees.

[109] In our view, article 17(1) needs to be given a meaning that carries with it some substantive protection for refugees. To achieve this purpose, the article should be interpreted to mean that refugees should be given "the most favourable treatment" accorded to those foreign nationals in South Africa whose status is most similar to "refugees". In our view, recognised refugees are most similarly situated to permanent residents. All other foreign nationals who are lawfully in the country only have temporary rights of residence, unlike recognised refugees who according to section

27(b) of the Refugees Act[28] have a right to remain indefinitely in the Republic. Moreover, like permanent residents, refugees are entitled to seek employment in terms of section 27(f) of the Act.[29] Ordinarily, in our view, therefore, the obligation imposed by article 17(1) of the UN Convention would require recognised refugees to be afforded the same work opportunities as permanent residents.

[110] Subsection (2) of article 17 relates to restrictions on the employment of refugees where the purpose of that restriction is "for the protection of the national labour market". The Convention provides that such protection may not operate to restrict refugees who have been in South Africa for three years or more, or who are married to South African citizens, or who have children who are South African citizens. Section 23(1)(a) contains no such qualification. Counsel for the respondents expressly disavowed that the purpose of section 23(1)(a) is to protect the labour market for South African citizens. If that is so, and we assume it to be so for the purposes of this argument, article 17(2) would have no application to the facts of this case.

[111] One last issue needs to be considered before we turn to the question of unfair discrimination. Section 22 of the Constitution provides 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."

[28] The text of section 27 is cited in paragraph 103 above.

[29] Id.

The applicants do not seek to rely on this provision. Nevertheless, this Court has held that the rights in the Bill of Rights must be interpreted in a manner which recognises that they are mutually reinforcing and inter-dependent.[30] The question is what effect, if any, section 22 has on the applicants' claim in this case. Section 23(1)(a) does not limit the right to work as a security service provider to South African citizens only, it permits permanent residents to work as security service providers. Whether it would have been open to the applicants to challenge section 23(1)(a) on the basis of unfair discrimination, were its provisions to have been limited to citizens, is not an issue we need to decide here. It is clear from section 27(b) of the Refugees Act that recognised refugees are protected by the Bill of Rights which includes the entitlement not to be the subject of unfair discrimination on the grounds of their refugee status. The discrimination in this case therefore does not involve the reservation of certain occupations for South African citizens only. In our view section 22 has no application to the applicants' claim.

[112] It is against this background that the question whether section 23(1)(a) constitutes unfair discrimination must be considered. The first question is whether discrimination against the group of recognised refugees is discrimination on a ground unspecified in section 9(3), but nevertheless falling within the scope of the constitutional prohibition of unfair discrimination contained in that subsection. In *Harksen v Lane NO and Others*, this Court held that:

[30] See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 23 and 83; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 40 and *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at para 274.

> "There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."[31]

[113] The question is thus whether discriminating against recognised refugees is likely to infringe their human dignity or impair their rights in some comparatively serious manner.[32] In our view, discriminating against refugees as a group may well infringe their dignity or impair their rights in a comparatively serious manner. Recognised refugees in South Africa are, by definition, a group of people who have been found by the Standing Committee for Refugee Affairs to have established that they qualify for refugee status as defined in section 3 of the Act, and not to have been excluded from that status under any of the statutory exclusions. To be afforded refugee status a refugee has to establish that they have had to flee their homeland because of a well-founded fear of persecution or owing to the fact that external aggression or other events have so disrupted their lives that they need to flee. By definition, too, refugees are not in their home country and are therefore deprived of the security that family and friends can ordinarily provide. Having fled their homes, they are in no position to return to their own countries while the reason for their flight persists. In addition, should they be found guilty of committing a serious offence,

[31] 1998 (1) SA 300 (CC) at para 47; 1997 (11) BCLR 1489 (CC) at para 46, relying on *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31. Although both *Harksen* and *Prinsloo* were dealing with the interim Constitution, this Court has held that there are no material differences between section 8 of the interim Constitution and section 9 of the 1996 Constitution for the purposes of this analysis. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 15-19.

[32] Id.

they may be at risk of losing their refugee status and being expelled.[33] In our view, therefore, discriminating against refugees involves discriminating against a vulnerable group of people such that discrimination against them will often impair their dignity or their rights in a serious manner.

