

**SUBMISSION TO THE PORTFOLIO COMMITTEE ON POLICE ON THE PRIVATE
SECURITY INDUSTRY REGULATION AMENDMENT BILL, NO. 27 OF 2012**

prepared by

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on behalf of

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EXECUTIVE SUMMARY

1. This submission is made by Webber Wentzel on behalf of Control Risks SA (Proprietary) Limited ("**Control Risks SA**"), in response to the invitation of the Portfolio Committee on Police ("**the Committee**") offering interested parties an opportunity to make written submissions on the Private Security Industry Regulation Amendment Bill, 2012 ("**the Bill**").
2. Control Risks SA is a security services provider incorporated under South African law, and is a wholly-owned subsidiary of Control Risks Group Holdings Limited ("**Control Risks UK**"). Some of the services rendered by Control Risks SA fall within the definition of "*security services*" under the Private Security Industry Regulation Act, 2001 ("**PSIRA**"). Control Risks SA is thus in the process of registering as a security services provider under PSIRA. Certain of Control Risks SA's key staff are, however, British nationals who are in the process of applying for permanent residence in South Africa in order to comply with section 23 of PSIRA. As such, if the Bill is enacted, Control Risks SA will not be able to register as a security services provider and, in turn, would not be able to render certain services to its clients within South Africa.
3. Clauses 9 and 11 of the Bill, in particular, have the potential to cause serious impairment to Control Risks SA.

The potential detriment caused by clause 9 of the Bill

4. The enactment of clause 9 of the Bill would require Control Risks UK to divest fifty-one per cent of its shareholding in Control Risks SA. This compulsory equity divestiture may conflict with the provisions of section 25 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") which prohibit the unlawful expropriation of property, and may potentially place the South African government in breach of its obligations under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments of 27 May 1998 ("**the SA-UK Bilateral Investment Treaty**" or "**the SA-UK BIT**") and other bilateral investment treaties ("**BITs**").
5. **Section 25 of the Constitution**
 - 5.1 Section 25(1) of the Constitution provides that no one may arbitrarily be deprived of property. Section 25(2) provides that property may only be expropriated for a

public purpose or in the public interest, and subject to compensation. Expropriation is considered to be a form of deprivation. Shares in a company may also be regarded as "*property*" under section 25.

- 5.2 Clause 9 of the Bill would substantially interfere with the property rights of Control Risks SA, who will now be subject to compulsory equity divestiture of fifty-one per cent of its business. This constitutes a deprivation of property as contemplated in section 25 of the Constitution. Further, the lack of sufficient and cogent reasons for the amendment proposed in clause 9, evident from the Memorandum on the Objects of the Bill, may render the deprivation arbitrary. Based on the jurisprudence of the Constitutional Court, clause 9 of the Bill conflicts with section 25 of the Constitution. Furthermore, contrary to section 25(2)(b) of the Constitution, the Bill does not provide for compensation to be paid to those persons whose property is expropriated.
- 5.3 Clause 9 of the Bill cannot be considered to be a justifiable limitation on the rights afforded to persons under section 25 of the Constitution, and thus cannot be legitimatised under section 36 of the Constitution for the following reasons: (i) there is no apparent legitimate government purpose related to clause 9, (ii) it would impose a severe limitation on the rights exercised under the Constitution and (iii) there are potentially less restrictive means available to the state.

6. **The SA-UK BIT**

- 6.1 Control Risks UK would be entitled to bring a number of claims under SA-UK BIT in the event that the Bill is enacted. It may bring claims under the SA-UK BIT based on the following articles of the SA-UK BIT: Article 2.2 which requires host states to afford investors fair and equitable treatment, Article 3.1 which requires host states to afford investors treatment which is no less favourable than that afforded to its own nationals (national treatment) and Articles 5.1 and 5.2 which prohibit unlawful expropriation.
- 6.2 The principle of fair and equitable treatment includes a state's obligation to act in good faith, without arbitrariness or discrimination, and respect investors' legitimate expectations. It is submitted that clause 9 of the Bill would breach the South African government's obligations under the SA-UK BIT, in that its enactment would frustrate the legitimate expectations of Control Risks UK, be unreasonable as well as discriminatory.

- 6.3 Article 3.1 of the SA-UK BIT requires that UK nationals or companies are not subject to treatment less favourable than that which South Africa affords to its own nationals or companies. The compulsory equity divestiture required under clause 9 of the Bill clearly imposes differential standards on citizens and non-citizens who own the majority of shares in security businesses. As such, Control Risks UK would face treatment which is less favourable than that accorded to South African companies or citizens, which is not permitted under the SA-UK BIT.
- 6.4 Clause 9 of the Bill would further render Control Risks UK's shares in Control Risks SA subject to direct, alternatively indirect, expropriation as contemplated in Articles 5.1 and 5.2 of the SA-UK BIT. This is due to the substantial interference caused to Control Risks UK's rights of ownership, as well as the legitimate expectation that it had when it initially invested in South Africa. It is submitted that the expropriation caused by clause 9 of the Bill would be unlawful as it fails to provide for compensation, and the operation of compulsory equity divestiture discriminates against foreign nationals.

The potential detrimental impact of clause 11

7. Control Risks employs foreign nationals in strategic positions owing to their extensive qualifications and experience. Such individuals are allowed to apply for permanent residency under section 27 of the South African Immigration Act, 2002 ("**the Immigration Act**") on the basis that they have received an offer for permanent employment in South Africa, and that, among other things, they have proven to the satisfaction of the Director-General of Home Affairs that no suitably qualified citizen or permanent resident was available to fill the relevant position. Thus the South African government recognises that there are instances where only non-citizens may have the necessary expertise and qualifications for a particular employment position. Requiring Control Risks SA to abandon employee contracts with highly experienced and qualified individuals will thus be detrimental to its business.

8. Section 9 of the Constitution

- 8.1 Section 9 of the Constitution guarantees the right to equality. Clause 11 of the Bill potentially violates the right to equality of any non-citizen who performs an executive or management function in a security business or acts as a director in a security business incorporated as a company on the Bill's enactment.

