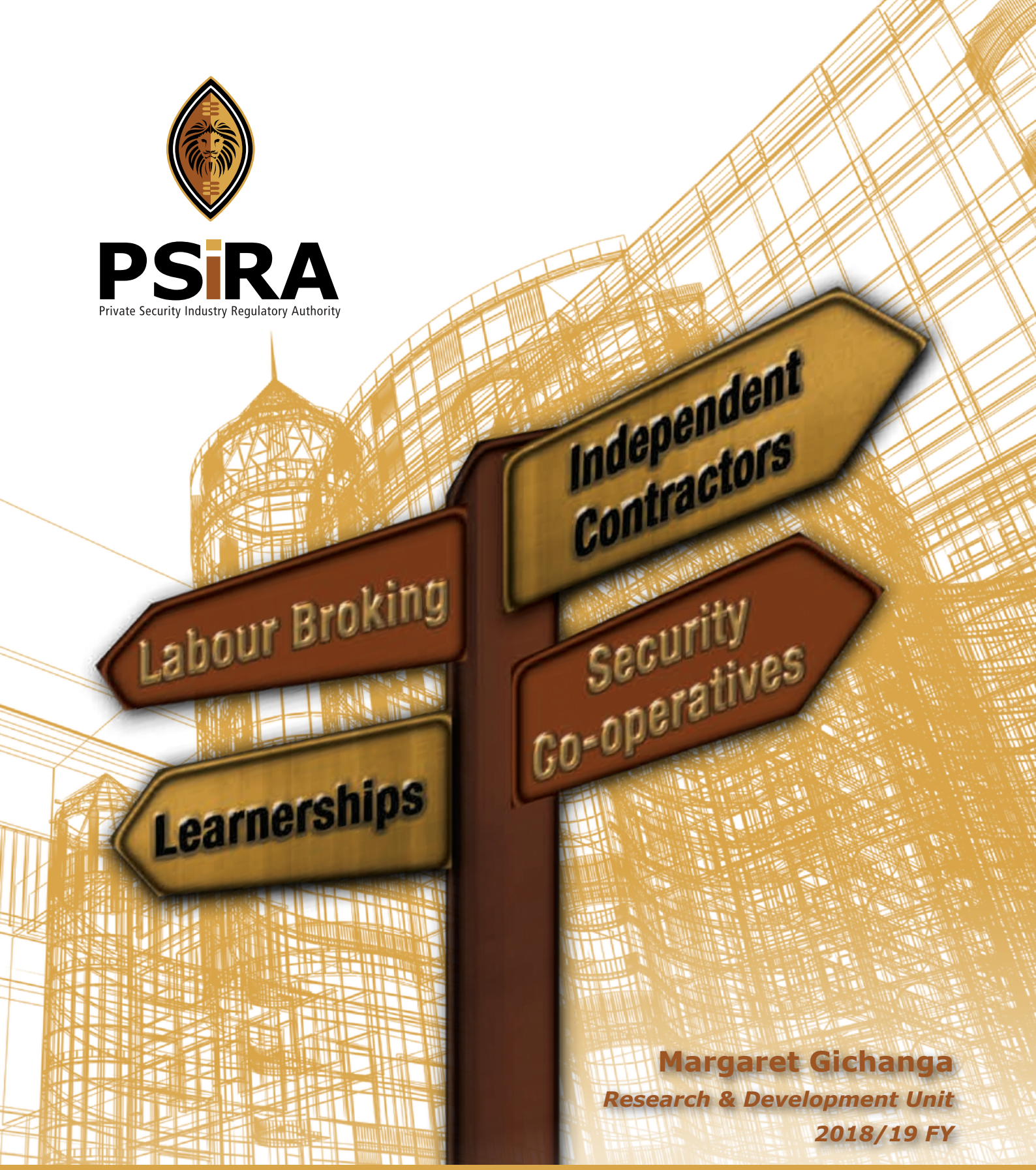
PSiRA
Private Security Industry Regulatory Authority



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(IN)SECURITY OF TENURE

LABOUR FLEXIBILITY AND THE PRIVATE SECURITY INDUSTRY

The Use of Labour Broking, Independent Contractors, Co-operatives and Learnerships in South Africa

THE AUTHOR

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EXECUTIVE SUMMARY

This research report discusses the role of labour broking in the private security industry in South Africa. Labour broking is a permissible form of labour subcontracting in terms of labour legislation, and it is linked to the use of independent contractors.

Labour broking supports a lucrative enterprise for certain specialised service providers, while simultaneously creating a vicious cycle of poverty for others. The former refers to those who, for example, provide close protection services while those who operate in the guarding sector bear the brunt of this variance.

Given the flexibility that it offers, labour broking adds value to the South African economy as it provides short-term labour and recruits young, mostly unskilled, black South Africans for a short period. The benefits that this presents are valid. However, limitations exist in the ability of this model of labour subcontracting to support any kind of long-term socio-economic stability.

Unskilled security personnel who are independent contractors are affected the most and their insecurity of tenure may have devastating long-term effects. It is in this context where compromised security also begins to be observed in relation to security personnel and the way in which grievances are manifested.

Co-operatives and learnerships are also explored in this report, having emerged as a relatively new form of contracting in the private security industry. They are legal and administered by the Department of Trade and Industry (dti) and the Safety and Security Sector Education and Training Authority (SASSETA), respectively. Co-operatives and learnerships have a role to play in a fairer distribution of resources among security personnel and advancing skills development for the industry. However, inconsistent and intentional manipulation of the purpose of co-operatives and learnerships diminishes their legitimacy in the private security industry.

Security officers are at the frontline of providing security in almost every facet of life in South Africa. It is therefore imperative for PSiRA to continue focusing on effective training and coherent registration. This will produce a better service which is critical, especially in view of our findings that mistreated security officers compromise security.

The information presented in this report has been gathered from primary and secondary sources.