[114] We are fortified in this conclusion by the provisions of article 17(1) of the UN Convention which requires recognised refugees to be afforded the most favourable treatment in relation to the right to work as other similarly situated foreign nationals. We have concluded that the foreign nationals most similarly situated to refugees in South Africa are permanent residents. Distinguishing between permanent residents and recognised refugees, as section 23(1)(a) does, is a form of discrimination contemplated by section 9(3) of the Constitution. Construing section 9(3) in this way

[33] Article 33 of the UN Convention provides that:

> "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Section 28 of the Refugees Act provides that:

> "(1) Subject to section 2, a refugee may be removed from the Republic on grounds of national security or public order.
> (2) A removal under subsection (1) may only be ordered by the Minister with due regard for the rights set out in section 33 of the Constitution and the rights of the refugee in terms of international law.
> (3) If an order is made under this section for the removal from the Republic of a refugee, any dependant of such refugee who has not been granted asylum, may be included in such an order and removed from the Republic if such dependant has been afforded a reasonable opportunity to apply for asylum but has failed to do so or if his or her application for asylum has been rejected.
> (4) Any refugee ordered to be removed under this section may be detained pending his or her removal from the Republic.
> (5) Any order made under this section must afford reasonable time to the refugee concerned to obtain approval from any country of his or her own choice, for his or her removal to that country."

Section 34 of the Refugees Act provides that "[a] refugee must abide by the laws of the Republic."

gives proper weight to our international law obligations in the light of the constitutional injunction to do so.

[115] The next question that arises is whether in precluding recognised refugees from being registered as security service providers, section 23(1)(a) of the Act discriminates unfairly against them. In answering this question, the approach established in *Harksen's* case must be followed.[34] Three factors are of particular importance: the position of the complainants in society; the nature of section 23(1)(a) and its purpose; and the effect of section 23(1)(a) on refugees. In relation to the second consideration, the nature of the discriminatory provision and its purpose, Goldstone J reasoned as follows in *Harksen*:

> "If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question."[35]

[116] Before we turn to an analysis of these three factors in the context of the present case, it is useful to be reminded that the purpose of the equality provision in our Constitution is as follows:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It

[34] See note 31 above at para 52 SALR; at para 51 BCLR.

[35] Id at para 52(b) SALR; at para 51(b) BCLR.

> seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[36]

[117] We consider now the three factors identified in *Harksen*. The group discriminated against in this case is refugees. We have already found that although refugee status is not a ground listed in section 9(3) of the Constitution, refugees as a group are by definition vulnerable. Discrimination on the ground of refugee status thus may well violate the dignity of refugees or impair their rights in a serious manner. Excluding them from work opportunities as private security service providers is a form of discrimination that may exacerbate the situation in which refugees find themselves and be harmful to them as a group.

[118] The next question that arises requires us to identify the purpose of the exclusion in section 23(1)(a). Counsel for the Minister expressly stated that the purpose of section 23(1)(a) was to ensure that those who enter the security service industry have been properly vetted to ensure that they are trustworthy and reliable security service providers. He expressly disavowed reliance on any purpose that would seek to protect the labour market for South Africans. Kondile AJ found that the purpose of section 23(1)(a) was to ensure that security services providers are trustworthy. While the purpose is worthy, we cannot agree that giving effect to the purpose through section 23(1)(a) is legitimate as it appears to be based on an illegitimate silent premise. The premise may be that foreign nationals, including refugees, are as a group inherently

[36] *President of the Republic of South Africa and Another v* Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41.

less trustworthy than South Africans. In our view, such a premise is not supported by any evidence placed before the Court and would amount to unfair and damaging stereotyping of foreign nationals. For the rest, we agree with Kondile AJ that ensuring that security service providers in general are trustworthy and reliable is a legitimate government purpose. We are not persuaded however that this purpose is promoted by excluding all refugees from being registered as security service providers. In this regard, it is important to note that the regulations specifically provide for the provision of police clearance certificates or other official certificates from countries other than South Africa where applicants have resided in the last ten years.

[119] Of greater concern is that the purpose identified by counsel seems to be amply covered by the other provisions of section 23 which achieve this purpose more appropriately and without discriminating against refugees. Section 23(1)(d) [37] requires applicants for registration not to have been found guilty of an offence listed in the first schedule to the Act within ten years of the application for registration. This requirement needs to be read in the light of regulation 2 which provides for the furnishing of police clearance certificates by applicants. There may well be refugees who can satisfy the Authority that they have not been found guilty of an offence by producing the necessary clearance certificates and so comply with section 23(1)(d); yet they would still automatically be excluded by the provisions of section 23(1)(a). Although the purpose relied upon by the respondents is worthy, it does not appear that the blanket prohibition on refugees is tailored appropriately to achieve that purpose.

[37] See note 3 above.

By excluding all refugees whether or not they can comply with the requirements of section 23(1)(d), the clear message underlying section 23(1)(a) is that whether refugees can prove their trustworthiness or not, they may not be employed as security service providers.