- 8.2 Section 9 of the Constitution provides that the state may not unfairly discriminate against anyone on certain listed grounds or on any analogues grounds. Clause 11 differentiates on the ground of citizenship, a recognised analogous ground.¹
- 8.3 The discrimination is unfair as the relevant provisions discriminate against a vulnerable segment of society, non-South African citizens, may be ineffective at achieving their purpose and will have a significant impact on permanent residents, who the Constitutional Court has recognised as deserving equivalent treatment to citizens.
- 8.4 Furthermore, the limitation of the right to equality is not justifiable under the limitations clause, section 36 of the Constitution, owing to (i) the importance of the right, (ii) the severe nature of the limitation as well as (iii) the availability of less restrictive means.

Vague, ambiguous and overly-broad provisions

9. The degree of control to be given to South African citizens under clause 9(b)

- 9.1 While clause 9(a) of the Bill provides that fifty-one per cent of a business must be owned and controlled by South African citizens in order to register as a security services provider, section 23(2)(a) of the PSIRA, read with the amended section 23(1)(a), in effect requires that one hundred per cent of a security business must be controlled by citizens in order to register. This is due to the requirement under clause 11 of the Bill that all directors and executives must be South African citizens. This patent ambiguity cannot be reconciled with the procedural obligation incident to the rule of law principle that legislation must be stated in a clear, accessible and reasonably concise manner. Thus, clause 9(a) of the Bill could be declared unconstitutional and invalid.

¹ Differentiation amounts to discrimination if it falls under one of seventeen specified or listed grounds in section 9(3) of the Constitution, or under another ground *analogous* to the specified grounds. Citizenship was held by the Constitutional Court to be analogous to the specified grounds in section 9(3) in *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (CC) ("**Larbi-Odam**") and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) ("**Khosa**").

10. **The lack of transitional provisions relating to the amendments proposed in clause 11**

10.1 There is no transitional provision in clause 11 of the Bill which allows a period within which natural persons and security businesses may appoint South African citizens as directors, managers and executives. This would result in a significant number of security service businesses immediately breaching the PSIRA upon the Bill's promulgation. Further, failure to comply with clause 11 constitutes an offence under section 38(3)(a) of the PSIRA which renders the offender liable for a fine and a term of imprisonment.

11. **The discretion afforded to the Minister under clause 9(b)**

11.1 Clause 9(b) of the Bill would grant the Minister of Police ("**the Minister**") a broad discretion, in light of the security interests of South Africa, to prescribe different percentages of ownership and control requirements in respect of different categories of security business. The vagueness of the provision is arguably contrary to rule of law principle that legislation must be drafted in a clear, accessible and reasonably concise manner.

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON POLICE ON THE PRIVATE
SECURITY INDUSTRY REGULATION AMENDMENT BILL, NO. 27 OF 2012**

1. Introduction

1.1 This submission is made in response to the invitation of the Committee, published on 16 September 2012,² offering interested parties an opportunity to make written submissions to the Committee on the Bill.³ This submission is made by Webber Wentzel on behalf of Control Risks SA.

1.2 We are grateful for this opportunity to make this submission on the Bill. In these comments we explain:

1.2.1 the business of Control Risks SA;

1.2.2 the manner in which certain clauses of the Bill regarding the requirements for registration of a security services provider would have a negative impact on the business of Control Risks SA and similarly placed companies;

1.2.3 that these clauses of the Bill may be unconstitutional as, once in effect, they would infringe upon Control Risks SA's rights, Control Risks UK's rights, as well as the rights of similarly placed companies, under section 25 of the Constitution;

1.2.4 these clauses, once in effect, may cause the South African government to be in breach of certain of its obligations under the SA-UK BIT. It should be noted that South Africa may breach other BITs, depending on the shareholding in and corporate structure of a particular security services provider;⁴

1.2.5 that these clauses may also violate the right to equality enshrined in section 9 of the Constitution to which any non-South African citizen who is a

² Bill Number B27 - 2012.

³ The invitation requesting written submissions was published in, among other periodicals, the Sunday Times on 16 September 2012.

⁴ To date, South Africa has entered into BITs with forty-six countries, twenty-three of which are in force. Consequently, if the PSIRA Bill is enacted, the South African government may find itself the target of numerous BIT claims and subject to arbitral proceedings before any number of international arbitral tribunals.

director or performs an executive or managerial function in a security business at the time of the Bill's enactment is entitled; and

1.2.6 that certain clauses of the Bill contain vague, ambiguous and overly-broad language which may render these clauses unconstitutional owing to their inability to meet the requirements of the rule of law principle enshrined in the Constitution.

1.3 We have structured this submission as follows:

1.3.1 the business of Control Risks SA;

1.3.2 problematic clauses of the Bill;

1.3.3 the potential detrimental impact of clause 9:

1.3.3.1 section 25 of the Constitution;

1.3.3.2 the SA-UK BIT:

1.3.3.2.1 fair and equitable treatment;

1.3.3.2.2 national treatment; and

1.3.3.2.3 expropriation;

1.3.4 the potential detrimental impact of clause 11:

1.3.4.1 section 9 of the Constitution;

1.3.5 vague, ambiguous and overly-broad provisions:

1.3.5.1 the degree of control to be given to South African citizens under clause 9;

1.3.5.2 the lack of a transitional provision relating to the amendments proposed in clause 11; and

1.3.5.3 the discretion afforded to the Minister under clause 9(b).

2. Control Risks SA

- 2.1 Control Risks SA is a private company incorporated under the laws of the Republic of South Africa. It is a wholly-owned subsidiary of Control Risks UK, which is incorporated in the United Kingdom.
- 2.2 Control Risks SA provides, among other things, strategic advice, intelligence, crisis management, security training, terrorist damage assessments and immediate assistance to enable clients to respond to crisis situations. Some of the services which Control Risks SA renders to its South African clients fall within the definition of the term "*security services*" under the PSIRA.⁵ Thus, Control Risks SA is in the process of registering as a security services provider under PSIRA with the Private Security Industry Regulatory Authority ("**the PSIR Authority**").
- 2.3 In order to comply with PSIRA, Control Risks SA is in the process of appointing both executive and non-executive directors who are South African citizens. Certain of its key staff in South Africa are, however, British nationals. These individuals are in the process of applying for permanent residence in South Africa in order to comply with section 23 (read with sections 20(1)(a) and 20(2)) of PSIRA. This requires that directors and persons performing an executive or

⁵ Section 1 of PSIRA defines "*security service*" as "*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;...*".

managerial function on behalf of a security services provider must be, among other things, either a citizen of or permanently resident in South Africa.

