THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 479/13

Reportable

In the matter between

SECURITY INDUSTRY ALLIANCE **APPELLANT**

and

PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY **FIRST RESPONDENT**

CHAIRPERSON OF THE PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY **SECOND RESPONDENT**

MINISTER OF POLICE **THIRD RESPONDENT**

Neutral citation: *Security Industry Alliance v Private Security Industry Regulatory Authority* (479/13) [2014] ZASCA 99 (15 August 2014)

Coram: Mpati P, Mhlantla, Leach JJA and Hancke and Swain AJJA

Heard: 5 May 2014

Delivered: 15 August 2014

Summary: Administrative law – administrative action – review – making of regulations providing for payment of fees in security industry – validity of amendment to regulations challenged under Promotion of Administrative Justice Act 2000 of 1994 – error of law not included as ground of review but flows from papers – applicant entitled to raise it.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Vorster AJ sitting as court of first instance):

1 The appeal is upheld.

2 The first and second respondents are ordered to pay the appellant's costs of the appeal, which shall include the costs of two counsel.

3 The order of the court below is set aside and the following order is substituted in its stead:

'(a) The application succeeds.

(b) The amendment to the regulations made under sections 43 and 44(7) of the Private Security Industry Regulation Act 56 of 2001, promulgated by the third respondent in *Government Gazette* No 34775 of 25 November 2011, is set aside.

(c) The first and second respondents are ordered to pay the applicant's costs, which shall include the costs of two counsel.'

JUDGMENT

MPATI P (MHLANTLA, LEACH JJA and HANCKE and SWAIN AJJA concurring):

[1] This appeal emanates from a decision of the North Gauteng High Court (Vorster AJ) dismissing the appellant's application to set aside an amendment to regulations promulgated by the third respondent and in terms of which security service providers, in the security industry, are required to pay increased levies. Section 2 of the Private Security Industry Regulation Act 56 of 2001 (the Act)

establishes the Private Security Industry Regulatory Authority, the first respondent, to which I shall refer as 'the Authority'. Its primary objects are to regulate the private security industry and 'to exercise effective control over the practice of the occupation of security service provider in the public and national interest and the interest of the private security industry itself . . .' (s 3). The Authority is governed by a Council, established in terms of s 6 of the Act. Its funds, which consist of money from any legitimate source, must be used for defraying the expenditure it has incurred in the achievement of its objects and the performance of its functions (s 16). Although the Authority is enjoined by s 5(4) of the Act to 'perform its functions in terms of this Act and the Levies Act [23 of 2002] . . .' the latter Act is yet to come into operation. The Act, on the other hand, came into operation on 14 February 2002 and repealed, on that date, the Security Officers Act 92 of 1987 (repealed legislation), 'with the exception of its provisions, including the regulations, relating to the deduction and payment of annual amounts, the funding of the Security Officers' Interim Board and the imposition of criminal and other sanctions relating thereto' (s 43).

[2] The objects of the Security Officers' Interim Board (Board) were, inter alia, to 'exercise control over the occupation of security officer . . . and to ensure that the industry acts in the public interest' (s 2(2) of the repealed legislation). The transitional provisions of the Act provide, inter alia, that 'all assets, rights, obligations, duties and liabilities of the Board vest in the Authority and are deemed to have been acquired or incurred by the Authority . . .' (s 44(2)(*a*)) and that 'anything done or any decision or steps taken by the Board in terms of a provision of the repealed legislation is deemed to have been done or taken by the Authority' (s 44(2)(*b*)).

[3] One of the saved provisions of the repealed legislation is s 18, of which subsec (1) reads:

'Every person registered as a security officer shall annually on or before a prescribed date pay to the Board the prescribed amount: Provided that with effect from 1 January 1994 the

said amount shall be paid before or on 1 April of the year concerned and of every subsequent year.'