[120] It is true that the interpretation of section 23(6) adopted by Kondile AJ does ameliorate the effect of the discrimination caused by section 23(1)(a). In our view, however, it does not save section 23(1)(a) from inconsistency with section 9(3) of the Constitution. A refugee who complies with the requirements of section 23(1)(b) – (m) of the Act[38] should be entitled to registration without more. There seems to be no reason, or none identified by the respondents, which would require refugees to have to establish further good cause within the meaning of section 23(6). In our view, correct as Kondile AJ's interpretation may be, it is not sufficient to remove the discriminatory impact caused by the direct effect of section 23(1)(a).

[121] On the other hand, the interpretation adopted by Kondile AJ will be of great assistance to refugees who are not able to produce the necessary documentation required by the Act and the regulations. There will be many refugees who experience this impediment. Article 25 of the UN Convention appreciates this and provides that refugees who cannot obtain assistance or documentation from their own countries should be assisted by the countries in which they have sought refuge or by

[38] See para 92 above.

international organisations.[39] Accordingly a refugee who cannot produce the documents necessary for registration but who can show good cause for registration should nevertheless be registered by the Authority in terms of section 23(6).

[122] We turn now to consider the impact of section 23(1)(a). Excluding refugees from the right to work as private security providers simply because they are refugees will inevitably foster a climate of xenophobia which will be harmful to refugees and inconsistent with the overall vision of our Constitution. As a group that is by definition vulnerable, the impact of discrimination of this sort can be damaging in a significant way. In reaching this conclusion it is important to bear in mind that it is not only the social stigma which may result from such discrimination, but also the material impact that it may have on refugees. As noted above, refugees will ordinarily be reliant on finding work to provide themselves with the means to maintain themselves and their families. It is true, as Kondile AJ points out, that refugees are permitted to work in other industries in South Africa,[40] but nevertheless there is evidence to suggest that the relatively low-skilled work available in the private

[39] Article 25 of the UN Convention provides that:

> "1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he [or she] cannot have recourse, the Contracting States in whose territory he [or she] is residing shall arrange that such assistance be afforded to him [or her] by their own authorities or by an international authority.
> 2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.
> 3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.
> 4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services rendered herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.
> 5. The provisions of this article shall be without prejudice to articles 27 and 28."

[40] Kondile AJ's judgment at para 48. Section 27(f) of Refugees Act provides that "a refugee is entitled to seek employment."

security industry is a significant source of employment for many refugees.[41] Their exclusion from this form of employment is therefore not negligible and may well have a severe impact on the ability of refugees to earn a livelihood in South Africa.

[123] In summary, refugees are a group vulnerable to discrimination. The discrimination in this case is caused by a provision whose purpose is both legitimate and laudable, but whose terms are not narrowly tailored to that purpose. Indeed, there are provisions in the Act other than section 23(1)(a) which could meet that purpose as efficaciously. The potential discriminatory impact of section 23(1)(a) in excluding refugees from working as security service providers, both in terms of its material or financial impact and its social stigma are significant. Finally, South Africa's international obligations in terms of article 17 of the UN Convention require us to afford recognised refugees the most favourable treatment accorded to foreign nationals. Section 23(1)(a) does not do that and in reaching the conclusion that it constitutes unfair discrimination, we take into account South Africa's obligations in terms of article 17(1). We conclude in the light of the foregoing that section 23(1)(a) is unfairly discriminatory.

[124] The last issue that needs to be considered is whether the limitation of section 23(1)(a) constitutes a justifiable limitation of section 9(3) within the meaning of section 36(1) of the Constitution.[42] For it to be so, we would have to be satisfied that

[41] According to research conducted by the Community Agency for Social Enquiry (CASE) from 2001 to 2003 (the National Refugee Baseline Survey 2003) which formed part of the record, the occupations of security guard and car watchers are the second most sought after amongst all employed asylum seekers and refugees.

[42] Section 36(1) of the Constitution provides as follows:

the purpose and effect of section 23(1)(a) is proportionate to the infringement of section 9(3). We cannot accept that it is. We accept that the purpose of section 23 is to ensure that trustworthy and reliable people are granted permission to work as security service providers. As explained above, we are not persuaded that this purpose is significantly furthered by the blanket prohibition on refugees (if it is furthered at all) and accordingly can give it little weight in the proportionality analysis. The infringement of section 9(3) that section 23(1)(a) causes, is significant. Accordingly we conclude that the limitation of section 9(3) caused by section 23(1)(a) is not justifiable within the meaning of section 36(1) of the Constitution.