3. Problematic clauses of the Bill

3.1 If enacted, the following provisions of the Bill are likely to have a negative impact upon Control Risks SA's business once enacted:

3.1.1 clause 9 of the Bill amends section 20 of PSIRA to include:

3.1.1.1 an additional requirement for the registration of a security business under subsection (2), namely that at least fifty-one per cent of the business must be *owned* and *controlled* by South African citizens;⁶

3.1.1.2 a provision empowering the Minister to prescribe different percentages of local ownership and control for certain categories of security services. The categories of security services listed include "*security training*"⁷ and "*security advisers*",⁸ which are services provided by Control Risks SA;⁹

3.1.1.3 a transitional provision which requires that companies which are registered as security services providers when the Bill is enacted:

3.1.1.3.1 have five years within which to comply with the additional registration requirement set out in 3.1.1.1; and

3.1.1.3.2 must comply with the percentages of ownership and control of the security services which may be prescribed by the Minister, as set out in 3.1.1.2.¹⁰ This clause does not specify a time period within which security services providers must restructure their businesses in accordance with the Minister's prescriptions; and

⁶ Clause 9(a) of the Bill.

⁷ Clause 9(b)(h) of the Bill.

⁸ Clause 9(2)(l) of the Bill.

⁹ Clause 9(b) of the Bill.

¹⁰ Clause 9(c) of the Bill.

- 3.1.2 clause 11 of the Bill amends section 23 of PSIRA to require:
- 3.1.2.1 under subsection (1)(a) (read together with subsection (2)(a)), that every natural person referred to in section 20(2) of PSIRA must be a South African citizen (as opposed to being permanently resident in South Africa, as PSIRA currently permits). As regards Control Risks SA, this would apply to every person performing executive or managerial functions in the business, as well as all of its directors;¹¹ and
- 3.1.2.2 under subsection (2), that for a security business to register as a security services provider, it must meet the "*percentage of ownership and control exercised by South African citizens*".¹² Although the meaning of this clause is not clear, it is assumed that it refers to the ownership and control requirements under clause 9(a) and (b) of the Bill;
- 3.1.3 clause 11 of the Bill does not stipulate a transitional time period to allow security businesses to make the necessary arrangements to comply with the amended requirements.
- 3.2 It is apparent from section 20(1) of PSIRA that, unless a security business is a security service contemplated under section 199 of the Constitution or registered as a security services provider in accordance with PSIRA, it may not "*render a security service for remuneration, reward, a fee or benefit*". In order for Control Risks SA to operate certain aspects of its business within South Africa, it needs to be registered as a security services provider. If the Bill is enacted, as Control Risks SA is currently structured, it will not be able to register as a security services provider.
- 3.2.1 As explained in 2.1, Control Risks SA is wholly owned by Control Risks UK and thus would not be able to meet:
- 3.2.1.1 the fifty-one per cent South African ownership and control requirement under clause 9(a) of the Bill; or

¹¹ Clause 11(a) of the Bill.

¹² Clause 11(c) of the Bill.

- 3.2.1.2 any alternative South African ownership and control percentages which the Minister may prescribe pursuant to clause 9(b) of the Bill, unless that percentage is zero.
- 3.2.2 As explained in 2.3, certain of Control Risks SA's executive and managerial staff are only in the process of applying for permanent residence status in South Africa. These individuals would need to become South African citizens if the amendment to PSIRA in clause 11(a) were to come into force.
- 3.2.3 Under the provisions of section 4(b) of the Immigration Act, read together with section 5 of the South African Citizenship Act, 1995 ("**the Citizenship Act**"), an applicant for citizenship must have been resident in South Africa for at least five years prior to the date of his or her application. Such applicant may only submit his or her application once he or she has obtained permanent resident status.¹³
- 3.2.4 In addition, if Control Risks SA contravenes section 20(1) of PSIRA, it will be guilty of an offence, and will consequently be liable to receive a fine and/or a term of imprisonment pursuant to section 38 of PSIRA.¹⁴
- 3.3 The only way in which Control Risks SA will meet the registration requirements and avoid any sanction under section 38 of PSIRA is for:

¹³ Under section 4(1)(b) of the Immigration Act, citizenship may be acquired by naturalisation by any person who is granted a certificate under section 5 of the Citizenship Act. Under section 5, the Minister of Home Affairs may grant a certificate of naturalisation as a South African citizen to any foreign national who satisfies the Minister, among other things, that:

- (a) he or she has been lawfully admitted to the Republic of South Africa for permanent residence therein;
- (b) he or she is ordinarily resident in South Africa; that he or she has been so resident for a continuous period of not less than one year immediately preceding the date of his or her application; that he or she has, in addition, been resident in South Africa for a further period of not less than four years during the eight years immediately preceding the date of his or her application; and
- (c) he or she intends to continue to reside in South Africa or to enter or continue in the service of the South African government or of an international organisation of which the South African government is a member or of a person or association of persons resident or established in the South Africa.

¹⁴ Section 38(3) of PSIRA reads as follows:

"(3) Any person who-

- (a) contravenes or fails to comply with section 20(1) or section 26(3);

is guilty of an offence and-

- (i) *on a first conviction of a contravention referred to in paragraph (a), is liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment;*
- (ii) *on a second or subsequent conviction of a contravention referred to in paragraph (a), is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment;..." (our emphasis).*

- 3.3.1 Control Risks UK to divest fifty-one per cent of its shareholding in Control Risks SA, and thus fifty-one per cent of its ownership rights in Control Risks SA, to South African citizens;
- 3.3.2 Control Risks UK to forfeit its right to control its South African subsidiary to South African citizens; and
- 3.3.3 Control Risks SA to hire only South African citizens for any position which involves executive or managerial functions, and consequently to dismiss any non-citizen from such positions.

4. **The potential detrimental impact of clause 9**

- 4.1 The apparent consequence of the enactment of clause 9 of the Bill is that Control Risks UK would need to divest fifty-one per cent of its shareholding in, as well as its right to own and control, Control Risks SA to South African citizens if it intends to operate as a security business in South Africa. This compulsory equity divestiture may constitute an unlawful expropriation of property under section 25 of the Constitution. In addition, it may place the South African government in breach of its obligations under the SA-UK BIT and other BITs, as to date, South Africa has entered into BITs with forty-six countries, twenty-three of which are in force. Consequently, if the Bill is enacted, the South African government may find itself the target of numerous BIT claims and subject to arbitral proceedings before any number of international arbitral tribunals.

4.2 **Section 25 of the Constitution**

- 4.2.1 Section 25 of the Constitution states (in relevant part) that:

"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) ...