The other relevant saved section, for present purposes, is s 32, which empowers the Board (now the Authority) to make regulations, with the concurrence of the Minister of Police (then Minister of Safety and Security), relating to, inter alia, 'any matter which in terms of [the repealed legislation] is required or permitted to be prescribed' (s 32(1)(*a*)).[1] In terms of s 32(2) different regulations may be made 'with reference to different categories of security officers'.

[4] The regulations contemplated in s 32 of the repealed legislation were issued and published in the *Gazette*.[2] Regulation 9(3) and (4) make provision for the formulae to be applied for the determination of the prescribed amount contemplated in section 18(1) of the repealed legislation, to be paid in the case of 'a security business registered as a security officer' and of 'a security officer, not acting as a security business'.[3] The regulations were amended with effect from 1 December 2011. In terms of the amendment the fees payable by a security business to the Authority were increased. Prior to the amendment the prescribed amounts payable in terms of reg 9(3) and (4) were:

(a) in respect of a security business:

(i) R250 per month;

(ii) 70 cents per month for each security officer rendering security service; and

(b) each security officer was obliged to pay to the Authority R7,00 per month.

The issue in this appeal is the validity or otherwise of the decision of the first and third respondents (the Authority and the Minister) to make and publish the amendment to the regulations.

[5] The effect of the amendment is that a security business is now required to pay R4 250 per annum and R7,00 in respect of each security officer rendering security

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[1] The original s 32(1) empowered the Minister to make regulations 'after consultation with the Board'.

[2] GN R797, *GG* 12413, 2 April 1990.

[3] The formulae are set out in the regulation.

service in its employ, whilst the amount payable by each security officer has not been increased. In addition, the annual amount of R4 250 must be paid on or before 30 April of the year concerned, meaning that it is payable in one lump sum in advance. In terms of reg 7(5), however, a written agreement may be concluded between the Authority and any security business 'regarding the method and date of payment of the prescribed amount'. The amount of R7 in respect of each security employee, which, depending on the size of the security business, could be a substantial sum, is payable within three days after the end of each calendar month.

[6] After the publication of the amendment to the regulations the appellant, an association incorporated under s 21 of the Companies Act 61 of 1973, which describes itself as an umbrella body representing various organisations with interest in the security industry, including security service providers and employers' associations, instituted review proceedings against the three respondents seeking the following relief:

'1. The decision of the first and [third] respondents to make and publish the Amendment to the Regulations under sections 43 and 44(7) of the [Act] read with section 32(1) of the Security Officers Act . . . , promulgated on 25 November 2011 in Government Gazette No 34775 (the Amendment to the Regulations) is set aside.

2. The first respondent is ordered to refund the difference, if any, between the amount paid by members of the applicant in terms of the Amendment to the Regulations and the amount that they would have paid in terms of the Regulations Relating to Security Officers GN R797, published under GG 12413, 2 April 1990.

3. The first respondent and any other respondent that opposes this application are ordered to pay the applicant's costs.

4. . . .'

The application was opposed, but the third respondent, the Minister of Police (Minister), did not participate in the proceedings both in the court below and in this

court. (I shall, however, refer to the first and second respondents collectively as 'the respondents'.) The court below dismissed the application with costs, holding that the appellant had 'failed to prove a case on the merits which justifies the granting of the relief claimed'. This appeal is with its leave.

[7] Section 32(4) of the repealed legislation provides that:

'Before any regulations are made under subsection (1), a draft of the proposed regulations shall be published by the Board in the *Gazette* together with a notice intimating that the Board intends to issue such regulations as regulations under subsection (1) and inviting interested persons to submit to the Board within a stated period, but not less than four weeks as from the date of publication of the notice, any objections to or representations concerning the proposed regulations: Provided that if the Board after the expiry of the said period decides on any alterations of the proposed regulations so published, as a result of any objections or representations submitted thereanent, it shall not be necessary to publish such alterations.'

It is not in dispute that the Authority complied with the provisions of s 32(4). A consultation paper was published on 2 April 2011 under the heading *'Review of the annual fees for the Private Security Industry'* and sent to key stakeholders in the private security industry, including the appellant.