[125] In the result, we would propose an order declaring section 23(1)(a) to be inconsistent with section 9(3) of the Constitution to the extent that it omits after the words "permanent resident status" the words "or refugee status in terms of the Refugees Act 130 of 1998".

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

Langa CJ and Van der Westhuizen J concur in the judgment of Mokgoro J and O'Regan J.

SACHS J:

[126] At the heart of this case lies tension between the legal status accorded by our law to refugees and certain objectives sought to be achieved by the law governing private security. Thus, while section 27(f) of the Refugees Act[1] declares in an unqualified way that accredited refugees may seek employment,[2] section 23(1) of the Private Security Industry Regulation Act[3] (Private Security Act) states broadly that

[1] Act 130 of 1998.

[2] It states that:

> "A refugee–
> a) is entitled to a formal written recognition of refugee status in the prescribed form;
> b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;
> c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;
> d) is entitled to an identity document referred to in section 30;
> e) is entitled to a South African travel document on application as contemplated in section 31;
> f) is entitled to seek employment; and
> g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time." (Emphasis added)

[3] Act 56 of 2001.

non-nationals who are not permanent residents cannot enter the security industry.[4] In my view, the impasse is not intractable. Officials may use the powers of exemption granted to them by section 23(6) of the Private Security Act[5] in a flexible and expansive way to ensure that refugees are kept out of the industry only when objectively speaking it is fair to do so. By this means adequate weight can be given to the status refugees enjoy, without the legitimate legislative concerns about the private security industry being ignored.[6]

[127] The starting point for the officials is that when determining what would constitute good cause for granting an exemption under section 23(6), they are not acting as mere purveyors of administrative largesse, nor are they simply called upon to manifest an appropriate degree of compassion for a vulnerable group that has suffered considerable trauma. They are responding to claims made under international and domestic law, and their discretion is bound by the need to take account of corresponding legal obligations. These obligations strongly favour acknowledging the

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[4] Section 23(1) provides:

> "Any natural person applying for registration in terms of section 21(1), may be registered as a security service provider if the applicant is a fit and proper person to render security service, and–
>
> (a) is a citizen of or has permanent resident status in South Africa".

[5] Section 23(6) reads:

> "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."

[6] The preamble to the Security Act points to the need to:

> ". . . achieve and maintain a trustworthy and legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law, and is capable of ensuring that there is greater safety and security in the country".

Section 1 defines "security service" as meaning one or more of the following services or activities:

> " . . . .
>
> c) providing a reactive or response service in connection with the safeguarding of a person or property in any manner;
>
> d) providing a service aimed at ensuring order and safety on the premises used for sporting, recreational, entertainment or similar purposes".

right of refugees to seek employment in all spheres of economic activity. Only clear and specific legislatively required reasons would authorise any avenues being closed to them.

[128] In this regard the mere fact that they are non-nationals, which is built into their status as refugees, could not on its own render it fair to keep them out. If there were no escape from the peremptory terms of section 23(1), I would agree with Mokgoro J and O'Regan J that the provision is overbroad and that words should be read in to entitle refugees to enter the security industry in the same way as permanent residents may do. I believe, however, that there are substantive grounds of an objective character that are pertinent to the nature of the activity itself, that could render it fair to exclude them.

[129] Thus, the absence of proof of a clean record, even though not attributable to the fault of the applicants, could be highly relevant in regard to people who might be called upon to guard key installations. At the same time the absence of proof could have relatively slight significance in respect of less sensitive tasks such as looking after parked cars or keeping order at a sports ground. After five years, the applicant for unqualified access to the security industry would be able to show a clean record for a considerable period, and, as a permanent resident, no longer be excluded from engaging in the more sensitive areas of security work. In these circumstances a requirement of a five year period to prove reliability for the most sensitive security tasks would not impose a bar that discriminated unfairly.

[130] Accordingly, while I accept the basic thrust of the eloquent and carefully articulated judgment by Mokgoro J and O'Regan J, I do not agree that section 23(1) is constitutionally unsustainable. If it is applied properly in conjunction with section 23(6), it need not have an overbroad effect. If the two sections are read together to avoid incompatibility with the equality provisions of the Constitution, the problem ceases to be one of interpretation and becomes one of application.

[131] Thus, I agree with Kondile AJ that section 23(1) of the Private Security Act is not unconstitutional. In my view, the section can be saved from unconstitutionality if the powers granted under section 23(6) are used in a way that acknowledges and gives effective expression to the special status enjoyed by accredited refugees. I agree too with his finding that section 23(6) has not been properly applied in the present matter. Indeed, by tending to treat the applicants as being indistinguishable from the general class of non-nationals, the officials have hopelessly tilted the balance against them. The blanket negative approach adopted, reversing the flexibility formerly applied, is in flagrant disregard of the status granted to refugees by international and domestic law, an issue I will deal with below. I therefore support the order Kondile AJ makes. The applicants may reapply and seek to establish good cause as required by section 23(6). Their applications must then be considered by the relevant officials on the basis of properly prepared papers and in the light of the principles enunciated by this Court.