(4) *For the purposes of this section –*

(a) *the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and*

(b) *property is not limited to land."*

4.2.2 As a precursor to this enquiry, we note that:

4.2.2.1 section 25 of the Constitution clearly applies to the PSIR Authority¹⁵ which is established by statute and derives its powers from chapter 2 of PSIRA;¹⁶

4.2.2.2 all private security services providers are entitled to the protection of section 25 of the Constitution regardless of whether they are juristic entities, as juristic entities are also entitled to the rights in the Bill of Rights under section 8(4) of the Constitution;¹⁷ and

4.2.2.3 it is apparent from the use of the words "*no one*" in section 25(1) of the Constitution, that these rights extend to non-citizens or companies which are not incorporated under South African law.

4.2.3 It is well established that the reference to "*property*" under section 25 of the Constitution includes property rights such as ownership and the bundle of rights that make up ownership. These include the rights to use property or to exclude other people from using it or to derive income from it or to

¹⁵ Applications for registration as a security services provider must be made to the PSIR Authority in terms of section 21 of PSIRA.

¹⁶ T Roux "Property" in Woolman et al *Constitutional Law of South Africa* (2nd Edition), Juta & Co Ltd, March 2012, at 46 - 6.

¹⁷ Section 8(4) of the Constitution states: "[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

In *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC) ("**FNB**"), at para 45, the Constitutional Court held that:

"denying companies entitlement to property rights would lead to grave disruptions and would undermine the very fabric of our democratic State.' The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons" (footnote omitted).

transfer it to others.¹⁸ Shares in a company may also be regarded as "property" under section 25.¹⁹

4.2.4 Expropriations are governed by section 25(2) of the Constitution and the Expropriation Act, 1975 ("**the Expropriation Act**"). An expropriation has been described as "*the forced transfer of a right in property*",²⁰ and is considered to be a form of deprivation of property.²¹ The requirements for a lawful expropriation were set out by the Supreme Court of Appeal in *Agri South Africa*:²²

"The Constitution draws a distinction between a deprivation of property and an expropriation. A deprivation of property is only constitutionally compliant if it occurs in terms of a law of general application and is not arbitrary. An expropriation is a special type of deprivation. It must, like any other deprivation, take place in terms of a law of general application and not be arbitrary. In addition it must be for a public purpose or in the public interest and the expropriation must be subject to the payment of compensation" (our emphasis).

4.2.5 Clause 9 of the Bill is a patent example of the forced transfer of the affected persons' rights of ownership. The term "*deprivation*" has been given a relatively broad meaning by the Constitutional Court,²³ requiring merely "*any interference*". The clause 9 amendments certainly interfere with the property rights of the affected persons who will be deprived of their shares in a security business, as well as their ownership and control rights, and

¹⁸ *Geyser and Another v Msunduzi Municipality and Others* 2003 (3) BCLR 235 (N) ("**Geyser**"), at 249.

¹⁹ See CG van der Merwe, "Things" in *Law of South Africa*, Volume 27, First Reissue Volume, LexisNexis Butterworths, 31 October 2001, at para 195, and Currie and De Waal, *The Bill of Rights Handbook* (5th Edition), Juta & Co Ltd, 2005 at 536-540.

²⁰ Roux, *op cit*, note 16, at 46-19.

²¹ *FNB*, *op cit*, note 17, at para 57; Roux, *ibid*, at 46-19.

²² *Minister of Minerals and Energy v Agri South Africa (Centre for Applied Legal Studies as amicus curiae)* 2012 (9) BCLR 958 (SCA) ("**Agri SA**") at para 12.

²³ In *FNB op cit*, note 17, at para 57, the Constitutional Court stated that "[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned." In *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) ("**Mkontwana**") at para 32, the Constitutional Court adopted a somewhat narrower approach to deprivation than "any interference" as referred to in *FNB*, stating that

"[w]hether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation ... [A]t the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to a deprivation."

However, in *Reflect-All 1025 v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2010 (1) BCLR 61 (CC) ("**Reflect-All**") at paras 34-36, the Constitutional Court quoted both *dicta* with approval, apparently suggesting that they are complementary.

would go so far as to qualify as a "*substantial interference*" given that affected persons stand to lose up to fifty-one per cent of their business.

4.2.6 In addition, following the test laid down by the Constitutional Court in *FNB*,²⁴ it is apparent that the clause 9 amendments are potentially arbitrary. The Constitutional Court set the following test for arbitrariness: "[a] deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair"²⁵ (our emphasis). The Constitutional Court went on to explain the way in which "sufficient reason" is to be established, which includes an evaluation of "the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question" as well as "the extent of the deprivation in respect of such property".²⁶ The court added that the test for arbitrariness "is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination".²⁷

4.2.7 According to paragraph 2 of the Memorandum on the Objects of the Private Security Industry Regulation Amendment Bill ("**the Memorandum**"), entitled "Objects of the Bill", the purpose of clause 9(a) of the Bill is "to provide for the additional requirements for the registration of security businesses to include a requirement that at least [fifty-one] per cent of their ownership and control must be exercised by South African citizens". While this purports to provide the object, it merely re-states the content of the clause without explaining the underlying rationale for the amendment it proposes. Paragraph 1 of the Memorandum lists the challenges which the private security industry face, including "the increased threat to national security posed by the participation of foreign nationals in the industry". This paragraph does not elaborate on the manner in which the participation of foreign nationals in the industry poses a threat to national security. More

²⁴ *FNB, op cit*, note 17.

²⁵ *FNB, ibid*, at para 100.

²⁶ *FNB, ibid*. In *Mkontwana, op cit*, note 23, at para 51, the Constitutional Court described the determination of "sufficient reason" to necessitate one "to evaluate the relationship between the purpose of the law and the deprivation effected by that law".

²⁷ *FNB, ibid*, at para 98.

importantly, it fails to draw a link between *permanent residents* and the alleged threat to national security. Clause 9 of the Bill effectively requires companies which are controlled by permanent residents of South Africa to give up control of the companies in question to South African citizens.²⁸ To view permanent residents as mere foreign nationals is contrary to the approach taken by the Constitutional Court towards permanent residents. In *Khosa*,²⁹ Mokgoro J cited the following portion from *Larbi-Odam*,³⁰ regarding permanent 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, 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" (our emphasis).

