



PRIVATE SECURITY -

LIFELINE OF THE LIVES AND LIVELIHOOD OF CITIZENS IN SOUTH AFRICA

SUBMISSION TO THE ESSENTIAL SERVICES COMMITTEE AS TO WHETHER PRIVATE SECURITY SERVICES SHOULD BE CLASSIFIED AS ESSENTIAL SERVICES

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Introduction

1. Counsel was briefed by AfriForum and Forum Security to provide an expert opinion as to whether the private security services should be classified as essential services in terms of section 213 of the Labour Relations Act 66 of 1995 (the LRA).
2. This opinion will be used in support of their submissions to the Essential Services Commission, who is currently investigating the matter in terms of section 71(1).

Legal considerations

Introduction

3. Section 213 of the LRA defines an essential service as follows:

Essential service means:

- a. a service, the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
 - b. the Parliamentary Service; and
 - c. the South African Police Service
4. Employees who are employed in a service classified as an essential service do not have the right to strike. This is a limitation on these employees' constitutional right to fair labour practices.¹ Any limitation on the rights enshrined in the Bill of Rights must comply with section 36(1) of the Constitution.
 5. Section 36(1) provides that:

¹ Section 23 of the Bill of Rights states:

Labour relations

23. (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right—
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right—
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

1. 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.

6. The limitation that applies to employees who are engaged in essential services is recognised internationally as a fair limitation on an employee's right to strike. The International Labour Organisation's (ILO's) Committee on Freedom of Association recognises that the entitlement to strike does not apply to employees who are engaged in essential services, which may include the hospital sector, electricity services, water supply services, air traffic control and even the telephone service. The definition of an essential service is also in accordance with the definition accepted by the ILO.

7. The security industry is regulated by Sectoral Determination 6 (SD6) for the Private Security Industry. In terms of SD6, the determination applies to:
 - (a) every employer and employee in the private security sector that guards or protects fixed property, premises, goods, persons or employees including monitoring and responding to alarms at premises which are guarded by persons or by electronic means, including car guards as defined in sub clause (2)(12).

8. In evaluating whether public transport is an essential service, the Essential Services Commission remarked that in order for a service to be declared an essential service, the following aspects must be evaluated (own emphasis):²

Before the ESC can designate any service as essential, it must be satisfied that:

 - 3.15.1 It is a service, or part thereof, that is essential. It is not employees, or a business or industry that is essential (see *SAPS v. POPCRU and Others supra*);
 - 3.15.2 There must be an interruption, irrespective of whether it is partial or complete. If industrial action is unlikely to interrupt the service, or if the interruption can be avoided (for example by using replacement labour), the service will not be designated as an essential service;
 - 3.15.3 The interruption of the service must endanger life, personal safety or health. Endanger means "putting at risk", "imperil" or "jeopardise". This implies that the conditions prevailing at the time that the designation is made, must be considered, and not the circumstances that may occur at some future stage; and
 - 3.15.4 The endangerment must impact on the population, being human beings (see D Pillay "Essential Services under the new LRA" (2001) 22 ILJ 1 and the ESC

² Case Number ESS 233, par. 3.15.

designation in the matter of the *Road Traffic Management Corporation and Others vs. NEHAWU and Others*).

Discussion and evaluation of the relevant legal principles

9. The service: Is private security services an essential service?

- 9.1 Private security services provide a first line of defence and protection against criminal or potential criminal activities. These services, as per SD6, include the protection of persons and property, access control, cash-in-transit protection and armed response.
- 9.2 These services firstly provide a proactive protection against any possible criminal activities, but also a lifeline to people who are faced with the dangers of criminal activities when these occur, for example in the case of armed response.
- 9.3 The South African Police Service (SAPS) has been recognised as an essential service since the inception of provisions for essential services in the LRA. In terms of section 205(3) of the Constitution “[t]he objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”
- 9.4 The aim of all the services rendered by private security services is similar to that of the SAPS, with the only difference that these services are rendered when the type of services falls outside the mandate of the SAPS, for example access control or cash-in-transit protection. However, the aim of services rendered by the private security sector is similar to that of the SAPS, namely, to support and strengthen the SAPS in combating and preventing crime, and protecting the safety and security of South African citizens and their property.
- 9.5 In the foreword of the Annual Report for 2018/2019 of the Private Security Industry Regulating Authority (PSIRA),³ B.H. Cele, the Minister of Police, remarked as follows (own emphasis):

One of the hallmarks of the National Development Plan (NDP 2030), (South Africa’s detailed blueprint for how the country can eliminate poverty, reduce inequality and reduce crime by the year 2030) casts a sharp focus on an integrated approach to safety and security that requires coordinated activity across all government departments, the private sector and community bodies like community safety centres.