[8] The motivation for the extent of the increases proposed in the consultation paper was set out as follows:

'Historically, the annual fees were reviewed based on inflationary increases of each financial year. However this inflationary increment did not take place since 2002. As such, the basis for determining the proposed annual fees is as follows:

- Normal percentage of CPI compounded over the past 9 years; and
- The number of security officers employed by a security business or made available by it to render a security service during a calendar month;
- Monthly gross income of security service provider;
- Equitable contribution by different classes or categories of security service providers.'

The consultation paper contained an undertaking that the industry would be given an opportunity to submit their initial comments and representations on the proposed annual review. All comments and submissions would be taken into account by the Authority 'before a request for concurrence is submitted to the Minister of Police for his independent consideration'.

[9] The appellant submitted its written comments on 14 April 2011 and raised certain concerns such as, amongst others, that the proposed increase was not related to the consumer price index; that the increase could not be absorbed by the industry and would not be economically viable; that no improved services by the Authority had been proposed to justify the increase; and that the amendment to the regulations would create cash flow problems for the appellant's members. The Authority did not respond to these comments, but alleged in the answering affidavit that it had considered the submissions of the appellant and other stakeholders. On 26 August 2011 the Minister, following recommendations made to him by the Authority, published a draft of the proposed amendment to the regulations in *Government Gazette* No 3450. Interested parties were invited to submit objections to or representations on 'the outcome of the consultation process as well as the recommendations'. This prompted the appellant to make further written submissions to the Authority on 21 September 2011, which were essentially identical to those submitted in response to the consultation paper. Specific comments were made in these submissions about small businesses such as electronic installers, small and medium importers and distributors and locksmith businesses with fewer than five employees, who are all required to pay the same annual fees as multi-national and bigger companies. The submissions concluded with a statement that the proposed increases were not acceptable and that further discussions should take place 'in order to arrive at an acceptable solution'.

[10] According to the Authority only five submissions were received, which objected to the increase of annual fees 'despite the fact that the annual fees were

never increased since 2001'. It stated that after intensive deliberations upon receipt of the submissions, it proposed a reduction of annual fees that would be payable by security businesses from R5 750 to R4 250. It thereafter 'presented the outcome of the consultation process with recommendations to the Minister' on 28 October 2011, who published the amendments to the regulations in the *Government Gazette* on 25 November 2011. The amendments were to take effect on 1 December 2011.

[11] It appears from the Authority's final recommendations to the Minister that, besides the objections by the stakeholders in the security industry, the National Treasury also expressed a concern that the increases would have an inflationary impact on the economy. It therefore supported an increase of only 9.1 per cent. The Authority dismissed Treasury's concerns because the percentage increase it proposed 'could not be justified without quantifying the impact on the economy'. It may be mentioned that the annual fees of R4 250 and the R7 payable in respect of each security officer represent increases of 41.6 per cent and 1000 per cent respectively.

[12] The justification proffered by the Authority for the increases, as contained in a justification report sent to the Minister under cover of a letter dated 22 June 2011, are:

(a) The current annual fee structure creates inequalities between security officers and business security providers in that the security officers contribute significantly towards regulation of the industry.

(b) The private security industry has grown significantly over the last decade, which poses challenges to the regulator with regard to its capacity to regulate the industry effectively. This means that the Authority must expand its human capacity.

(c) Historically the Authority has been performing poorly, posting deficits since 2009.

In seeking the Minister's concurrence for the proposed amendment to the regulations the Authority submitted that, in the absence of Government funding, and in order to deal with the challenges facing it, it has to source the necessary funds (increase in fees) from the only avenue available to it, namely the security industry.

[13] Six main grounds of review were relied upon in the founding affidavit in support of the relief sought by the appellant. I shall, for present purposes, mention only two. These were:
(a) The consultation process leading to the promulgation of the new regulations was inadequate and therefore procedurally unfair.

(b) The increases of the prescribed amounts are unreasonable and irrational.