4.2.8 Given that permanent residents are viewed as persons committed to South Africa, it is arguable that the distinction that clause 9 of the Bill draws between permanent residents and citizens by implying that the security industry under the control of permanent residents poses a threat to national security, but that the security industry under the control of citizens does not, is arbitrary.

4.2.9 Neither the Bill nor the Memorandum indicates:

4.2.9.1 how the compulsory equity divestiture in security businesses by non-citizens, as required by clause 9 of the Bill; nor

²⁸ Section 23(2)(a), read together with section 23(1)(a), of PSIRA requires that all directors of and persons performing executive or managerial functions in a security service business must be either South African citizens *or permanent residents*. Although the control of a company is specific to each company, it is most likely linked to the directors of or the persons performing executive or managerial functions in that company. Thus for the any security business registered as a security services provider under PSIRA, is likely controlled by permanent residents.

²⁹ *Khosa*, *op cit*, note 1, at para 71.

³⁰ *Larbi-Odam*. *op cit*, note 1.

4.2.9.2 how a change in control of security businesses from permanent residents to South African citizens, as required by clause 9 of the Bill, will diminish the "*threat to national security*".

4.2.10 Thus no apparent relationship between the deprivation and the purpose of the Bill exists. This, coupled with the severe impact that the clause 9 amendments will have to the detriment of affected persons, leads to the conclusion that the clause 9 amendments are arbitrary, and thus clause 9 of the Bill would not pass constitutional muster.

4.2.11 In addition to its arbitrariness, clause 9 of the Bill may be considered unconstitutional as it fails to comply with section 25(2)(b) of the Constitution,³¹ which mandates that compensation be paid to the affected persons whose property is expropriated. No provision is made for this in either the clause 9 amendment or the Bill as a whole. It is imperative that, if the government intends to proceed with this amendment, and in addition to rectifying the arbitrariness concerns raised above, provision must be made for the payment of just and equitable compensation, with guidance as to how this should be calculated and the circumstances under which such compensation will be paid.

4.2.12 It is further submitted that clause 9 of the Bill, if it were found to be unconstitutional as a result of its infringements of section 25 of the Constitution, these infringements would not be justifiable under section 36 of the Constitution. Section 36 of the Constitution provides that:

"(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 the 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;

³¹ See, in this regard, the detailed provisions of section 25(3) of the Constitution and sections 10-13 of the Expropriation Act, which offer guidance for the payment of compensation.

(d) *The relation between the limitation and its purpose; and*

(e) *Less restrictive means to achieve the purpose.*

(2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

4.2.13 As set out above in relation to arbitrariness, there is no apparent legitimate governmental purpose related to the clause 9 amendments, and thus the "*relationship between the limitation and its purpose*" to be considered under section 36(1)(d) is not cogent. In addition, clause 9 of the Bill would impose a *severe* limitation on the rights of affected persons under section 25 of the Constitution. Notwithstanding the assumed importance of the national security of South Africa, it is arguable that "*less restrictive means*" exist by which the government may ensure that the role of foreign nationals in the private security industry does not escalate into a national security threat.

4.3 The SA-UK BIT

4.3.1 Control Risks UK would be entitled to bring a number of claims under the SA-UK BIT in the event that the Bill is enacted into law, as:

4.3.1.1 Control Risks UK may be considered a "*company*" as defined under Article 1(d)(ii) of the SA-UK BIT;³²

4.3.1.2 Control Risks SA may be considered Control Risks UK's "*investment*" as defined under Article 1(a)(ii) of the SA-UK BIT;³³ and

³² Article 1(d) of the SA-UK BIT reads as follows:

"*companies' means:*

(i) ...

(ii) *in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in territory to which this Agreement is extended in accordance with the provisions of Article 12:...*"

³³ Article 1(a)(ii) reads as follows:

"*investments' means every kind of asset and in particular, though not exclusively, includes:*

(i) ...

(ii) *shares in and stock and debentures of a company and any other form of participation in a company;...*" (our emphasis).

4.3.1.3 Control Risks UK's "*investment*" (ie Control Risks SA) is in South Africa's "*territory*", as defined under Article 1(e)(i) of the SA-UK BIT.³⁴

4.3.2 As to the term of the SA-UK BIT, Article 14 contains a twenty year sunset clause, and thus an investment by a company incorporated in the United Kingdom will be protected under the SA-UK BIT for an additional twenty years after its termination.

4.4 Fair and equitable treatment

4.4.1 Article 2.2 of SA-UK BIT requires that:

"Investments of nationals or companies of each Contracting Party [that is South Africa or the United Kingdom] shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party" (our emphasis).

4.4.2 The principle of fair and equitable treatment is broad and encompasses a number of specific investment protection measures and general international law standards, both substantive and procedural in nature. These include, potentially relevant to this case, a state's obligation to act in good faith, consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making as well as respect investors' legitimate expectations.³⁵ An investor is entitled to expect the host state to act in accordance with its stated decisions, policies, rules and regulations which

³⁴ Article 1(e)(i) reads as follows:

"*territory*" means:

- (i) *In respect of the Republic of South Africa: the Republic of South Africa, including the territorial sea and any maritime area situated beyond the territorial sea of the Republic of South Africa which has been or might in the future be designated under the national law of the Republic of South Africa in accordance with the international law as an area within which the Republic of South Africa may exercise rights with regard to the sea-bed and subsoil and the natural resources".*

³⁵ The reference to legitimate expectations refers to the expectations of the relevant investor arising from its reliance on specific host state conduct, usually oral or written representations or commitments, relating to an investment. In addition, an investor may also have legitimate expectations regarding the stability and predictable legal and administrative framework that meets certain minimum standards, including transparency and consistency in the host state's decision-making process, as well as the general expectation that the host state will treat foreign investments fairly and equitably (Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, 2009, at 279 - 280).

relate to its investments.³⁶

4.4.3 It is apparent that clause 9 of the Bill breaches the South African government's obligations under Article 2.2 of the SA-UK BIT as its enactment would, among other things:

4.4.3.1 frustrate the legitimate expectations of Control Risks UK which were formulated at the time when it made its investment. This is because the content of the Bill and the possibility of a compulsory equity divestiture to South African citizens were not public knowledge at the time when Control Risks UK decided to invest in South Africa through the incorporation of Control Risks SA; and

4.4.3.2 be unreasonable.³⁷ In 4.2.7 to 4.2.10 it was noted that there is no apparent relationship between the compulsory equity divestiture and the requirement that non-citizens give up control over their security businesses, as stipulated in clause 9 of the Bill, and the purpose of the government to diminish the threat to national security posed by the private security industry; and

4.4.3.3 be discriminatory. The discriminatory nature of clause 9 of the Bill is noted in 4.5.4 below, as it requires unjustifiably differential treatment of investors and investments in like or similar circumstances on the basis of that nationality.³⁸

4.5 National treatment

4.5.1 Article 3.1 of the SA-UK BIT requires that "[n]either Contracting Party shall in its territory subject investments of returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it

³⁶ *Tecnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award 29 May 2003 ("**Tecmed**"), at para 154; *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, ICSID Case No. ARB/01/7, Award 25 May 2004, ("**MTD**") at para 114; *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No. UN3467, Award of 1 July 2004, ("**Occidental**") at para 185; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/08, Award 12 May 2005 ("**CMS**"), at para 279 and *LG&E v Argentina*, ICSID Case No. ARB/02/1, Award of 25 July 2007 ("**LG&E**"), at para 127.