[132] In this respect I wish to supplement the factors which Kondile AJ identifies as being relevant to a showing of good cause for exemption. In my view, special emphasis has to be given to four considerations, all of which bear on the status given by law to refugees. Taken together, they strongly favour the notion that being an accredited refugee in itself goes a long way to establishing good cause for exemption.

[133] The first factor to take into account is the set of obligations undertaken by South Africa in terms of international law. The second is the significance of the provisions of the Refugees Act. The third is the historical and social setting in which the rights and entitlements of refugees have to be determined. And the fourth is the constitutionally-mandated obligation to counteract xenophobia.

Obligations under international law

[134] After achieving democracy in 1994, South Africa for the first time adhered to a number of international instruments dealing with refugees.[7] Refugees are legally entitled to a standard of treatment in host countries that encompasses both fundamental human rights and refugee-specific rights. The former are enshrined in international human rights law;[8] for the latter, the 1951 UN Convention Relating to

[7] It is commonly assumed that South Africa only began receiving refugees in significant numbers from 1994. This is a fallacy. The history of refugee movement into the country can be tracked back to World War I and World War II. At that time, the country had not acceded to any international conventions due to political demands. Indeed the dismantling of the apartheid regime was accompanied by a new wave of immigration – asylum seekers mainly from African countries. The difference between the past and the present flows of asylum seekers is that South Africa is now a signatory to international instruments that bind the government to certain obligations. See Majodina "Introduction: The Challenges of Forced Migration in Southern Africa" in Majodina (ed) *The Challenge of Forced Migration in Southern Africa* (Africa Institute of South Africa, Pretoria 2001) at viii.

[8] These include (but are not limited to) the rights protected under: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on

the Status of Refugees (the Convention), which predates most human rights treaties, remains the main instrument and contains a relatively detailed enumeration of rights. In some cases the Convention requires state parties to extend to refugees the same standard of treatment as for nationals; in others it obliges states to accord refugees as favourable a treatment as possible, and not less favourable than that accorded to non-nationals generally in the same circumstances. In devising these two main yardsticks, those who drafted the Convention clearly sought to ensure that refugees would not end up as pariahs at the margins of host societies.[9]

[135] Thus the Convention obliges state parties to issue refugees with identity papers and with documentation required for international travel (the Convention travel document), prerequisites for many people to the rebuilding of their social lives and re-establishing means of livelihood. It forbids discrimination on the grounds of race, religion, or country of origin. And, of special importance, it protects refugees from being returned to the place where their lives and freedoms would be at risk (the principle of *non-refoulement*). Taken together, these obligations constitute a coherent and enforceable legal regime for refugees that are markedly more favourable than the discretionary regime generally applicable to immigrants.

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the Rights of the Child (CRC) and the African Charter on Human and People's Rights. It should be noted that most of these treaties establish mechanisms for reporting and comments on the extent to which states fulfill their treaty obligations. In the case of the Refugee Convention, which is dealt with below, no such treaty body exists, which makes enforcement through national legislation particularly important.

[9] Verdirame and Harrell-Bond with a foreword by Justice Albie Sachs *Rights in Exile*: *Janus-Faced Humanitarianism* (Berghahn Books, New York 2005) at xiv.

[136] The rationale for this regime and its binding element comes from the very circumstances that caused the refugees to abandon their homeland in the first place. In general terms, international refugee law, and the asylum built upon that regime, are designed to extend protection to refugees in an international context so as to substitute the national protection they have lost and cannot claim at home.

> "They have been forced out of their country as a result of persecution or danger, and now must receive legal protection and the opportunity to realise the most fulsome life possible in a foreign country.
>
> . . . .
>
> In recreating as closely as possible the national protection lost or not claimable by a refugee, the refugee regime seeks to put the refugee in a situation as close as possible to that of the national of the country of asylum."[10]

The positive obligation to admit refugees, provide them with asylum and treat them in accordance with specific standards, thus contrasts sharply with the absence of a mandatory obligation to admit foreigners to the state's territory. It would accordingly be inappropriate for the state to act towards refugees in a manner that is consonant with the general discretionary provisions of the regime constructed upon immigration, security, and other municipal priorities, while ignoring the specific obligations that flow from the refugee regime.[11]

[10] Okoth-Obbo "The Refugee Experience and Policy Issues in Southern Africa" in Majodina (ed) above n 7 at 47.