It is on the basis of these and other grounds that the appellant sought to review the decisions of the respondents in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[14] Elaborating on ground (a) the appellant alleged that although it twice provided the Authority with written submissions, it was never given the opportunity to engage the Authority to explain the full impact of the proposed changes despite expressly asking for such an opportunity. Nor did the Authority engage or attempt to engage with it in an attempt to formulate a fee increase that would be feasible and workable for the security industry. The appellant thus concluded as follows:
'61.1 The [appellant] and its members were not given a reasonable opportunity to make representations as required by section 3(2)(b)(ii) of the PAJA. The decision to make the amendment to the Regulations is accordingly procedurally unfair and reviewable in terms of section 6(2)(c) of the PAJA.

61.2 Due to the failure to engage with the [appellant] and other stakeholders, the respondents failed to take into account relevant considerations in deciding to make the Regulations. The decision is accordingly reviewable in terms of section 6(2)(e)(iii) of the PAJA.

61.3 Due to the failure to consider, properly or at all, the representations of the [appellant], the decision was not rationally connected to the information before the respondents and is reviewable in terms of section 6(2)(f)(ii)(cc) of the PAJA.

61.4 The respondents' failure to consider the representations of the [appellant] demonstrates that the respondents did not have an open mind, and effectively decided the form that the amendment to the Regulations would take before they embarked on the consultation process. As such, the decision was taken in bad faith and is reviewable in terms of section 6(2)(e)(v) of the PAJA.'

The court a quo held that the Authority had taken the concerns raised by the appellant in its written submissions into account and found 'that the increase of the fees and the extent of such increase is clearly rationally connected with the reason for the decision, being the budget deficit which the [Authority] seeks to address . . . '.

[15] It is not in dispute that the decision of the Minister to publish the amendment to the regulations on the recommendation of the Authority constituted administrative action.[4] It will be convenient, at this stage, to deal briefly with a conclusion reached by the court below in respect of an argument advanced before it by counsel for the respondents. Relying on the judgment of the Constitutional Court in *National Treasury & others v Opposition to Urban Tolling Alliance & others* 2012 (6) SA 223 (CC), counsel had argued that the Authority could lawfully and reasonably make the decision to increase the fees within the framework of Government policy, which excludes the raising of funding from sources other than the private security industry. The making of policy, so the argument continued,

[4] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as* amici curiae*)* 2006 (2) SA 311 (CC) paras 121, 128 and 135.

falls within the proper preserve of the executive and is therefore not subject to scrutiny by the courts. The court below said the following in its judgment (para 10):

'In the instant case the [Authority] made a policy decision to service its budget deficit by means of an increase of fees payable by registered security service providers and security officers employed by them. It is common cause that the [Authority] was created and functions in terms of an Act of Parliament and has a public duty to fulfil relating to *inter alia* the coordination and control of security services within the Republic of South Africa. As such, it is part of executive Government. It follows that I am driven to the conclusion that the level of increase of fees as a means to finance the budget of the [Authority] is not a lawful ground of review based on the level of the increase. Consequently, I am of the view that the application must fail on this ground.'

Despite this conclusion, though, the court proceeded to consider the merits of the application, in the event of its interpretation of the Constitutional Court judgment being erroneous.

[16] I agree with counsel for the appellant that the decision that funding for the operational expenses of the Authority be sourced from the security industry, which was a policy decision, was never in issue in the case. In *Urban Tolling Alliance* the dispute was whether the users or a general fuel levy should fund the improvement of roads. In the present matter the decision to increase the fees payable by the security industry constitutes the application of policy and is therefore an administrative decision, susceptible to review.[5] It follows that the court a quo's reliance on *Urban Tolling Alliance* was misplaced. Indeed, counsel for the respondents did not support the court's finding.