ACRONYMS AND ABBREVIATIONS

Association of Mineworkers and Construction Union	AMCU
Basic Conditions of Employment Act	BCEA
Close Protection Officers	CPOs
Commission for Conciliation, Mediation and Arbitration	CCMA
Companies and Intellectual Property Commission	CIPC
Co-operative Incentive Scheme	CIS
Compensation for Occupational Injuries and Diseases Act	COIDA
Department of Trade and Industry	dti
Employment Equity Act 55 of 1998	EEA
Enterprise Observatory of South Africa	EOSA
Labour Relations Act	LRA
National Qualifications Framework	NQF
National Economic Development and Labour Council	NEDLAC
National Education, Health and Allied Workers' Union	NEHAWU
Organisation for Economic Co-operation and Development	OECD
Private Security Industry Regulatory Authority	PSiRA
Security Association of South Africa	SASA
Safety and Security Sector Education and Training Authority	SASSETA
Skills Development Act	SDA
Skills Development Levy	SLA
South African Maritime Safety Authority	SAMSA
South African Municipal Workers' Union	SAMWU
South African National Employers' Association	SANSEA
South African Transport and Allied Workers Union	SATAWU
Temporary Employment Services	TES
Unemployment Insurance Fund	UIF
United Kingdom	UK
United States	US

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1 INTRODUCTION

This report explores the role of labour broking in the private security industry in South Africa. Labour broking is a permissible form of labour sub-contracting in terms of labour legislation, and it is linked to the use of independent contractors.

Given the flexibility that it offers, labour broking adds value to the South African economy as it provides short-term labour and recruits young, mostly unskilled, black South Africans for a short period. The benefits that this presents are valid. However, limitations exist in the ability of this model of labour subcontracting to support any kind of long-term socio-economic stability. Labour broking is most prominent in the cleaning and the private security sectors.

In South Africa, employment protection legislation applies to all employees who work. It applies regardless of the governing law of any employment contract or the nationalities of either the employee or the employer.[1] It is not possible for an employee to contract out of statutory employment protection unless the legislation specifically permits it and then, only to the extent permissible in terms of the legislation.[2] There is a grey area as far as the latter is concerned in the private security industry. This report probes this grey area.

As at 04 December 2018, the Private Security Industry Regulatory Authority (PSiRA) database showed 1 649 service providers that were registered under the category of labour broker. PSiRA is mandated to exercise effective control over the practise of the occupation of security service providers in the public and national interest and the interest of the private security industry itself.[3]

The Private Security Industry Regulation Act 56 of 2001 defines a security officer as any natural person who 'makes a person or the services of a person available, whether directly or indirectly, for the rendering of a security service.'[4] The relevance of this study is to understand labour contracting flexibility and the way in which this impacts compliance in the private security industry in South Africa.

Co-operatives and learnerships are also explored in this report, having emerged as a relatively new form of labour contracting in the private security industry. Both these avenues are legal and administered by the Department of Trade and Industry (**dti**) and the Safety and Security Sector Education and Training Authority (SASSETA).

The assumption is that the security subsector plays a prominent role in the country by way of facilitating additional manpower. The aim of the report is to understand how labour broking and the related use of independent contractors, co-operatives and learnerships in the private security industry coincides with or derogates from regulatory requirements for security service providers. Whether labour broking has implications for safety and security for consumers and impacts socio-political stability in the country will be gleaned from the inferences.

2 RESEARCH HYPOTHESIS, QUESTION AND METHODOLOGY

The hypothesis for this research is as follows: Labour brokers, independent contractors, co-operatives and learnerships are legal forms of labour contracting in South Africa and facilitate an increased workforce into the private security industry, indirectly contributing to safety and security in South African homes and businesses.

Flowing from this hypothesis, the main research question for the project is: Is the use of labour broking, independent contractors, co-operatives and learnerships effective approaches to enhance safety and security in South Africa?

The research methodology comprised of both desktop and field research, and the study employs qualitative research methods to make inferences. A literature review was conducted to collate information on the trends and characteristics of the labour broking environment for private security. This component was largely desktop and yielded peripheral evidence of dedicated studies undertaken for the private security industry. Most of the available literature focuses on flexible labour subcontracting in the mining and manufacturing sectors.

Field work was carried out between April and September 2018. It entailed thirteen 13 face-to-face interviews to uncover opinions, perceptions and suggestions about the strengths and weaknesses of labour broking, cooperatives and learnerships.

Conclusions are drawn and recommendations made at the end of the report.

Limitations

Limitations that may have thwarted more pointed inferences include the reluctance of potential respondents to participate in the study due to the tainted reputation of labour contracting in the South African private security industry.

1 **Bhoola, U, March 2002, 'National Labour Law Profile: South Africa,' International Labour Organization. Available at: https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm (accessed 26 September 2018).**

2 **Ibid.**

3 **Section 3 of the Private Security Regulation Act No 56 of 2001.**

4 **Private Security Regulation Act No 56 of 2001, section 1 (k).**

Additionally, the PSiRA database is not an entirely reliable source of information with which to identify possible participants, due to a lack of segmentation at the initial point of registration. Security providers are able to register for services which they may or may not readily provide. In some cases, individuals contacted claimed they did not know what labour broking was, nor did they register for it. In other instances, registered individuals were recorded as operating in Gauteng when they, in fact, operate in other provinces.

3 BACKGROUND

According to sections 198 and 198A of the Labour Relations Act (No. 66 of 1995) labour broking is permissible in South Africa. Variations of labour broking exist globally. The International Labour Organization (ILO) categorises subcontracting into job contracting (the contractor offers certain services or equipment) and labour-only contracting (only labourers are provided).[5]

Labour broking is largely seen as a form of effective managerial control that emerged in the industrialisation age in Britain, Japan and the United States (US).[6] This casualisation of labour is a strategic decision to enable employers to employ and pay contract workers without necessarily establishing a direct employment relationship.[7]

In various sectors of the South African economy, labour-only contracting is a dominant form of subcontracting. Some argue that it helps boost the economy by creating employment and supports end-users by providing a supply of short-term labour.[8] Low wages and casual occupations are a part of the realities of South Africa's predominantly black population.[9] According to the International Labour Organization, there were about 71 million unemployed youth (aged 15–24 years) globally, in 2017, with many of them facing long-term unemployment.[10]

5 Deloitte, Labour Broking and Outsourcing. Available at: https://www2.deloitte.com/content/dam/Deloitte/za/Documents/process-and-operations/ZA_Labour%20broking%20and%20outsourcing%20-%20FP.pdf (accessed 16 February 2018).

6 Kenny, B and Bezuidenhout, A, 1999, 'Contracting, complexity and control: An overview of the changing nature of subcontracting in the South African mining industry,' Journal of the South African Institute of Mining and Metallurgy.