[11] Id at 48.

[137] It is important therefore that the progressive legal construct for refugees not be dominated by and held hostage to priorities drawn from immigration control or protection of the local labour force. As Okoth-Obbo has pointed out:[12]

> ". . . the refugee protection system has, and should have, a validity all of its own. It should not be viewed as only the balance from requirements established at the level of immigration control and national penal and criminal law enforcement. It is possible to secure and even expand refugee space without this being seen as a constriction of the ability of states to pursue legitimate influx control and law and order objectives."

[138] The Convention devotes considerable attention to the question directly raised in the present matter, namely, the obligation to respect the right of a refugee to engage in wage-earning employment. This obligation requires acknowledgement of the right to receive at least the most favourable treatment accorded to nationals of a foreign country in the same circumstances;[13] and in any case not to be subjected to restrictive measures for the protection of the national labour market after three years of residence.[14] Furthermore, the Contracting States are expressly required to give sympathetic consideration to assimilating the rights of all refugees with regard to

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[12] Id at 54-55.

[13] Article 17(1) of the Convention. Verdirame and Harrell-Bond write that the right to work is defined in the ICESCR as the right "of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (art 6). To achieve the full realisation of his right, states are also required to provide "technical and vocational guidance and training programmes" and to adopt "policies and techniques to achieve steady economic, social, and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual." This does not mean that individuals have an automatic right to paid employment, but, at the very least, that they should not be denied the opportunity to seek it. See above n 9 at 215. Treatment equal to the most favourable treatment given to non-nationals is a minimum requirement, the absolute base-line. The objective envisaged by the Convention is, where possible, something more. It is that Contracting States use their best endeavours consistently with their laws and constitutions to secure the settlement and the enjoyment of productive and dignified lives of refugees in their territory.

[14] Article 17(2)(a) of the Convention.

[15] These provisions should not be read in a begrudging, technical way so as to limit work opportunities and to guarantee only the bare minimum. On the contrary, they should be viewed conjunctively and purposively as being designed to encourage self-reliance on the part of refugees and to promote the possibility of their being able to lead valuable, dignified and independent lives; the quality of asylum, like the quality of mercy, should not be strained.

Refugees Act[16]

[139] The preamble to the Refugees Act notes that:

> ". . . the Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law."

Section 6 goes on to state that the Act must be applied with due regard to the above-mentioned legal instruments as well as the Universal Declaration of Human Rights

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[15] Article 17(3) of the Convention. In the same spirit, Article 18 which deals with self-employment requires that:

> "The Contracting States shall accord to a refugee lawfully in their territory *treatment as favourable as possible* and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies." (My emphasis)

Similarly, Article 19(1), concerning the liberal professions provides that:

> "Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, *treatment as favourable as possible* and, in any event, not less favourable than that accorded to aliens generally in the same circumstances." (My emphasis)

[16] Above n 1.

and any other international agreement to which the Republic is a party.[17] The statutory matrix[18] in which the right to seek employment is embedded is notably facilitative and rights-based. A refugee is: accorded full legal protection, including the rights set out in the Bill of Rights; entitled to identity and travel status documents; given an unrestricted right to seek employment; and able to apply for permanent residence after five years continuous residence. Taken together, these provisions reflect acknowledgment by the legislature of the need to create a progressive and humane refugee regime in keeping with South Africa's international legal obligations. It is in this manifestly broad and supportive legislative setting that any question about the right to seek employment must be resolved.

The social and historical context

[140] The context which led to the adoption of the Refugees Act was set out by the then Deputy Minister of Home Affairs[19] in the following striking terms:

> "Because of our history and our struggle we have increasingly had to bear the mantle of champions of the oppressed. Furthermore, because of the political and economic stability in our country, and the fact that thousands of us have experienced the pain of destitution and homelessness, South Africa is in a unique position to chart a humane policy as far as refugees are concerned. This has meant that South Africa has had to

[17] Section 6 of the Act further states:

> "Interpretation, application and administration of the Act.–(1) This Act must be interpreted and applied with due regard to–
>
> a) the Convention Relating to the Status of Refugees (UN, 1951);
> b) the Protocol Relating to the Status of Refugees (UN, 1967);
> c) the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969)
> d) the Universal Declaration of Human Rights (UN, 1948); and
> e) any convention or international agreement to which the Republic is or becomes a party."

[18] Above n 2.

[19] Lindiwe N Sisulu.