³⁷ In *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award of 17 March 2006 ("**Saluka**"), at 458 - 460, the tribunal, referring to the International Court of Justices' decision in the *Fisheries Jurisdiction Case* (Spain v Canada), held that the standard of reasonableness requires proof that the host state's conduct "*bears a reasonable relationship to some rational policy*".

³⁸ Newcombe and Paradell, *op cit*, note 35, at 289.

accords to investments or returns of its own nationals or companies..." (own emphasis).

- 4.5.2 In addition, Article 3.2 requires that "[n]either Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies..." (own emphasis).
- 4.5.3 Generally, the national treatment standard of review requires a comparison of investors and investments in like or similar circumstances to determine whether differences in treatment accorded by the host state are attributable to the nationality of the investor or the investment.³⁹ This must be followed by an analysis of the treatment accorded by the host state to such investors and investments to determine whether "*less favourable treatment*" is accorded to foreign nationals and their investments in comparison to nationals of the host state and their investments. In addition, parties to BITs may have included in the BIT grounds on which less favourable treatment of foreign nationals are justified. These grounds must be considered in determining whether the particular national treatment obligation has been breached. The host state bears the onus of proving this final step of the analysis.⁴⁰
- 4.5.4 Clause 9 of the Bill clearly imposes differential treatment on security businesses which are majority owned and controlled by South African citizens and those which are majority owned and controlled by non-citizens. The differential treatment is directly attributable to the nationality or citizenship of the investor in question. It consists of constraints on the freedom of non-citizens to own and control their security businesses, as a result of the compulsory equity divestiture and the requirement that non-citizens give up control over their security businesses. South African citizens who own and control security businesses already comply with such requirements, and thus would not be prejudiced by the enactment of the Bill. If the Bill is enacted, Control Risks UK, as a company incorporated in

³⁹ *Ibid*, at 159 and 161.

⁴⁰ *Ibid*, at 162 - 163.

the United Kingdom, would face treatment which is less favourable than that which would be accorded to South African citizens who own and control a company comparable to Control Risks SA.

- 4.5.5 It is noted that Article 3.1 provides no grounds of justification for the "*less favourable treatment*" accorded to security businesses owned and controlled by non-citizens. As the South African government has included such grounds of justification in a number of the BITs which it has entered into,⁴¹ it is arguable that the intent of the contracting parties by excluding such grounds of justification from the SA-UK BIT was that the national treatment standard should not be so limited. In some cases, international arbitral tribunals have held that the host state may, regardless of whether any grounds of justification are provided in the relevant BIT, justify its differential treatment of foreign nationals and their investments, if it can prove that there is a legitimate public policy rationale behind it which is unrelated to nationality-based discrimination.⁴² It is clear, however, from the analysis contained in 4.2.7 to 4.2.10, that the rationale behind clause 9 of the Bill is directly related to the extent of the participation of non-citizens in the South African security industry. The government would thus be unlikely to dismiss the burden of proof placed on it in this regard.

4.6 Expropriation

- 4.6.1 Article 5.1 of the SA-UK BIT requires that:

"Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation... in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation" (own emphasis).

- 4.6.2 Article 5.1 goes on to describe how compensation should be calculated in the event of such expropriation of an investment:

⁴¹ The following BITs entered into by the South African government contain grounds of justification for the breach of the national treatment standard by one of the contracting parties: SA-Mauritius BIT, SA-Russian BIT of 23 November 1998, SA-Nigeria BIT of 29 April 2000, SA-Algeria BIT of 24 September 2000, SA-Rwanda BIT of 19 October 2000, SA-Tunisia BIT of 28 February 2002 and SA-Libya BIT of 14 June 2002.

⁴² Newcombe and Paradell, *op cit*, note 35, at 159 and 161.

"Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable at the rate of exchange applicable on the date of the transfer pursuant to the exchange regulations in force."

- 4.6.3 Article 5.2 of the SA-UK BIT differentiates between nationalisation, expropriation and measures that have an effect equivalent to either nationalisation or expropriation. Article 5.2 does not expressly include both direct and indirect expropriation. It can, however, be argued that even when a BIT does not expressly refer to indirect takings, the concept of expropriation is broad enough to cover relevant measures of both the direct and indirect kind.⁴³ Alternatively, it is arguable that the phrase "*having effect equivalent to...*" implies that the BIT covers both direct and indirect expropriations.⁴⁴
- 4.6.4 Direct expropriation involves a mandatory legal transfer of the title to property or its outright physical seizure. With direct expropriation, the state or a state-mandated third party usually derives benefit from the expropriation.⁴⁵
- 4.6.5 Indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure.⁴⁶ The

⁴³ "Expropriation" in *UNCTAD Series on Issues in International Investment agreements II*, United Nations Conference on Trade And Development, 2012, at 8.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, at 6. In *Amoco International Finance Corporation v Government of the Islamic Republic of Iran*, Partial Award No. 310-56-3 (July 14, 1987), 15 Iran-U.S.C.T.R 189 ("**Amoco**"), at 220, the Iran-US Claims Tribunal referred to a "*compulsory transfer of property rights*" as the measure of direct expropriation. In *Metalclad Corporation v. Mexico*, ICSID Case No. ARB (AF)/97/1. (NAFTA), Award of 30 August 2000 ("**Metalclad**"), at para 103, the Tribunal spoke of "*open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host, to the obvious benefit of the host state.*"