7 Ibid.

8 Deloitte Labour Broking and Outsourcing.

9 Barchiesi, F, 2008, 'Wage labour, Precarious Employment and Social Inclusion in the Making of South Africa's Postapartheid Transition,' African Studies Review Vol. 51, Cambridge University Press.

10 Statistics South Africa Website, Youth Unemployment Still High in Q1: 2018. Available at: http://www.statssa.gov.za/?p=11129 (accessed 01 31 October 2018).

In South Africa those aged 15–34 years are considered as youth, but the unemployment rate is high for both youth and adults. About one in every three young people did not have a job in the first quarter of 2018.[11] Some of these young people have become discouraged with the labour market and are not building on their skills base and are also not in employment, education or training (NEET).[12]

Labour broking is also known as temporary employment services (TES) and is a common practice in South Africa in which companies employ a 'casual' workforce through labour brokers.[13] Labour broking is defined as a form of labour subcontracting in which a labour broker forms a company that provides manual labourers who need little formal training.[14]

3.1 Who is an employer and who is an employee?

Labour reforms were introduced in South Africa soon after the transition to democracy in 1994. The legislation that extends formal labour rights to a more diverse constituency of workers,[15] is namely the Labour Relations Act (No. 66 of 1995 [LRA]), the Basic Conditions of Employment Act (No. 75 of 1997 [BCEA]), the Employment Equity Act (No. 55 of 1998 [EEA]) and the Skills Development Act (No. 97 of 1998 [SDA]).

It is worth noting that this legislation is contrasted with the exponential growth of agencies providing short-term labour during the 1994–2004 period, arguably to bypass labour legislation and undermine union organisation in the workplace.[16] Labour broking of temporary and casual workers is shown to have affected, disproportionately, African (black) women and men during 1994–2004.[17] To date the situation is no better. More African (black) women and men survive through the labour broking practice as temporary and casual workers.

Despite the legality of the labour broking practice, workers contracted by labour brokers are susceptible to having their employment rights abused through discrimination, unfair termination and lower salaries.[18] This is compounded by the fact that labour law does not prohibit the broker or the end-user from identifying casual labourers as independent contractors, implying that these labourers can be excluded from legislative labour protection.[19] It is important to note that not all labour brokers abuse their temporary staff.

11 Ibid.

12 Ibid.

13 Ibid.

14 Kenny, B and Bezuidenhout, A, 1999.

15 Clarke, M, 2004, 'Ten Years of Market Reform in South Africa: Real Gains for Workers?' Canadian Journal of African Studies.

16 Ibid.

17 Ibid.

18 Deloitte, Labour Broking and Outsourcing.

19 Ibid.

Amendments to the Labour Relations Act address the issue of labour brokers or temporary employment services and outlines when labour brokers can be used without risk to the client: 'when a TES employee is assigned to a client for a period of less than three months; when a TES employee is assigned to a client as a substitute for an employee who is temporarily absent from work; when a TES employee is assigned to a client to perform a category of work which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published in the Government Gazette by the Minister of Labour.'[20]

Section 198 (a) of the Labour Relations Act makes salient provisions that apply to labour brokers. Apart from the three months stipulated timeframe, the issue of who is an employer, has become a legally contested matter.[21] Giving security of employment and the right to equal treatment after a period of three months (which is a key sticking point) allows fixed-term contracting under certain conditions, with protections provided in section 198 (b) of the LRA.[22]

3.2 Flexibility of law and of labour

The flexibility of South African legislation allows access to employment opportunities. Currently, government is still caught between the call for an outright ban of labour brokers and the opposing call to not regulate at all, and rather let the market regulate.[23] According to Mr Macun of the Department of Labour, the amendments that were made to labour legislation during the past few years aimed at striking a balance and avoiding a negative impact on employment.[24]

Professional services firm, Deloitte, states that despite the challenges it poses, labour broking is crucial to South Africa's economy and overall employment structure, and has proven to be a mitigating factor for the country's high unemployment figures.[25] As a subsector, labour broking accounts for close to 1.3 million jobs out of an overall 2 million jobs.[26]

It is important to bear in mind that these statistics account for a broad range of economic sectors and are not specifically attuned to the private security industry – security specific statistics are not available.

According to Deloitte, the use of labour brokers remains a positive contributor for companies that require seasonal, large-scale, temporary staff or that run an event that demands short-term staff.[27] Such seasonal employment offers financial relief to poverty-stricken youth, albeit temporarily, without elevating recruitment and administration burdens for end-users.

In his research paper of 2004, Clarke noted that despite the raft of improvements that are perceived as labour friendly, various loopholes and weaknesses reinforce marginalised workers' exclusion and vulnerability.[28] He argued that legislative changes were made to appease local and international business interests and that casual workers continued to receive inferior wages and partial or no benefits.[29] Workers that fall under the definition of 'employee' are not protected as protection only applies to those that have formal employment contracts and work for more than 24 hours per month for an employer.[30]

According to Clarke, slow economic growth and the adoption of neo-liberal economic policies creates the conditions for casual, temporary and non-standard work to flourish.[31] Not all non-standard jobs are low paying and insecure, but the majority of them are. Non-standard jobs cannot be included as part of national statistics to indicate job creation (as is standard government policy) owing to their insecure tenure and low wages.[32]

The maximum of three-months for temporary employment services was arguably informed by global trends which was initially set at the maximum of six months. After considering the international environment, the National Economic Development and Labour Council (NEDLAC) decided to apply the maximum of three months for temporary employment.[33] Business preferred 12 months and labour wanted zero. In the end, Parliament changed to three months.[34] It was noted that the National Minimum Wage Act will help this conundrum, when it comes into force.