> put into practice the concept of international solidarity and burden sharing, allowing the victims of international conflicts and human violations to seek a safe haven within our borders. Although in comparison we host a relatively small number of refugees, we are hoping that we could lead the way in the development of progressive refugee policies. . . . South Africa had no experience of hosting refugees – instead we produced refugees. South African society has not been sufficiently educated on issues of refugees, the causes of refugees and particularly the government's responsibilities towards refugees."[20]

[141] These factors provide the stark background against which determinations must be made of what is "good cause" in relation to access of refugees to employment in the security industry. It is not all that long ago that, during the late period of minority racist rule, tens of thousands of South Africans fled across our borders into neighbouring states. Few had documents or anything more than a change of clothing, if even that. They were well received and sheltered, and treated with humanity by many African states, who frequently paid a heavy price in lives and blood for fulfilling their international responsibilities.[21] Thousands more South Africans were given shelter and enabled to lead productive lives in countries right across the globe. Many have returned and now occupy important positions in our country. These moral

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[20] Sisulu "Meeting the Challenges of Forced Migration" in Majodina (ed) above n 7 at 5-6.

[21] Matlou "The Creation of Refugee Law: The South African Experience" in Majodina (ed) above n 7 at 122-123 states that:

> "[F]or years states in the region had to contend with South Africa's destabilisation policies, known as the 'total strategy'. This deliberately placed constraints on regional support for the anti-apartheid struggle, weakening South Africa's neighbours and forcing them to deport refugees elsewhere or to South Africa. From 1980-1985, it is estimated that South Africa created about 281 500 refugees in the region, whilst thousands more died, were mutilated, internally displaced or raped. The after-effects of this strategy are still being felt in Southern Africa.
>
> In 1987, Simba Makoni, the then Executive Secretary of the SADCC (SADC's predecessor), estimated the total amount of damage to the SADC region from South Africa's destabilisation at $10 billion, which was more than total development aid to the region or about one-third of the value of regional exports. The total damage to the region, when we add other root causes, is in all likelihood much higher than this, especially the permanent psychological and physical damage to thousands of people, large tracts of land laid waste by the indiscriminate laying of landmines, lost development opportunities and so forth."

debts are paid off not through direct reciprocity, but by means of voluntary acceptance of international treaty obligations.

[142] The preamble to the Constitution speaks of building "a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations." This acknowledges two things: the international support, based upon the principles of the Universal Declaration of Human Rights and the United Nations, that enabled our country to overcome division and achieve constitutional democracy, and the humanitarian obligations that go with achieving a dignified place as a democratic member of the international community.

Xenophobia

[143] The Braamfontein Declaration has pointed out that

> "[x]enophobia is the deep dislike of non-nationals by nationals of a recipient state. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances."[22]

This prejudice is strong in South Africa.[23] It strikes at the heart of our Bill of Rights. Special care accordingly needs to be taken to prevent it from even unconsciously tainting the manner in which laws are interpreted and applied. If refugees are treated as intrinsically untrustworthy, with their capacity to perform honestly and reliably

[22] Article 2 of the Braamfontein Statement on Xenophobia, *South African Human Rights Commission*, 15 October 1998.

[23] Id.

being placed presumptively in doubt, then xenophobia is given a boost and constitutional values are undermined. As the then Deputy Minister of Home Affairs pointed out at a conference on forced migration,[24] because of the historic isolation of South Africa, our people's perceptions are unfortunately insular, thus making them very susceptible to xenophobia. She observed that this situation is further exacerbated by the fact that there is often a problematic confusion in the minds of people between foreigners who are here illegally and refugees. This confusion is created because these two groups often occupy the lowest economic stratum in our society. She observed that they are invariably black and do not speak any local languages.[25]

[144] The constitutional response to xenophobia need not, of course, involve exaggerated xenophilia. Just as refugees should be protected from irrational prejudice, so they should not be able to lay claim to irrational privilege. The law – in this case section 23(6) – must be applied in a manner that is fair, objective, appropriately focused and in keeping with the letter and the spirit of our international and national legal obligations. Exercises of power that purport to have a neutral foundation but track stereotypes are often seen as flowing from and reinforcing negative presuppositions. Indeed, the routinised way in which power is exercised can readily become entangled in the public mind with existing prejudicial assumptions, reinforcing prejudice and establishing a downward spiral of disempowerment. One of the purposes of refugee law is precisely to overcome the experience of trauma and

[24] See above n 19.

[25] The then Deputy Minister highlighted the fact that xenophobia is racialised: the prejudice is directed against refugees from Africa, not those from Eastern Europe.

displacement and make the refugee feel at home and welcome. Disproportionate and uncalled-for adverse treatment would defeat that objective and induce an unacceptable and avoidable experience of alienation and helplessness. It would be most unfortunate if the left hand of government, that supervises the security industry, took away what the right hand of government, that accords to accredited refugees a special status, gives.