⁴⁶ *Ibid.*, at 7. In *Tecmed, op cit*, note 36, at para 114, the Tribunal held that indirect expropriation constituted, among other things, "*where laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government*". In the *Metalclad, ibid*, the Tribunal similarly held that indirect expropriation included "*covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state*". In *Tippets, Abbott, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2 (June 29, 1984), 6 Iran-U.S.C.T.R 189 ("**Tippets**") at 225, the Tribunal held that "*a deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected*".

test, when determining whether the *effect* of the instituted measure is indirect expropriation, is whether conduct consisting of an act or omission on the part of a state, can be construed as a substantial interference with the rights of the investor.⁴⁷ An enquiry into whether any economic loss or damage has resulted from the measure in question is distinct from the determination that the measure constitutes expropriation.⁴⁸

4.6.6 If clause 9 of the Bill is promulgated, Control Risks UK's shares in Control Risks SA would be subject to direct expropriation as clause 9 requires the transfer of Control Risks UK's title to fifty-one per cent of its shares in Control Risks SA to a South African citizen. Alternatively, Control Risks UK's shares in Control Risks SA would be subject to indirect expropriation. This is as a result of the substantial interference that the enactment of clause 9 would cause regarding Control Risks UK's rights of ownership to its shares in Control Risks SA. In addition, Control Risks UK's claim of indirect expropriation would be reinforced by its legitimate expectations on making its investment in South Africa.⁴⁹

4.6.7 Notwithstanding the general right of states to expropriate property owned by foreign nationals, each of the elements stipulated under Article 5.1, as well as conditions imposed by customary international law, must be adhered to for the expropriatory act to be lawful. It is apparent that the expropriation which is brought about by clause 9 of the Bill's enactment, would be unlawful as:

4.6.7.1 the Bill fails to provide for compensation in the manner envisaged by Article 5.1 of the SA-UK BIT; and

4.6.7.2 the operation of the compulsory equity divestiture is discriminatory against foreign nationals on the basis of their citizenship.⁵⁰

⁴⁷ See *Biwater v Tanzania* ICSID Case ARB/05/22, Award of 24 July 2008, at paras 464-467. In *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/08, Award 12 May 2005 ("*Biwater*"), at para 262, the Tribunal held that the effects of the instituted measure must be substantial to the extent that the investor's benefits in its property would be neutralised.

⁴⁸ *Ibid*, at para 781.

⁴⁹ *Metalclad*, *op cit*, note 45, at para 103.

⁵⁰ UNCTAD, *op cit*, note 43, at 35.

5. The potential detrimental impact of clause 11

5.1 Control Risks SA's reason for employing foreign nationals in strategic positions is due to their extensive qualifications, expertise and experience in its sphere of business. Control Risks SA is unlikely to be the only security business in South Africa which would have employed non-citizens as a result of their experience and expertise.

5.2 It is noted that under section 27 of the Immigration Act, an individual may apply for permanent resident status on the basis that such individual has received an offer for permanent employment in South Africa, and that, among other things, he or she has proven to the satisfaction of the Director-General of Home Affairs that no suitably qualified citizen or permanent resident was available to fill the relevant position. Thus the government also recognises that there are instances where only non-citizens may have the necessary expertise and qualifications for a particular employment position.

5.3 It stands to reason that requiring Control Risks SA and similarly placed security businesses to abandon employee contracts with highly experienced and qualified individuals for the reason that they are non-citizens, will be detrimental to their businesses.

5.4 Section 9 of the Constitution

5.4.1 Clause 11 of the Bill may violate the right to equality, under section 9 of the Constitution, of any non-citizen who is a director or performs an executive or managerial function in a security business at the time of the Bill's enactment.

5.4.2 Section 9 of the Constitution states that:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) 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.

- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

5.4.3 Clause 11 amounts to differentiation in that its enactment would accord differential treatment on different persons or different categories of persons.⁵¹ Differentiation amounts to discrimination if it falls under one of seventeen specified or listed grounds in section 9(3) of the Constitution,⁵² or under another ground *analogous* to the specified grounds. In order for a measure to be classified as discrimination on an analogues ground, the differentiation must relate to the attributes or characteristics of persons "*in a way which impairs their fundamental dignity as human beings... [or] in some other way [which] affects persons adversely in a comparably serious manner*".⁵³ Citizenship was held by the Constitutional Court to be analogous to the specified grounds in section 9(3) in *Larbi-Odam*⁵⁴ and *Khosa*.⁵⁵ Thus, the differentiation in clause 11 of the Bill as regards the treatment of citizens and permanent residents will amount to discrimination on the analogues ground of citizenship.

5.4.4 If the enactment of the clause 11 were challenged, the government would have to prove that the discrimination between citizens and permanent

⁵¹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) ("**Harksen**"), at para 25.

⁵² The grounds are: "*race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth*".

⁵³ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) ("**Prinsloo**") at para 33.

Sachs J, in one of the dissenting judgments in *Harksen, op cit*, note 51, noted that the court was required to approach the issue contextually. This approach has also been endorsed in the leading cases of *Prinsloo, ibid*, and *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) ("**Hugo**"). Sachs J stated that the court is required "*to pay special regard to patterns of advantage and disadvantage experienced in real life which might not be evident on the face of the legislation itself*".

⁵⁴ *Larbi-Odam, op cit*, note 1, at 19.

⁵⁵ *Khosa, op cit*, note 1, at 71.

residents encompassed therein is fair. It is submitted that this is unlikely given that:⁵⁶

- 5.4.4.1 non-citizens, including permanent residents, are considered to be a vulnerable segment of society;⁵⁷
- 5.4.4.2 as regards the nature of the provision or power and the purpose sought to be achieved by it, as discussed in 4.2.7, the Bill and the Memorandum fail to provide any link between the objective of diminishing the "*threat to national security*" and a change in control of security businesses from permanent residents to South African citizens;
- 5.4.4.3 the severe extent to which the interests of the affected persons are affected by the discrimination. The Constitutional Court in *Larbi-Odam* expresses the impact the Bill's proposed provisions will have on permanent residents:

*"A person's profession is an important part of his or her life. Security of tenure permits a person to plan and build his or her family, social and professional life, in the knowledge that he or she cannot be dismissed without good cause. Conversely, denial of security of tenure precludes a person from exercising such personal life choices."*⁵⁸

On the basis that the relevant provisions discriminate against a vulnerable segment of society, are likely to be ineffective in achieving their purpose and in light of the significant impact they will have on permanent residents,

⁵⁶ Goldstone J stated in *Hugo* that, in assessing whether the discrimination considered is unfair, "[e]ach case will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned". This impact is to be primarily assessed with regard to human dignity, the court citing L'Heureux-Dubé J in *Egan v Canada* (1995) 124 CCR (2d) 79 at para 104-105, who stated that "*inherent human dignity is at the heart of individual rights in a free and democratic society*". In assessing whether the discrimination is unfair, the court held at para 51, that various factors should be taken into consideration, including the position of the complainant in society, the nature of the provision or power and the purpose sought to be achieved by it (where a provision aims to achieve a worthy societal goal and does not purport to manifestly discriminate against any group, the right to equality is less likely to be infringed) and the extent to which the interests of the complainant have been affected by the discrimination. The first two factors are both relevant in assessing this decisive final factor. The discrimination will be regarded as unfair if it has impaired the fundamental human dignity of the complainant or if it constitutes a comparably serious infringement.

