

**THE SOUTH AFRICAN CHAPTER OF THE ASSOCIATION OF CERTIFIED FRAUD  
EXAMINERS ("ACFE") - CONSULTANT**

**OPINION**

**Francois van Zyl SC  
Chambers  
CAPE TOWN  
17 October 2018**

## **Introduction**

1. Consultant is a recognised South African professional body, representing and governing fraud examination professionals in South Africa.
2. Consultant is part of the world's largest anti-fraud and white-collar crime organisation and a premier provider of training and education in these areas. Members of Consultant are committed to reducing white collar crime worldwide and inspiring public confidence in and objectivity within the profession. The profession of fraud examiners is now also registered as a formal profession on the Occupational Framework as a stand alone profession.
3. In recent months Consultant has been approached by the Private Security Industry Regulatory Authority ("PSIRA"), established in terms of section 1 of the Private Security Industry Regulation Act 56 of 2001 ("the Act"), which requested access to Consultant's membership data base. Consultant is concerned that PSIRA is considering compelling Consultant's members who conduct investigations, to register with PSIRA in terms of section 20(1)(a) of the Act and pay levies to this body.
4. Consultant currently has a Memorandum of Understanding ("MOU") with PSIRA, in terms of which it was agreed that Consultant's South African members are exempted from registering with PSIRA, if they can prove that they are current members of Consultant and that they are not involved in providing security-related services. PSIRA has indicated to the CEO of Consultant that it wants to change the MOU with Consultant.
5. PSIRA has requested Consultant to supply details of all its members. To date, Consultant has resisted this request. Consultant is willing to disclose details of private investigators who provide security related service to

PSIRA, but not the entire member data base, as this may be regarded as infringing their members' right to privacy.

6. Consultant held an imbizo earlier this year, during which meeting Consultant's members debated the issue of the MOU with PSIRA, registering its members with PSIRA, and/or legally insisting that the Act be amended and that fraud examiners be specifically excluded from compulsory registration in terms of the Act. Consultant's members opted for the legal route - that fraud examiners need to be exempted from the operation of the Act.
7. I have been provided with a copy of an opinion by Adv Francois Labuschagne of Nexis dated 8 March 2018 ("the Labuschagne opinion"). The Labuschagne opinion analyses the provisions of the Act with a view to determine whether forensic auditors and investigators of economic crime should register as "private investigators" as envisaged in section 20(1)(a) of the Act, read with the definitions of "private investigator" and "security service" in section 1 of the Act.
8. I have also been briefed with a letter by Adv Jan Swanepoel SC written in 2001, in which he sets out his comments on the PSIRA Bill. The Act as finally approved by Parliament, however, differs from the Bill.

**Advice and guidance required:**

9. I am requested to analyse the provisions of the Act to determine whether PSIRA has a basis on which it can assert jurisdiction over Consultant and its members "who do not provide security related services".
10. I am further requested to guide Consultant as to how it should respond to the demands of PSIRA concerning access to Consultant's membership data base.

11. I am also requested to indicate the potential legal steps or options available to Consultant to protect the organisation and its members who are opposed to being regulated by a regulator whose core function relates to regulating the private security industry in South Africa.

**The Private Security Industry Regulation Act, no 56 of 2001**

12. The long title of the Act reads as follows:

"To provide for the regulation of the private security industry; for that purpose to establish a regulatory authority; and to provide for matters connected therewith."

13. The preamble to the Act reads as follows:

"WHEREAS the adequate protection of fundamental rights to life and security of the person as well as the right not to be deprived of property, is fundamental to the well-being and to the social and economic development of every person;

AND WHEREAS security service providers and the private security industry in general play an important role in protecting and safeguarding the aforesaid rights;

AND WHEREAS every citizen has the right to freely choose an occupation, including the occupation of security service provider;

AND WHEREAS it is necessary 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;"

14. Section 3 of the Act states that the primary objects of PSIRA are to regulate the private security industry and to exercise effective control over the practice of the occupation of security services provider in the public and national interest and in the interest of the private security industry itself. PSIRA is given wide powers in section 4 to achieve its objects.
15. Section 28 provides that the Minister must, after consultation with the Council of PSIRA, prescribe a Code of Conduct for security service providers which contain sufficient procedures and rules of evidence for its enforcement. This Code of Conduct will be legally binding on all security service providers, irrespective of whether they are registered with PSIRA or not and, to the extent provided for in the Act, on every person using his/her own employees to protect or safeguard his/her own property or other interests or persons or property on his/her premises or under his/her control. A Code of Conduct for security service providers was accordingly prescribed by the Minister during February 2003, the object of which was to be the regulation of the private security industry and to exercise effective control over the practice of the occupation of security service provider.
16. The Act, in section 29, provides that improper conduct proceedings may be instituted by PSIRA against a security service provider, or other person who employs a security officer, on an allegation of improper conduct.
17. In terms of section 26 of the Act, PSIRA may, *inter alia*, withdraw the registration of a security service provider if it is found guilty of improper conduct in terms of the Act.
18. Section 20(1)(a) of the Act provides for the registration of persons rendering a security service, as follows:

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

19. **"Security Service"** is defined in section 1 of the Act as follows:

**'security service'** means 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 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) tot (l) are rendered;

20. **"Security Service Provider"** is defined as follows:

**'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;"

21. **"Private Investigator"** is defined as follows:

**'private investigator'** means a person who, in a private capacity and for the benefit of another person, investigates the identity, actions, character, background or property of another person, without the consent of such a person, but does not include -

- (a) auditors, accountants, attorneys, advocates or forensic scientists conducting investigations which fall within the normal course and scope of their professional functions;
- (b) internal investigators conducting normal and reasonable investigations into employee misconduct;
- (c) internal investigators conducting investigations which a business, other than an investigating business, may undertake in the course and scope of its normal and reasonable endeavours to safeguard its security, strategic, operational or business interests:

Provided that no person is excluded from the definition of a private investigator if he or she conducts any investigation which falls within the exclusive function of the State;" (underlining provided)

22. Section 1(2) of the Act provides that the Minister for Safety and Security may, after consultation with PSIRA, by notice in the Gazette exempt any

service, activity, practice, person or entity from any or all the provisions of the Act. Section 21(5) contains a similar position, limited to security service providers

**The meaning to be ascribed to the expression "Security Service" as defined in Section 1**

23. In *Bertie van Zyl v Minister for Safety and Security* 2010(2) SA 181 (CC) the Constitutional Court considered paragraph (a) of the definition of "security service". The Court stated that if the text of paragraph (a) of the definition of "security service" is considered in isolation and interpreted literally, it seems, as the applicants in that matter contended, that section 20(1)(a), containing the obligation to register as a security service provider, will apply to all workers in all industries who in their line of employment simply happen to protect or safeguard the person or property of others, such as child minders, teachers and doctors, all of whom may protect or safeguard people and property in one way or another in the regular course of their work. The Court, however, interpreted paragraph (a) of the definition of "security service" in the light of the purpose of the Act and its context as a whole and found that the definition in paragraph (a) attains a much narrower meaning than that contended for by the applicants. The Court found such a contextual interpretation of paragraph (a) of the definition of security services capable of restricting the literal meaning of section 20(1)(a) without straining the wording of the provision.
24. The Court specifically referred to paragraphs (b) to (m) of the definition of "security services" and remarked that these paragraphs "... list aspects which have far more restrictive connotations of security services", stating

that these terms relate to special performances by security protection services.<sup>1</sup>

25. In paragraph [46] the Court stated the following:

"In statutory interpretation, it is important that courts strike an appropriate balance between the text and its context. Indeed, if one has regard to the nature and role of the private security industry, and to the stated objectives of the Act, s 20(1)(a) is open to an interpretation that promotes the spirit, purport and objects of the Bill of Rights. That reading favours a common-sense meaning, discernible from the context of s 1(b)-(m) and the Act as a whole. Therefore, only those whose duty it is to protect against the dangers with which the private security industry concerns itself - criminal acts against persons or property - are security service providers and must be regulated under the Act. That interpretation is not unduly strained and gives effect to the purpose of the Act."

26. It is important to stress that the Bertie van Zyl judgment was concerned only with the interpretation of paragraph (a) of the definition of "security service" read with the provisions of section 20(1)(a) of the Act. The Court did not deal specifically with the contents of paragraphs (b) to (m) of the definition, save to point out that these paragraphs list aspects which have far more restrictive connotations of security services and relate to special performances by security protection services. Insofar as the Labuschagne opinion seems to accept that the Bertie van Zyl judgment conclusively dealt with the meaning to be ascribed to the definition of security service, I must respectfully disagree.

27. This is amply demonstrated by the contents of paragraph (j) of the definition of "security services" which provides that someone who performs the functions of a locksmith, is also rendering a security service. Locksmiths clearly do not perform a service "to ensure the security of life

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<sup>1</sup> At paragraph 44

and property", neither do they wear uniforms or carry firearms or provide personal or property protection. Whereas a purposive interpretation is necessary to limit the wide meaning of security service as provided for in paragraph (a) of the definition, it will clearly strain the wording of paragraph (f) of the definition to, for instance, find that only locksmiths who protect the rights to life and security of the person as well as the right not to be deprived of property, renders a security service. That is clearly not the function of a locksmith, yet the activities of a locksmith are specifically included by the Legislature as a security service.

28. Similarly, it is difficult to interpret the definition of "private investigator" to limit the definition to persons rendering a service protecting the right to life and security of person as well as the right not to be deprived of property. The emphasis in the definition is on the investigation of the identity, actions, character, background or property of another person without that person's consent. The legislature clearly realised that professionals such as auditors, accountants, attorneys, advocates or forensic scientists conducting investigations which fall within the normal and reasonable course and scope of their professional functions, may fall under this definition, consequently they were specifically excluded. The emphasis in this definition is on the type of investigation being undertaken. Persons who conduct the type of investigations described in the definition, are regarded as private investigators. They must register in terms of section 20(1)(a) of the Act and are subject to be regulated by PSIRA.
29. It is instructive to bear in mind that auditors, accountants, attorneys, advocates and forensic scientists are self-regulating professions with strong codes of conduct of their own. There is no need for them to also be regulated by PSIRA.

### **Advice**

30. I am consequently of the view that PSIRA has a basis on which it can assert jurisdiction over Consultant's members (other than auditors, accountants, attorneys, advocates or forensic scientists) who, in a private capacity and for the benefit of another person, investigate the identity, actions, character, background or property of other persons without their consent, but excluding internal investigators as referred to in paragraphs (b) and (c) of the definition of "private investigator".
31. With regard to PSIRA's demand concerning access to Consultant's membership data base, I do not read section 4 of the Act to clothe PSIRA with the power to demand access to Consultant's membership data base. This is, however, a decision which may in the future affect Consultant's relationship with PSIRA and Consultant may be well advised to give PSIRA limited access to its data base with regard to those members whose conduct satisfies the requirements of "private investigator" as defined in section 1.
32. The option available to Consultant to protect the organisation and its members who are opposed to being regulated by PSIRA is, in my view, to approach the Minister for Safety and Security to exempt Consultant and its members from the provisions of section 20(1)(a) as provided for in section 1(2) of the Act)
33. I advise accordingly.

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FRANCOIS VAN ZYL SC

17 August 2018