[17] The appellant's primary complaint is that the consultation process followed by the Authority was 'conducted in a mechanical and formalistic manner without properly considering the comments received'**.** In publishing its draft amendment to the regulations and calling for, and receiving, comments and representations

[5] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) paras 141-143.

thereon the Authority chose to follow the notice and comment procedure provided for in s 4(3) of PAJA to give effect to the requirement of procedurally fair administrative action (s 4(1), albeit that it was complying with the provisions of s 32(4) of the repealed legislation. It is not in dispute that the regulations, or the decision to amend them, materially and adversely affected the rights of the public, particularly persons in the security industry. Section 4(3) of PAJA provides:

'If an administrator decides to follow a notice and comment procedure, the administrator must –

(*a*) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;

(*b*) consider any comments received;

(*c*) decide whether or not to take the administrative action, with or without changes; and

(*d*) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.'

The primary question here is whether the Authority and the Minister *considered* the comments received from interested parties and *decided* whether or not to proceed with the amendment to the regulations with or without changes as required by the section.

[18] In this court counsel for the appellant submitted that in amending the regulations, thereby increasing the fees payable by security service providers by huge margins, the Authority and the Minister failed to differentiate between small and large companies. It was not in dispute, so it was argued, that the Authority did not assess whether smaller companies could cope with the increases. Counsel contended that the reason for the failure to differentiate was that the Authority felt that its hands were tied, in that it had no power to differentiate. The Authority, therefore, appreciated that there was a need to differentiate, but held the belief that it could not do so. Counsel accordingly submitted that the failure to differentiate between small and large companies was materially influenced by an error of law on the part of the Authority and the Minister, and that the regulations

ought to be set aside on this ground (s 6(2)(*d*) of PAJA), because s 35(2) of the Act does make provision for differentiation. Section 35(2) reads:

'Different regulations may be made in terms of subsection (1) with reference to different categories or classes of security service providers.'

[19] In a final report containing its recommendations to the Minister, sent under cover of a letter dated 28 October 2011, and which the Minister approved and signed on 14 November 2011, the Authority dealt with comments and submissions received by it following the notice and comment procedure. Under the heading 'Analysis of comments' it says the following about differentiated fees:

'The last comment relates to smaller business objecting to the R5 250.00 which is levied to each business regardless of size of business. Whilst all avenues were exhausted to arrive at a more equitable fee structure, current legislation does not permit classification of business by size or income in order to arrive at differentiated fees. This matter will only be addressed by the introduction of the levies through the Private Security Levies Act.'

It is clear from this comment that the Authority believed that the legislation currently in force, including the saved provisions of the repealed legislation, did not permit it to differentiate between small and large companies when it considered the increase of annual fees.

[20] Counsel for the respondents conceded during argument that the advice given to the Minister by the Authority, relating to a lack of power to differentiate as aforesaid, was wrong and was based on an error of law. However, on 12 May 2014 the registrar of this court received a letter from the State Attorney, Pretoria, representing the respondents, in which it was stated that upon reconsidering the issue after the hearing, they established that the submission made on behalf of the appellant and conceded by counsel for the respondents was in fact not correct. The letter recorded further that the State Attorney had received instructions 'to file supplementary heads of argument' which were in the course of being prepared. The appellant did not object to this move. The supplementary heads were

subsequently lodged with the registrar and a response from counsel for the appellant was also delivered thereafter.

[21] The supplementary heads of argument open with a statement that at the hearing of this appeal 'the appellant raised an argument which was not foreshadowed in its pleadings; raised at the court *a quo*; or its heads of argument in this Honourable Court'. The argument referred to relates to the issue presently under discussion in this judgment, namely whether or not the Authority had the power to differentiate between small and large companies when it considered the increases. The issue involves a point of law, which may be raised for the first time on appeal; provided it is covered by the allegations made in the papers and it does not result in unfairness to the other party.[6] In my view, the issue was indeed covered in the papers.

[22] I have mentioned above (in para 9) that specific comments were made by the appellant in its response to the Authority's consultation paper, about small businesses such as electronic installers, etcetera, who are all required to pay the same annual fees as multi-national and big companies. In its founding affidavit the appellant alleged that the impact of the amendment to the regulations on many of its members will be significant and, 'in the case of the smaller service providers, potentially fatal'. The following allegation was also made in the founding affidavit:

'[The Authority] did not bother to find out what the impact of the increase would be on those who have to pay it. It did not assess, for example, whether the smaller marginal security service providers could cope with the increase, due two weeks after the amendment to the Regulations were promulgated. This unbalanced approach is unreasonable and unfair.'