It is for this reason that the contribution of the private security industry, as an indispensable force multiplier in crime prevention, is highly appreciated. A key imperative of the National Development Plan is that people living in South Africa should

³ Private Security Industry Regulatory Authority. 2019. *Annual Report 2018/2018*, p. 9. Available at <https://www.psira.co.za/dmdocuments/PSiRA%20Annual%20Report%202019.pdf>. Accessed on 17 August 2020.

feel safe and have no fear of crime. PSiRA plays an important role in realising this goal by:

- playing a part in strengthening of the criminal justice system, through cooperation between all departments in the government's justice, crime prevention and security cluster;

...

- 9.6 It is evident that the Minister of Police as well as government in its National Development Plan recognise the Private Security Industry as a critical essential service to supplement the SAPS, whose services have been recognised as essential services since the inception of the applicable legislation.
- 9.7 The Essential Services Commission conducted various investigations and declared 18 types of services as essential services. These include municipal security, security services that support public health services, security services of the Department of Water Affairs and Forestry, and security services in support of welfare-registered nursing homes.
- 9.8 It is submitted that the rationale in declaring these security services as essential services applies *mutatis mutandis* to all services rendered by private security organisations. Forum Security, for example, is extensively involved in the protection of schools and learners. This is not a service that can be rendered by the SAPS or any other third-party service provider that is not a security organisation. The protection of these learners is as important as the protection of any municipal or public health service.
- 9.9 The services rendered by private security organisation are directly linked to the protection of citizens' rights to life and security.⁴
- 9.10 The building of partnerships with the Police Service to ensure the effective functioning of the Police Service and to protect citizens constitutional rights is also echoed in the address by Gen. K.J. Sithole, the National Commissioner of

⁴ In terms of sections 11 and 12 of the Constitution of South Africa, which reads:

11. Life

Everyone has the right to life.

12. Freedom and security of the person

1. Everyone has the right to freedom and security of the person, which includes the right
 - a. not to be deprived of freedom arbitrarily or without just cause;
 - b. not to be detained without trial;
 - c. to be free from all forms of violence from either public or private sources;
 - d. not to be tortured in any way; and
 - e. not to be treated or punished in a cruel, inhuman or degrading way.
2. Everyone has the right to bodily and psychological integrity, which includes the right
 - a. to make decisions concerning reproduction;
 - b. to security in and control over their body; and
 - c. not to be subjected to medical or scientific experiments without their informed consent.

Police, in the SAPS's Annual Report for 2018/2019, where he stated that in order to achieve the outcomes of the Police Service (own underlining):⁵

Outcome 3: All people in South Africa are and feel safe

Outcome 11: Create a better South Africa and contribute to a better Africa and a better world

Outcome 12: An efficient, effective and development-oriented public service

Outcome 14: A diverse, socially cohesive society with a common national identity

These outcomes can only be achieved through **collaboration**, working together to **establish new partnerships, strengthening existing partnerships**, thereby ensuring that, collectively we provide an **integrated, coordinated, efficient and effective service** to all our communities, by **putting people first**.

9.11 PSiRA reported that a total of 283 467 security officers and 5 077 security businesses were registered with PSiRA in 2018/2019.⁶ According to the SAPS, it employed 150 855 SAPS Act members.⁷ This emphasises the dire need for the protection of lives and property in South Africa and the devastating effect that a nationwide strike – for example in the security industry – may have on the safety, security and lives of all South African citizens. A full-scale strike in this sector will result in a 60% reduction in crime prevention capacity.

9.12 To deny a person the right to be protected by private security during a strike in the security sector will, in my submission, be a direct violation of the person's rights in terms of section 12(1)(c) of the Constitution, which provides among others that a person has the constitutional right to "be free from all forms of violence from either public or private sources."

9.13 Private security services have been regarded as essential services since level 4 of the COVID-19 lockdown. I point out that in *Skets Projects (Pty) Ltd v South African Transport and Allied Workers Union* (J 546/2020) [2020] ZALCJHB 99, the Labour Court considered this issue and ruled that an essential service in terms of the Disaster Management Act 57 of 2002 is not automatically an essential service in terms of the LRA. However, it is submitted that the decision to declare a service as an essential service is premised on the same rationale in both instances.