It can be argued that the "gig economy" is now common place in many parts of world. The term, refers to a labour market characterised by freelance, flexible, on-demand work rather than the more traditional nine-to-five working model.[35] Workers can find jobs by registering on websites or apps. An estimated 15.6% of the UK workforce and 34% of the US workforce are part of the gig economy.[36]

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20 **Maeso, M, 'Labour Law – When a Labour Broker is Not Performing a Genuine 'Temporary Service', Who is the Employer?' Available at: http://www.wylie.co.za/articles/labour-law-who-is-the-employer-when-a-company-uses-a-labour-broker-but-the-employee-is-not-performing-a-genuine-temporary-service/ (accessed 16 February 2018).**

21 **Interview, Macun, I, Director: Collective Bargaining, Department of Labour, 28 May 2018.**

22 **Ibid.**

23 **Ibid.**

24 **Ibid.**

25 **Deloitte, Labour Broking and Outsourcing.**

26 **Ibid.**

27 **Ibid.**

28 **Clarke, M, 2004.**

29 **Ibid.**

30 **Ibid.**

31 **Ibid.**

32 **Ibid.**

33 **Macun, I, 28 May 2018.**

34 **Ibid.**

35 **Business Tech Website, 04 November 2017. Available at: https://businesstech.co.za/news/business/208831/what-is-the-gig-economy-and-could-it-work-in-south-africa/ (accessed 31 October 2018).**

36 **Ibid.**

In the US, this is expected to rise to 43% by the year 2020.[37] Instead of being paid a regular salary, workers are paid for each 'gig' they do.

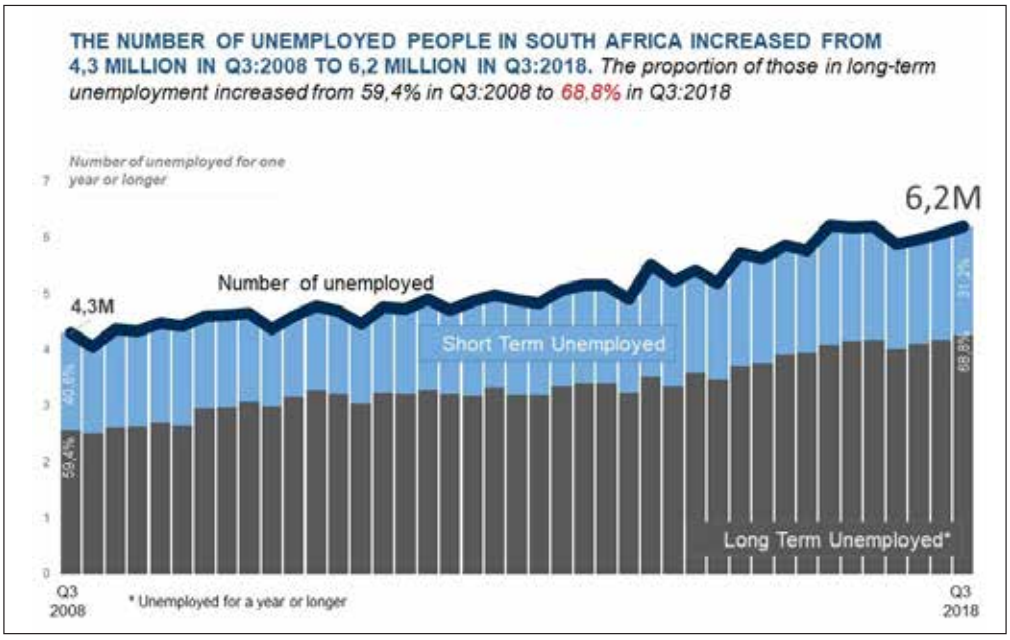
The 'gig' development is relevant because South Africa's official unemployment rate is on the increase. In the past 10 years (2008–2018), the unemployment rate has increased from 21,5% to almost 28,0%.[38] According to the Organisation for Economic Co-operation and Development (OECD), long-term unemployment causes significant mental and material stress for those directly affected as well as for their families. It is also of concern for policymakers, as high rates of long-term unemployment indicate that labour markets are operating inefficiently. [39]

The table below shows that the number of unemployed people in South Africa increased from 4.3 million in quarter 3 of 2006 to 6.2 million people in quarter 3 of 2018. The proportion of those in long-term unemployment increased from 59.4% in quarter 3 of 2008 to 68.8% in quarter 3 of 2018.[40]

4
AN ANALYSIS OF LABOUR BROKING IN THE PRIVATE SECURITY INDUSTRY

A labour broker typically acts as middle man between an end-user and a security officer. This arrangement works well when a company has a specific short-term demand to reach a particular objective. Labour broking is provided for in Sectoral Determination 6 (2015) clause 1 (2) (b).[42] Mr Botes, the National Administrator of the Security Association of South Africa (SASA) stated that the law does not prohibit labour broking and the use of independent contractors.[43] The 2015 clause deems all relations as employer-employee and that all are entitled to benefits, remuneration and all other conditions of employment.[44]

There is a presumption clause in the Basic Conditions of Employment Amendment Act that states that if certain conditions apply, then the person is considered an employee. This is not difficult to prove in the private security industry.[45] The following conditions are stipulated in section 200A of the Labour Relations Act and section 83A of the BCEA, in terms of the presumption as to who is an employee;



Source: Statistics South Africa[41]

37 **Business Tech Website, 04 November 2017.**

38 **Stats SA Website. Available at: http://www.statssa.gov.za/?p=11688 (accessed 10 November 2018).**

39 **Ibid.**

40 **Ibid.**

41 **Ibid.**

42 **Department of Labour, Sectoral Determination 6, 1 September 2015. Available at: http://www.labour.gov.za/DOL/downloads/legislation/sectoral-determinations/basic-conditions-of-employment/privatesecuritywages_sept2015.pdf (accessed 26 September 2018).**

43 **Botes, T, National Administrator Security Association of South Arica (SASA), 24 April 2018.**

44 **Ibid.**

45 **Ibid.**

(1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person. [46]

A clear example of labour broking in action is the temporary employment of security guards during the 2010 Fédération Internationale de Football Association (FIFA) World Cup. At the time, there was a demand for 8 700 guards to be deployed at soccer stadiums in Johannesburg, Cape Town and Durban, and at various broadcast centres.[47] Guards were required to have PSiRA grade C or D training certificates and special events training – a key requirement for work during sporting events. The guards were vetted and cleared by the state intelligence services[48] and were employed for a fixed term, either until the end of the world cup or another date as specified on the relevant contract (which may have been longer or shorter).[49]

Section 198 (b) of the Labour Relations Act provides for labour broking (also called temporary employment services) and determines that the labour broker is the middle-man and that the end-user can be deemed to be a co-employer. All three, including the private security company, can be regarded as co-employers and be liable for issues related to unfair discrimination, remuneration and unfair dismissal. Mr Botes, of SASA, noted that labour broking is not a convenient way to circumvent fair treatment of employees.[50]