In the answering affidavit the Authority dealt expressly with the objections relating to smaller businesses and concludes that the issue 'will only be addressed by the introduction of the Private Security Levies Act'. Clearly, then, the argument on

[6] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 39 and the cases there cited.

behalf of the appellant based on an error of law flows from the papers and counsel was entitled to raise it.

[23] With regard to the reference to s 35(2) of the Act as the basis for the argument that the Authority did have the power to differentiate between small and large companies, counsel for the appellant maintained their stance in their response to the supplementary heads of argument. Counsel submitted that 'section 35(2) of the old Act gives the Minister the power to make regulations *"as to, generally, any matter which he considers necessary or expedient to prescribe for the attainment of the objects of this Act"*. The reference to s 35(2) of the old Act is erroneous. Section 35 of the repealed legislation has no subsec (2) and deals with offences and penalties. The correct provision is s 32(1)(*f*). In view of what follows, however, it is not necessary to say more in this regard.

[24] In the supplementary heads of argument counsel for the respondent correctly identified the saved provisions of the repealed legislation that are relevant to this issue, namely s 32(2). It reads:

'Different regulations may be made under subsection (1) with reference to different categories of security officers.'

Counsel contended, however, that s 32(2) of the repealed legislation clearly empowers the Authority, with the concurrence of the Minister, to differentiate only between categories of security officers and not between categories or classes of security service providers. The contention is fallacious.

[25] Section 18(1) of the repealed legislation[7] provides that every person registered as a *security officer* shall pay to the Authority a prescribed amount annually on a prescribed date. The section does not provide that security service providers are required to pay an annual fee. But the regulations do contain such a

[7] Quoted in para 3 above.

provision. They do so because 'security officer' is defined[8] in the repealed legislation as 'a person or employee referred to in section 10(1)'. Section 10(1) reads as follows:

'10 Persons prohibited from performing certain acts unless registered as security officers. –

(1) As from a date determined by the Minister by notice in the *Gazette*-

(a) no person shall render a security service unless he, and if such a person is a company or a close corporation, it and every director of the company or it and every member of the close corporation, are registered with the Board as a security officer; and

(b) . . . .' (My underlining)

It follows that, contrary to the view conveyed to the Minister by the Authority that current legislation did not permit it to classify businesses by size or income in order to arrive at differentiated fees, it was so permitted. The Authority thus misconstrued the provisions of the repealed legislation which empower it to make regulations. It committed an error of law.

[26] The question to be considered now is whether the error of law was material. In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) Jafta J observed that an error of law is not material if it does not affect the outcome of the decision. This occurs, he said, if, on the facts, the decision-maker would have reached the same decision, despite the error of law.[9]

[27] I have referred above to the Authority's final report to the Minister in which it stated, in essence, that were it not for the fact that 'current legislation' did not permit it to differentiate between small and large security service providers in relation to the levies, it would have differentiated. The Authority thus appreciated that there should be differentiation, but considered itself powerless to consider the imposition of differentiated fees. Furthermore, the misapprehension of its powers

[8] The definition must, logically, have been saved together with sections 18 and 32.

[9] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 91. See also *Hira & another v Booysen & another* 1992 (4) SA 69 (A) at 93G-H.

was the probable cause, I consider, for the Authority not to take up the invitation of the appellant for further consultation. The failure by the Authority to take up the invitation is the basis for the appellant's submission, which is not without substance, in my view, that there was inadequate consultation in the process leading up to the promulgation of the amendment to the regulations. In my view, the error of law clearly affected the outcome of the Authority's decision. It was therefore material.