⁵ South African Police Service. 2019. *Annual Report 2018/2019*, p. 10. Available at https://static.pmg.org.za/SAPS_Annual_Report_20182019.pdf. Accessed on 17 August 2020.

⁶ Private Security Industry Regulatory Authority. 2019. *Annual Report 2018/2018*, p. 16. Available at <https://www.psiira.co.za/dmdocuments/PSiRA%20Annual%20Report%202019.pdf>. Accessed on 17 August 2020.

⁷ South African Police Service. 2019. *Annual Report 2018/2019*, p. 11. Available at https://static.pmg.org.za/SAPS_Annual_Report_20182019.pdf. Accessed on 17 August 2020.

- 9.14 It is also submitted that, considering the above, private security services are undoubtedly essential services. This fact is recognised by government as well as the Minister and Commissioner of Police.
10. **Can an interruption in the service be prevented? There must be an interruption, irrespective of whether it is partial or complete. If industrial action is unlikely to interrupt the service, or if the interruption can be avoided (for example by using replacement labour), the service will not be designated as an essential service.**
- 10.1 It is submitted that a total disruption in the delivery of this critical service cannot be prevented in case of a strike. By law, security officers must have obtained certain qualifications and must be registered with PSiRA to be able render any security services. Security officers cannot be sourced or replaced from the general public or from other employees, who do not have these qualifications and are not registered.
- 10.2 In addition, each type of security service may require additional training and further qualifications, for example commercial firearm licences or training in armed response. In most instances, each specific site or client will have their own requirements. Moreover, even if security officers can be found to replace striking security officers, they may place the life of the client in jeopardy if they are untrained in respect of the specific needs of the client. For example, access control at an old-age home or school is completely different from access control at a mine or from crowd control in cases of public violence. Specific characteristics and people skills are required for each institution.
- 10.3 Furthermore, replacement labour can pose serious, live-threatening security risks in instances where a long-term confidential relationship must be established to secure and maintain the successful and safe provision of these services. Examples of these working environments include cash-in-transit operations, close protection (bodyguard) services, protection of high security or high-risk installations.
- 10.4 In the case of many of the services rendered, the success of the operation is determined by teamwork and the specific manner in which each member of the team functions. This is sometimes only achieved through years of training. Replacement labour cannot be trained to operate in the specific groups or to function as part of the team in the limited time given before a strike is affected. Examples of these services include armed response units, tactical operations (for example rhino and wildlife protection teams), crowd control or protection in cases of public violence. Any blunder by replacement labour under these circumstances can lead to serious injuries or death, or devastating damage to property, and poses a serious risk to the client and the team within which the person operates, as well as the people against whom the client must be protected.

- 10.5 In many instances, the institutional knowledge of the client's operations or property will determine the safety of the people on the premises or the property itself. If the entire security staff component is engaged in strike action, there will be insufficient time and means to train replacement labour. In most instances, new appointments are trained and absorbed into the current structure over time and under guidance of the established staff. It is highly unlikely that replacement labour could be adequately trained and effectively employed without institutional knowledge. This will place the lives and property under their protection in danger.
- 10.6 The services rendered by private security services cannot be rendered by the SAPS, who acts in a reactive capacity after a crime was committed. As stated above, the services of private security institutions are preventative and a first line of defence and protection against criminal activities. This is similar to the services rendered by paramedics at an accident scene, compared to the services rendered by the doctors in the hospital where the patient is taken to. In the security industry, crime prevention actions, the reaction time to crime scenes and the actions taken during the first moments after a crime has been committed are vital to the lives at stake and the successful prosecution of the criminals involved. This provides a lifeline to those who are placed in jeopardy by criminal activities.
11. **Who will be endangered if the services cannot be rendered? The interruption of the service must endanger life, personal safety or health. Endanger means "putting at risk", "imperil" or "jeopardise". The endangerment must impact on the population, i.e. human beings.**
- 11.1 The core function of private security services is the protection of lives, personal safety and health. The disruption of these services endangers the lives of the whole or any part of the population.
- 11.2 The disruption of access control to workplaces, businesses, estates or malls will for example endanger the lives of everyone – the public as well as employees working at or visiting these venues.
- 11.3 Even security services that are aimed at protecting assets (for example cash-in-transit services) are directly linked to the protection of the employees and members of the public who visit these venues, especially since excess cash is transported or kept there, which makes it vulnerable to possible armed attackers or robberies. The keeping, collecting and transporting of this cash in an unprotected environment without the assistance of private security services will definitely place the employees and the public in general in danger.
- 11.4 The same principle applies to security services that protect lives and assets during public violence. The protecting of any institution as an asset inevitably involves the protection of employees who there and people who visit these venues.