According to Mr Macun of the Department of Labour, there is no such thing as "using the law to bypass the law" in terms of obligations to the employee.[51] PSiRA regulation is defined as being 'mismatched' with labour legislation. The legislation was amended in order to protect vulnerable workers and improve the working conditions of all temporary workers.[52]

Mr Macun emphasised that compliance and enforcement is needed, hence strategies for PSiRA's enforcement are important. It is also important to know and understand why settlements for underpayment are allowed. More focus should be placed on advocacy and information campaigns, with an emphasis on a multi-pronged strategy.[53]

Mr Botes of the Security Association of South Africa, stated that the association does not, cannot and will not prohibit the use of labour broking. The association, however, insists that all temporary workers be deemed employees.[54] This means that there is no benefit in using a labour broker except that employees cannot go to the Commission for Conciliation, Mediation and Arbitration (CCMA). In case of a dispute, employees must go to the labour broker involved and seek redress from him or her. In most cases, the security officers have already agreed away their rights and the CCMA has no jurisdiction, which is the biggest travesty of all.[55] The Security Association of South Africa intends supporting labour broking in the private security industry until the practice is overturned by the Constitutional Court.[56]

5 INDEPENDENT CONTRACTORS

5.1 The demise of independent contractors?

The viability of labour broking and its concomitant use of independent contractors suffered a crushing indictment by Acting Judge AJ Snyman of the Labour Court in the 2014 case *FMW Admin Services CC v Stander and Others*.[57]

FMW Admin Services CC was a business owned by the first registrar of the Security Officers Board. He started a company to provide labour broking, and then became the administrator of independent contractors (self-employed security officers).[58] The claim was made that labour broking is for clients that do not want to be involved with the private security personnel, and therefore prefer to outsource (mainly because they do not have enough knowledge in this area of expertise).[59]

Judge Snyman referred 'to the independent contractor or self-employed security officer system introduced

46 Department of Labour, Amended Labour Relations Act. Available at: http://www.labour.gov.za/DOL/legislation/acts/labour-relations/read-online/document.2008-05-29.1082051997 (accessed 26 September 2018).

47 Botes, T, 24 April 2018.

48 Ibid.

49 Ibid.

50 Ibid

51 Macun, I, 28 May 2018.

52 Ibid.

53 Ibid.

54 Botes, T, 24 April 2018.

55 Ibid.

56 Ibid.

57 (J2126/2014) [2014] ZALCJHB 354; (2015) 36 ILJ 1051 (LC (16 September 2014 Court Case).

58 Ibid.

59 Anonymous respondent, 30 May 2018.

to the private security industry by FMW as "unlawful and not worthy to protect or even be allowed to perpetuate… and is clearly exploiting vulnerable individual security guards desperate for work in an economy where work is scarce".[60]

Mr Brits of the Sivikela Loss Control claimed that the real issue was not explored and that Judge Snyman's actual finding was that FMW did not have protectable interests and resolved that the Department of Labour (DoL) and PSiRA would investigate.[61] The court stated that using independent contractors is not illegal but that it is, however, desirable to have social security.[62]

Section 36 of the Constitution states that rights can be limited in terms of the law of general application and that "limitations must be reasonable and justifiable, and may only be made with good cause."[63] This places an emphasis on "the nature of the right; the importance of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose, and less restrictive means to achieve the purpose."[64]

This section of the Constitution sheds light on what is permissible to limit for those individuals who opt for independent contractor status which provides no social security. It helps determine who and on what grounds such a status should be disallowed. Indeed, there is a flawed purpose between the cost-cutting employer who uses independent contractors and the security guard who may receive a higher salary but works as a full-time security guard, with no employment protection. In this context, it is not feasible to use independent contractors.

5.2 The right to work versus poverty as coercion

According to Mr Bhembe of the South African Transport and Allied Workers Union (SATAWU), some security officers prefer the independent contractor route because independent contractors are paid daily rates that are higher than the rates paid to permanent security staff. The obvious disadvantage is that they are unlikely to have financial security for their long-term needs.[65] Security officers working under contract as 'self-employed' are eligible to earn R8 000 per month while security officers under a normal employment contract earn R5 000 per month (the highest earnings for a security guard with Grade A' training).[66]

Though it is a legal means of employment, being an independent contractor is not beneficial for security officers. This is compounded by the fact that labour law does not prohibit the labour broker or the end-user from identifying casual labourers as independent contractors, implying that these labourers can be excluded from legislative labour protection.[67] Note that not all labour brokers exploit their temporary staff. The DoL representative asserted that independent contractors are clearly defined and fall outside the ambit of the LRA and those who chose that route have no legal recourse.[68]

The argument is that the private security industry is very competitive and there are more individuals that are registered than are deployed and actively working, meaning there is a high demand for work.[69] In reality, what happens most often in the market is that private security companies employ job seekers as independent contractors.[70] Sectoral Determination 6 clause 20 makes provision for labour brokers and independent contractors and the latter is a choice that an individual makes when he or she wants a job.[71]

The Department of Labour does not register individuals for Unemployment Insurance Fund (UIF), Compensation for Occupational Injuries and Diseases Act (COIDA), or Skills Development Levy (SDL). It only registers employers. Yet the PSiRA Act allows individuals to render a security service.[72] This contradiction between DoL and PSiRA creates a difficult situation for individuals, especially seeing that legally speaking, something that cannot be obeyed, cannot be punished.[73] People that work as independent contractors end up never having social security (no UIF, COIDA, Provident Fund etc). Consequently, PSiRA and the DoL have taken the stance that the use of independent contractors should be discouraged.[74]

Section 36 of the Constitution refers to 'the event that a person's rights are infringed or threatened in a justifiable manner to prohibit a person to work.' The aim is to highlight that many High Court judgements refer to the right to work which is also protected in the Constitution.[75]

The argument is that if the Minister of Labour prohibits independent contractors, then the minister must realise that we live in a real world where clients pay real money for services rendered.[76] This implies that the independent contractor system cannot be stopped as it is driven by demand from clients/consumers. As such consumers are the final decision-makers and their willingness, or lack thereof, to pay for security services largely determines whether private security business owners will comply with legislation.