[28] It will be recalled, in addition, that in its report and recommendations to the Minister the Authority recorded that it had exhausted all avenues 'to arrive at a more equitable fee structure'. There is nothing in the report, nor in the answering affidavit, to indicate what those avenues were, or when they were considered. Specific allegations were made in the founding affidavit: First, that although the appellant twice provided the Authority with submissions, it was never given the opportunity to engage with the Authority to explain the full impact of the proposed changes; second, that the Authority never engaged, or attempted to engage, with it to attempt to formulate a fee increase that would be feasible and workable for the security industry. The Authority's response in the answering affidavit was simply that the appellant 'never requested an oral hearing'; that the stakeholders 'were afforded the opportunity to file objections and representations which they responded to including [the appellant]' and that the recommendations were duly considered by it and recommendations were made to the Minister. There is no evidence as to what avenues were followed or considered.

[29] In the absence of information relating to what avenues it had exhausted to arrive at a more equitable fee structure, I am unable to find that, what was conveyed to the Minister in this regard, was the truth. In my view, the position is quite the contrary. It is difficult to comprehend how all avenues could have been exhausted without any further consultation with the industry, including the

appellant, after the impact of the increases on smaller security service providers was squarely raised in the representations.

[30] The Minister was thus misinformed on two fronts. The first is that he was incorrectly informed that the Authority had no power to impose differentiated fees (an error of law). The second is that he was incorrectly informed that all avenues had been exhausted to arrive at a more equitable fee structure when there was no evidence to support that assertion (misinformation as to the facts). In these circumstances, the Minister could not be said to have taken a proper decision, in my view. His decision was contaminated by the incorrect interpretation, by the Authority, of the provisions of s 32(2) of the repealed legislation and the consequent misapprehension of its powers, as well as the factual misinformation. The amendment to the regulations accordingly falls to be set aside.

[31] Merely for purposes of completeness, I mention the other grounds of review. The third ground was that the implementation of the increases was irrational. In this regard it was alleged that the new regulations gave the industry a week to adjust to the new fees regime. It was therefore submitted, inter alia, that the time allowed for the security industry to respond to the increases was not reasonable and could not be justified. The fourth ground was that there was no reciprocal increase in service delivery. It was alleged that the Authority had implemented an astronomical increase, but had put forward no concrete proposals to increase or improve the quality of service it provided. The fifth ground was that the amendment to the regulations was not made in terms of the relevant empowering provisions. In terms of the Act the Authority may only recover revenue for the purposes provided by it (the Act). It was submitted that the decision to promulgate the regulations was taken for a reason not authorised by the empowering statute and that it was not rationally connected to the purpose of the Act. The sixth ground was that the costs recovered were in excess of what is required for the Authority's operations. It was alleged that there was an over-recovery which exceeded the

limits of the Authority's statutory power to collect fees. Given the conclusion I have reached based on the question of the misinformation conveyed to the Minister on the law and on the facts, it is not necessary to consider these grounds.

[32] No argument was advanced in this court in respect of the order sought in the second paragraph of the notice of motion, viz. an order directing the Authority to refund the difference, if any, between the amount paid by the members of the appellant in terms of the amendment to the regulations and the amount they would have paid had the amendment not come into operation. No such order shall issue.

[33] In the result the following order is made:

1 The appeal is upheld.

2 The first and second respondents are ordered to pay the appellant's costs of the appeal, which shall include the costs of two counsel.

3 The order of the court below is set aside and the following order is substituted in its stead:

'(a) The application succeeds.

(b) The amendment to the regulations made under sections 43 and 44(7) of the Private Security Industry Regulation Act 56 of 2001, read with section 32(1) of the Security Officers Act 92 of 1987, promulgated in *Government Gazette*

No 34775 of 25 November 2011, is set aside.

(c) The first and second respondents are ordered to pay the applicant's costs, which shall include the costs of two counsel.'

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L MPATI

PRESIDENT

APPEARANCES

For appellant	G J Marcus SC (with him C Steinberg)
Instructed by:	Blake Bester Incorporated, Roodepoort
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For First and Second Respondents	T Motau (with him J Nortje)
Instructed by:	State Attorney, Pretoria
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