⁵⁷ *Khosa*, *op cit*, note 1, at 71. The Constitutional Court referred to *Larbi-Odam*, *op cit*, note 1, stating that: "[w]ith regard to the vulnerability of permanent residents, the court in *Larbi-Odam* found that ... foreign citizens are a minority in all countries, and have little political muscle."

⁵⁸ *Larbi-Odam*, *op cit*, note 1, at para 23.

the discrimination is likely to be deemed unfair. This view is supported by approach taken by the Constitutional Court towards permanent residents, as discussed in 4.2.7, and the equal manner in which the Constitutional Court has treated permanent residents and citizens, particularly with regard to employment.⁵⁹

5.4.5 It is further submitted that clause 11 of the Bill, if it were found to be unconstitutional as a result of its infringements of section 9 of the Constitution, would not be justifiable under section 36 of the Constitution. In consideration of the factors listed under section 36, and in support of this view:

5.4.5.1 the right to equality is one of the foundational rights in the Bill of Rights. There can be no argument as to the right's fundamental importance in terms of the objects and underlying values of the Constitution;

5.4.5.2 there is no apparent legitimate governmental purpose related to clause 11 of the Bill;

5.4.5.3 clause 11 of the Bill would impose a *severe* limitation on the rights of the affected persons under section 9 of the Constitution; and

5.4.5.4 notwithstanding the assumed importance of the national security of South Africa, it is arguable that "*less restrictive means*" exist by which the government may ensure that the role of foreign nationals in the private security industry does escalate into a national security threat.

6. Vague, ambiguous and overly-broad provisions

6.1 The degree of control to be given to South African citizens under clause 9(a)

6.1.1 Clause 9(a) of the Bill provides that no security business may register as a security services provider unless fifty-one per cent of that business is owned and *controlled* by South African citizens. Section 23(2)(a) of PSIRA, read with section 23(1)(a) as amended by clause 11 of the Bill, stipulates

⁵⁹ *Khosa, op cit*, note 1, at para 71.

that no person may perform executive or managerial functions in or be a director of a security services provider, if the business is incorporated as a company, unless they are a South African citizen. Although the control of a company is subjective and thus specific to each company, it is most likely linked to the directors of or the persons performing executive or managerial functions in that company. Thus, clause 9(a) of the Bill would require that only fifty-one per cent of the control of a security services provider must be exercised by South African citizens, while section 23(2)(a) of PSIRA, read with section 23(1)(a) as amended by clause 11 of the Bill, may effectively require one hundred per cent of the business to be controlled by South African citizens.

6.1.2 This patent ambiguity cannot be reconciled with the rule of law principle that legislation must be stated in a clear, accessible and reasonably concise manner.⁶⁰ The ambiguous nature of the provision does not provide reasonable certainty,⁶¹ and accordingly, does not meet the requisites of the principle of rule of law and could be declared unconstitutional and invalid.

6.2 **The lack of a transitional provision relating to the amendments proposed in clause 11**

As noted in 3.1.3, no transitional period is provided for under clause 11 of the Bill to allow security services providers to comply with the proposed requirement that every natural person performing managerial or executive functions for a security business or every director, if the business is a company, must be a South African citizen. Thus, when the Bill is enacted, it would immediately leave these individuals, and the businesses in which they operate, outside of the remit of the registration requirements. As a result, the continued operation of certain security businesses would, upon proclamation, become unlawful and would constitute an offence in terms of section 38(3)(a) of PSIRA.

⁶⁰ *Affordable Medicines Trust v Minister of Health RSA 2005 (6) BCLR 529 (CC)* ("**Affordable Medicines**") at para 73.

⁶¹ *Ibid*, at para 108.

6.3 **The discretion afforded to the Minister under clause 9(b)**

The enactment of clause 9(b) of the Bill would give the Minister a broad discretion to prescribe different percentages of ownership and control requirements in respect of different categories of security businesses. In exercising this discretion, the Minister must, rather vaguely, be guided by “*the security interests of the Republic*”. It is arguable that this provision runs contrary to the rule of law on the basis that it is vague and ambiguous and the constitutional imperative that legislation must be stated in a clear, accessible and reasonably concise manner.⁶²

6.4 The uncertainty that will ensue in the event that the Bill is enacted in its present form is not only contrary to the constitutional principle of the rule of law, but will also have the potential to undermine both local and foreign investor confidence.

7. **Conclusion**

7.1 In summary it is submitted that:

7.1.1 the amendments proposed by clauses 9 and 11 of the Bill are likely to have a negative impact on the business of Control Risks SA and similarly placed companies;

7.1.2 clauses 9 and 11 of the Bill may be unconstitutional as, once in effect, they would infringe upon Control Risks SA's rights, Control Risks UK's rights, as well as the rights of similarly placed companies, under section 25 of the Constitution;

7.1.3 these clauses, once in effect, may cause the South African government to be in breach of certain provisions of the SA-UK BIT, in particular, the fair and equitable treatment, the national treatment and the expropriation provisions. It is further noted that South Africa may breach other BITs depending on the shareholding in and corporate structure of a particular security services provider;

⁶² *Ibid* at para 73.

- 7.1.4 clauses 9 and 11 of the Bill may violate the right to equality, under section 9 of the Constitution, of any non-citizen who is a director or performs an executive or managerial function in a security business at the time of the Bill's enactment; and
- 7.1.5 clauses 9 and 11 of the Bill contain vague, ambiguous and overly-broad language which may render these clauses unconstitutional owing to their inability to meet the requirements of the rule of law principle enshrined in the Constitution.