The relevance of the Minister's power to prohibit a person to work a particular number of shifts (given that the Constitution stipulates that individuals are free to choose their profession), was raised by Mr

60 **Chauke, M, 17 October 2014, PSiRA Industry Circular.**
61 **Brits, W. J, Sivikela Loss Control CC, 23 July 2018.**
62 **Ibid.**
63 **Constitution of the Republic of South Africa, 1996.**
64 **Ibid.**
65 **Anonymous respondent, 30 May 2018.**
66 **Mr Bhembe, SATAWU, 11 July 2018.**
67 **Deloitte Labour Broking and Outsourcing.**
68 **Macun, I, 28 May 2018.**
69 **Ibid.**
70 **Ibi**
71 **Ibid.**
72 **Brits, W. J, 23 July 2018.**
73 **Ibid.**
74 **Ibid.**
75 **Ibid.**
76 **Ibid.**

Brits.[77] The claim was made that DoL and PSiRA caused problems in the private security industry and they should be mindful not to create unemployment.[78]

An anonymous respondent stated that the biggest problem is that the Department of Labour wishes to declare independent contractors as employees whereas, according to the LRA, that right lies with the labour court.[79] Section 200A subsection 3 of the LRA states that when there is a dispute between parties, any of the contracting parties may approach the CCMA for an advisory award on whether the persons involved in the arrangement are employees.[80]

The most important aspect regarding independent contractors is contained in the subsection that deals with existing contracts: neither the CCMA nor the Department of Labour have jurisdiction over cases where individual independent contractors' contracts are terminated. Regardless of the reasons for termination, only the Labour Court can make a pronouncement on such matters.[81] The section that defines who is an employee aims to protect workers against exploitation and helps workers avoid situations where they cannot freely decide whether to be independent contractors.[82]

5.3 The pros and cons of the independent contractor model

The norm in the security industry is for labour brokers to recruit security staff as independent contractors and deploy them at special occasions such as company functions, sport events and emergency situations.[83]

One respondent stated that his company has a strike team available to be deployed at sports stadiums. The strike team entails an *ad hoc* group of security officers that are on the company's payroll and when they are needed, they are called in (summoned to work). Their service contract generally lasts between two weeks and three months. They are effectively independent contractors.[84] Incidentally, the strike team includes bouncers that previously worked at universities before the Fees Must Fall protests.

Then, there are close protection officers (CPOs) that work as independent contractors. The close protection industry uses independent contractors because of the nature of their business model. Close protection officers may only work for a two-week period at a time.[85] One respondent owns a small company that consists of two people, namely himself and another individual. He has a database of hundreds of security 'consultants' across Africa[86] that he contracts for short-term close protection assignments, for example in Guinea and Mozambique. When needed, he advertises vacancies and people send in their CVs. New recruits are vetted before being deployed.[87] The respondent noted that work outside South Africa is done by recruits who are not South African.[88]

He further asserted that, to qualify for close protection vacancies, close protector officers must complete the Ronin Close Protector Course. Ronin (see www.ronin.co.za) has an excellent reputation worldwide and its training is regarded as a guarantee that an officer will be an effective close protector.[89] There is demand for Ronin training, so much so that companies are compelled to send their officers for training at Ronin (even when they are not eager to do so). The market dictates that he will always be able to fill his classes.[90]

Another respondent said that he trained some independent contractors in the past, but no longer does so because he found that they – as independent contractors or freelancers – were not always available when he needed them. This posed a challenge and consequently he now only uses permanent employees. He implied that because of this, the use of independent contractors has somewhat dwindled.

This respondent pointed out that mines make use of strike protection officers and pay daily rates of R650 for independent contractors who are registered with PSiRA. A criminal check is carried out before they are deployed.[91] He claimed that some independent contractors received training on riot control at the Ekurhuleni Training Institute.[92] Efforts to identify the relevant training institute proved futile and no such training institution could be found on the PSiRA database.

According to Mr Bhembe of SATAWU, some companies use semantics to evade regulation.[93] He alleged that one of the biggest private security company in South Africa bids for tenders under false pretences. The company claims to provide security officers as a service but once the tender is secured, these individuals are referred to as 'self-employed.' [94]

When dealing with an independent contractor, it is imperative to verify if a person is really an independent contractor. He reiterated that Labour Relations Act section 200A is prescriptive and defines what an employee is. A person is deemed to be an employee of a company when such company provides

77 **Brits, W. J, 23 July 2018.**
78 **Ibid.**
79 **Ibid.**
80 **Ibid.**
81 **Ibid.**
82 **Ibid.**
83 **Anonymous respondent, 30 May 2018.**
84 **Ibid.**
85 **Botes, T, 24 April 2018.**
86 **Anonymous respondent, 07 June 2018.**
87 **Ibid.**
88 **Ibid.**
89 **Ibid.**
90 **Ibid.**
91 **Ibid.**
92 **Ibid.**
93 **Mr Bhembe, SATAWU, 11 July 2018.**
94 **Ibid.**

a uniform, regulates work time and provides tools of trade.[95]

The LRA opened doors for people to seek redress and go to the CCMA, for example if an employee claims he was coerced into becoming an independent contractor.[96] The Act ensures protection and freedom of choice.[97] Restricting an independent contractor's right to work and the number of shifts worked, should not be allowed, seeing that the reason he/she works is to earn an income.[98]

Clause 20 of the Sectoral Determination 6 for the Private Security Industry deals with temporary employment services, labour brokers and independent contractors. It states that:

(1) Employers shall abide by the provisions of the Labour Relations Act, Act 66 of 1995, as amended, in respect of Temporary Employment Services, Labour Brokers and Independent Contractors.

(2) Notwithstanding the above, no employer may use the services of a Temporary Employment Service, Labour Broker or Independent Contractor unless the Temporary Employment Service, Labour Broker or Independent Contractor provides the employer with satisfactory proof that it is in compliance with –

  (a) Sectoral Determination 6;

  (b) the Unemployment Insurance Act;

  (c) the Compensation for Occupational Injuries and Diseases Act.

  (d) the South African Revenue Services, and is in possession of an IT30 tax certificate; and

  (e) the rules of the Private Security Sector Provident Fund.

(3) The provisions of subclause 20(2) shall not apply to Alarm Installers and Employment Agencies.