- 11.5 The close protection of individuals and possible attacks on these individuals affects and endangers the public as a whole, or at least that portion of the public who is present during the attack. Examples of these attacks over the past years include those in the taxi industry, or political leaders who were assassinated.
- 11.6 As stated above, the denial of these protection services during a strike is an infringement of a person's constitutional right to safety and security. The rights protected in all these cases are connected to the affected persons and are not present purely for an economical value. Furthermore, the protection against the persons involved and the assets cannot be separated or divorced from one other.

The ILO and international best practises

12. In 1983, the ILO's committee of experts defined essential services as services that "the interruption of which would endanger the life, personal safety or health of the whole or part of the population." This definition was adopted by the Committee shortly afterwards.
13. Although the question of what constitutes essential services "depends to a large extent on the particular circumstances prevailing in a country", the Committee has given its opinion on the essential or non-essential nature of a series of specific services. For example, the hospital services, electricity services, water supply services, public or private prison services and air traffic control services are considered essential services, where the right to strike may be subject to major restrictions or even prohibitions.⁸
14. It is submitted that declaring private security services in South Africa (where crime statistics are of the highest in the world) an essential service is not only paramount to protecting the lives of its citizens, but must also comply with the standards and guidelines set by the ILO.
15. Conversely, the education sector, transportation in general, agriculture and even airline pilots are not considered essential services, despite the important roles that these services fulfil.⁹ Section 2 defines essential services as services rendered by whoever (either government or any other person) of which the interruption will endanger the life, health or personal safety of the whole or part of the population.
16. The security and safety of people and the public in general are regarded by most member countries of the ILO as essential services. Examples include:

⁸ Digest, par. 585.

⁹ Digest, par. 587.

- 16.1 Hungarian legislation provides that “[t]here is no place for strike if it would directly and seriously threaten human life, health, security and environment or hinder the prevention of elementary damage.”¹⁰
- 16.2 In South Australia, essential services are defined as “a service (whether provided by a public or private undertaking) without which the safety, health or welfare of the community or a section of the community would be endangered or seriously prejudiced.”¹¹
- 16.3 The Dominican Republic’s Labor Code determines that “[n]o strikes or walkouts are allowed involving the essential services, those whose interruption are liable to endanger the life, health or security of the people in any segment of the population. Nevertheless, the workers as well as the employers of this type of service have the right to proceed to an agreement according to what is set forth on section 680 of this code.”¹²
- 16.4 In Côte d’Ivoire, essential services are defined “a service [of which] the interruption ... is liable to endanger the life, health or safety of the whole or part of the population.”¹³
17. The safety and security of people is key to all considerations as to whether employees have the right to strike and whether a service is regarded as an essential service.
18. As directed by the ILO Committee, the specific circumstances of each country must be considered. It has been confirmed by the Minister as well as the Commissioner of Police that the safety of people in South Africa, crime prevention and the combating of crime can only be achieved through a close collaboration between the SAPS and private security services. This is also aligned with governments National Development Plan.

Conclusion

19. It is submitted that declaring private security services as essential services should be carefully considered. The granting of employees’ right to strike will inevitably result in an infringement of law-abiding citizens and the public’s right in general to life and safety, as enshrined in the Constitution.
20. If a person’s life or safety is placed in jeopardy because they were unjustifiably denied the right to protect themselves, the state may be held liable for the decision to deny them the rights to secure security services that could have

¹⁰ Act on the Right to Strike (VII of 1989).

¹¹ Essential Services Act, 1981.

¹² Labor Code, 1992.

¹³ Labour Code, 1995.

protected them if it is found that security officers had unjustifiably been granted the right to strike.

21. Section 38 of the Constitution provides that anyone who are listed in the section has the right to approach a court alleging that a right in the Bill has been infringed, and that this court may then grant appropriate relief. In *Fosé v Minister of Safety and Security* 1997 3 SA 786 (CC) the Constitutional Court held that appropriate relief may include an award for damages where such an award may be necessary to enforce constitutionally-entrenched rights. In *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* (AgriSa And Legal Resources Centre, *amici curiae*) 2004 (6) SA 40 (SCA) and also *MEC for the Department of Welfare v Kate* (580/04) [2006] ZASCA 49 the Supreme Court of Appeal confirmed the concept of constitutional damages.
22. In my opinion, private security services fall within the ambit and definition of essential services as defined in the LRA and should therefore be declared an essential service.

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16 August 2020

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