Conclusion

[145] The culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves is not something new in our country. As Professor Hammond-Tooke has pointed out,[26] in traditional society−

> ". . . the hospitality universally enjoined towards strangers, [is] captured in the Xhosa proverb *Unyawo alunompumlo* ('The foot has no nose'). Strangers, being isolated from their kin, and thus defenceless, were particularly under the protection of the chief and were accorded special privileges."

Today the concept of human interdependence and burden-sharing in relation to catastrophe is associated with the spirit of ubuntu-botho. As this Court said in *Port Elizabeth Municipality v Various Occupiers*:[27]

> "The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a

[26] Hammond-Tooke *The Roots of Black South Africa* (Jonathan Ball Publishers, Johannesburg 1993) at 99.

[27] 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 37.

> structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern." (footnote omitted)

These words were used in relation to homeless South Africans. The reminder that we are not islands unto ourselves, however, must be applied to our relationship with the rest of the continent.

[146] The applicants in this matter all come from African countries. They have been granted refugee status because instability and bloodshed in their home countries has rendered life there intolerable. Their states of origin have either set out to persecute them or else been unable to provide them with the protection that citizens should be able to demand from their government. Two examples illustrate this. The tenth applicant, whose father was a school-teacher, states that:

> "It was alleged by the [Rwandan Patriotic Front] that all Hutu's were involved in the genocide, which occurred in my country during 1994. During the period 1994 to 1998 all my husband's family members were killed and two of my sisters, one of my brothers and a host of other family members were killed".[28]

The twelfth applicant tells a similarly tragic story:

> "I have been a resident and citizen of the Democratic Republic of the Congo. . . . My father was a king in Bukavu, South Kivu. He was killed by rebel soldiers who were in the process of fighting a civil war against the government on or about April 2001. At the time of my father's death I was a student. The rebel soldiers killed my father because he refused to sign a proposition document."[29]

[28] Tenth applicant, Pelagie Nyiranzazora, 26 years old.

[29] Matembela Chitera, 30 years old.

One was the child of a school teacher, the other of a king. Both were students when forced to flee to South Africa. They do not seek hand-outs from the state, but simply the opportunity to work and earn a living. They have organised themselves into groups and received training as security guards. This capacitates them to do relatively humble tasks such as guarding parked cars or patrolling shopping-malls.

[147] I see no reason why access to employment in the security industry by persons in their situation should not be permitted in relation to sectors such as these, where no high security interests are at stake. To bar them would be to discriminate against them unfairly. At the same time I would not regard it as unfair to keep them from guarding installations and persons where particularly high security considerations come into play.

[148] The greater power of officials to grant unqualified exemptions to enter the industry should not exclude a lesser power to grant a restricted exemption, the only proviso being that the basis for the qualification be fair and reasonable in the circumstances. Indeed, it would be dangerous and self defeating for the public administration to function on the basis that if officials cannot grant everything an applicant might seek, they cannot grant anything at all. The converse should also apply: officials should not be required to accede to everything refugees may ask for on the basis that in fairness the applicants are entitled at least to something. The principle of 'all-or-nothing' is frequently dangerous in administrative law. It disregards the notion of proportionality that lies at the heart of fairness of treatment. Experience

warns that because cautious administrators might be fearful of being regarded as unduly generous, in practice this principle will usually lead to nothing.

[149] In summary: the applicants were correct in their initial approach to court when they challenged the criteria used by officials who had excluded them in blanket fashion from the security industry, in some cases withdrawing permits already granted. For the reasons I have given, however, I believe that the applicants' subsequent challenge to the constitutionality of section 23(1) was over-ambitious. The mere fact of being refugees does not entitle them to be admitted as of right to all spheres of the private security industry. The key factor is that being an accredited refugee goes a long way in itself to establish that there is "good cause" for exempting an applicant from the prohibition against non-nationals and non-permanent residents entering the security industry.

[150] It is to be hoped that, bearing in mind the special status that accredited refugees enjoy under our law, the clarifications given by this Court will assist both refugees and officials in streamlining the processes involved, engaging with each other in a mutually respectful manner, and achieving outcomes that are objectively grounded, fair and reasonable.

For the Applicants:	Advocate Paul Kennedy SC, Advocate Anton Katz and Advocate Donovan Baguley instructed by Lawyers for Human Rights.
For the First and Third Respondents:	Advocate Wim Trengove SC and Advocate SK Hassim instructed by Savage, Jooste & Adams.
For the Second and Fourth Respondents:	Advocate Wim Trengove SC and Advocate SK Hassim instructed by the State Attorney, Johannesburg.