(4) Disguised employment relationships, including those involving self-employed security guards, may be tested according to the factors in Clause 18.[99]

It is worthwhile noting that Clause 18 of Sectoral Determination 6 is a replica of Section 200A of the LRA in that it gives clear criteria to identify an employee and distinguish an employee from an independent contractor. The private security industry arguably exists on a spectrum and the security personnel most vulnerable to exploitation are the least capable of taking on the onerous task of asserting their work status.

In spite of the 2014 judgement, referred to above, handed down by the Labour Court Sivikela Loss Control (also known as FMW) brought an ex parte application in the High Court (Guateng Division) on the 25th of May 2017.[100] The basis of the urgent application was to argue that, in terms of section 22 of the Constitution of South Africa a security officer has the right to choose her/his trade and occupation freely. The application also intended to argue that security officer's can determine on their own if they wish to render their skills or services as an employee or a contractor.

It was further argued that PSC's also have the right to choose if they wish to secure the services of a security officer in the form of an employee or a contractor. This was meant to imply that as a result the provisions of Sectoral Determination 6 infringed on the aforementioned Constitutional right. Judge Holland-Müter AJ handed down a written judgement on the matter on 25 August 2017 and stated that in principle this was a labour matter and questioned the jurisdiction of the application.[101]

The judge underscored that the applicants sought sanction from the court to enable security officers to abandon statutory benefits enshrined in the BCEA and the LRA. These benenfits include minimum wages, hours, working conditions, unemployment protection etc. The urgent application also sought to affirm that an independent contractor would by nature of his or her status be liable for damages to a third party while performing outsourced duties. A clear attempt to exploit vulnerable security guards desperate for work and contrary to the interests of security officer's. This was declared an unlawful sham by the High Court and one that could not be allowed.[102]

Similar to Snyman AJ in the FMW judgement, Judge Holland-Müter AJ asserted that if the independent contractor model was sanctioned it would lead to widespread exploitation of individual security officers. It was acknowledged that the applicants had knowledge of the FMW matter and thus their ex parte application was intended to circumvent the Labour Court. The application was dismissed with costs. Applicants filed an application for leave to appeal which was also dismissed with costs.[103]

On the one side of the spectrum, there are independent contractors that have internationally marketable skills and verifiable high-standards of training. These individuals operate in a lucrative environment and

95 **Mr Bhembe, SATAWU, 11 July 2018.**

96 **Brits, W. J, 23 July 2018.**

97 **Ibid.**

98 **Ibid.**

99 **Basic Conditions of Employment Act, No 75 of 1997 Amendment of Sectoral Determination 6: Private Security Sector, South Africa, 01 September 2015. Available at: http://www.labour.gov.za/DOL/downloads/legislation/sectoral-determinations/basic-conditions-of-employment/privatesecuritywages_sept2015.pdf (accessed 12 November 2018).**

100 **Van Der Merwe & Sivikela Loss Control CC vs Private Security Industry Regulatory Authority and others, High Couth of South Africa (Gauteng Division, Pretoria, Case No: 71328/2014).**

101 **Ibid.**

102 **Ibid.**

103 **Ibid.**

what is considered as job insecurity for others, is their preferred freelance mode of work.

On the other side of the spectrum, there are those who may be so utterly desperate for a job that they enter into work/service agreements as independent contractors. The findings from interviews conducted as part of this study suggest that these individuals are sometimes coerced into agreements that lock them into social and economic immobility. Simply put, such individuals are poor and desperate, and therefore unable to demand fairer work contracts. They also cannot rely on the protection provided by labour legislation because of their status as independent contractors. In the private security industry, the dominant notion is that lesser pay accompanied by unfavourable working conditions is better than unemployment.

5.4 Industrial relations and the unions

To be indifferent about unions is "nothing less than a reactionary re-winding of modern capitalist history. In the second half of the 19th century — despite almost universal predictions of inevitable working class immiserating — socialist and labo[u]r movements arose that stopped the lengthening of the working day, checked the fall in wages, and brought a measure of dignity and security to the workplace."[104]

In South Africa, trade unions are not as active as they were in the past. Activism in the private security industry started in the early 1990s with PSiRA's predecessor, the Security Officers Board (SOB),[105] and has grown over the years. The transition of the man 'standing at the gate' to a fully-fledged security officer controlling entry, is proof of the growth that has taken place during the past 20 years.[106]

In the early days, there was no provident fund and no Sectoral Determination 6 prescribing wages, but rather a Wage Act regulating the private security industry.

In 1998, the first strike lead by SATAWU took place. Strikers demanded a provident fund and a reduction of hours on duty, from 60 hours a week to 45 hours a week. At that time, salaries were very low and they only started to improve when SATAWU signed a settlement agreement to end the strike. Later on, in 2006, Sectoral Determination 6 was introduced which was accompanied by a requirement for employers to contribute to a provident fund for their security officers.

The next strike was held in 2006. Although it was marred by violence, it lead to key changes, one of which was the introduction of paid maternity leave for female security officers – before the strike, maternity leave was unpaid and expectant mothers had to claim from UIF.[107]

Since the 2006 strike, the industry has started to slow down in terms of deploying human guards and there has been a general move towards deploying technology such as CCTV cameras.

There has also been a decrease in trade union membership since 2006. Security officers usually join trade unions to force their employers into making concessions. Once employers concede to their demands and the situation at work stabilises,[108] security officers start questioning the need for union membership; they become reluctant to pay the R20 union membership fee which translates to about 1% of their basic salary.[109]

Legislation 'eats' into trade union membership. When there was no legislation, employees felt exploited and joined trade unions.[110] It's clear that the shrinking of membership is caused not only by insourcing (bringing outsourced skills in-house) but also by the fact that more security officers feel they do not need the unions seeing that the situation at work is stable.[111]

Members say to SATAWU that the private security industry is a labour brokerage by nature, albeit an advanced brokerage because it is regulated.[112] If labour broking means having a main employer who outsources work to individual workers, then security and cleaning industries are advanced and accepted forms of labour broking. If there is no primary employer, there is no secondary employer, and if there was a policy to have private security services as in-house en masse, the industry would not exist.[113]

5.5 Exploitation elements

If the terms of work are scrutinised, it is easy to observe that although individuals have signed an agreement as independent contractors, they are technically employees. SATAWU addresses this issue by taking legal steps to close private security companies that use (and exploit) independent contractors.[114] One company was found to have two sets of contracts: one that reflects adherence to legal prescripts and the other one being exploitative. During the first days of service, the security officers would work under the exploitative contract. Only once the security officers complained, for example about Sunday work being unpaid, would the company then change the contract.[115] If security officers did not complain, the company kept the exploitative contract in place.

104 Yates, M. D, 30 March 2006, 'What's the Matter with U.S. Organized Labor? An Interview with Robert Fitch.' Available at: https://mronline.org/2006/03/30/whats-the-matter-with-u-s-organized-labor-an-interview-with-robert-fitch/ (accessed 06 November 2018).

105 Mr Bhembe, SATAWU, 11 July 2018.

106 Ibid.

107 Ibid.

108 Ibid.

109 Ibid.

110 Ibid.

111 Ibid.

112 Ibid.

113 Ibid.

114 Ibid.

115 Ibid.

A few years ago, security officers had to work 60 hours a week in terms of the old labour legislation, namely 473 Wage Determination. Now the hours are set at 48 hours per week.[116] The BCEA states that any person may work a maximum of 45 hours per week. The private security industry disagrees with that, hence the 48 hour week minimum.[117]

The principle of 'no work, no pay' applies to independent contractors. It has happened that SATAWU challenged an employer to give an employee a normal contract, and the person resigned and requested to be put back on the exploitative contract.[118] Non-compliant employers pose the risk of eroding the gains made by the unions and compliant private security companies. This issue is often raised as the core challenge to compliance in the industry.

Some private security companies use different terms and different contracts when it suits them – employees that work for a company known as "Ubuntu" would know about this.[119] When PSiRA and the DoL conduct inspections, the business owner simply presents the 'normal' contract.[120]

Note that the DoL does not conduct random inspections, it only does so after receiving a complaint. It investigates the cases of the specific individuals that laid a complaint, possibly overlooking other individuals that work under similar circumstances.[121] It follows that if a company has 500 workers, it is most probable that only one contract will be corrected.

Labour broking is not favourable because independent contractors are not regarded as permanent employees and cannot enjoy job security or benefits. But because labour broking is legal, there is nothing that independent contractors can do about it.[122] Labour broking in this context poses risks because aggrieved security officers may resort to crime. It is alleged that a private security company that escorts valuable items, has had numerous hijackings as a result of leaked information. The drivers are independent contractors and once their contract ends, they have some knowledge of the inner workings of the business. This implies that the use of independent contractors may increase the incidences of hijacking.[123] The name of the assets-in-transit company referred to here is not listed on PSiRA's database and therefore the company is likely not a registered entity.

SATAWU cannot act on behalf of security officers who do not receive the benefits due to them unless they are members of the union.[124] There are few private security companies that are in support of their security officers being members of the union.[125] In one significant case involving a company known as SPE, that has since shut its doors, the union challenged the company to place security officers on normal employment contracts. When the company refused to do so, all the workers resigned.[126]

Fidelity is no longer a member of SASA. Fidelity's membership was refused after SASA demanded a declaration to affirm that the company does not make use of independent contractors, labour brokers or unsupervised learners.[127] Unfortunately, SASA has no resources to inspect its members.

5.6 The flexibility of labour broking

Labour broking flexibility is not unique to South Africa. However, in the context of private security provision, questions around the reliability of an independent contractor should be probed further to test if this has any direct implications on safety and security in the country. Such a test is beyond the scope of this report and presents an opportunity for further research.

As mentioned earlier, an unreliable, disloyal and aggrieved security officer may be a liability to the businesses and homes being protected.

In 2016, the employment tribunal in the UK noted that Uber drivers are 'workers' and not self-employed contractors as their contracts stipulated.[128] Uber was told to reclassify its drivers. Uber maintains it does not employ any drivers or own any cars and only "provides the technology platform that enables the connection between driver and passenger".[129]

In South Africa, recently, the CCMA issued a ruling that seven Uber drivers who had been 'deactivated' from the Uber platform and had subsequently referred unfair dismissal claims to the CCMA were not independent contractors but must be considered employees.[130] This is a positive step for workers and shows that it is necessary to address the common deprivation of employment rights in modern business models. However, without changes to legislation and a continued global momentum in favour of the independent contractor model for blue collar jobs, it seems unlikely that courts will change how they view workers in the future.

116 Brits, W. J, 23 July 2018.
117 Ibid.
118 Mr Bhembe, SATAWU, 11 July 2018.
119 Ibid.
120 Ibid.
121 Ibid.
122 Anonymous respondent, 30 May 2018.
123 Ibid.
124 Mr Bhembe, SATAWU, 11 July 2018.
125 Ibid.
126 Ibid.
127 Botes, T, 24 April 2018.
128 Business Tech Website, 04 November 2017.
129 Ibid.
130 Ibid.

6
CO-OPERATIVES

The Co-operatives Act (No. 14 of 2005) defines a cooperative as 'an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles'.[131] The Co-operatives Act provides for the formation and registration of co-operatives, the establishment of a Co-operatives Advisory Board, the winding up of co-operatives and matters connected therewith. The Co-operative Amendment Act (No. 6 of 2013) was signed by the President in August 2013 but the commencement date is still to be gazetted.[132]

The promotion of co-operatives, a flagship project of the Department of Trade and Industry for the year 2004/2005, had the purpose of serving as an initiative to address the needs of the so-called 'second economy'. While South Africa has a highly-developed co-operative sector, operating in the 'first economy', there are also co-operatives operating in the mainly informal, marginalised and unskilled economy, the latter of which is populated by the unemployed and those who are unemployable.[133]

The dti views the development of co-operatives as critical to the effective functioning of the South African economy. As such, the government will continue to provide much-needed support to co-operatives through public education and training, as well as the promotion of co-operative development initiatives in society at large.[134]

An analysis of formal enterprises in 280 cities and towns – conducted by the Enterprise Observatory of South Africa (EOSA) – shows marginal available entrepreneurial space for businesses that sell undifferentiated products and services, which is what most co-operatives try to do.[135] In the Metsimahole Local Municipal area (Sasolburg and environment), for example, there is no evidence of co-operatives trying to benefit from the petro-chemical value chain by making candles.[136]

Since 2002, Government has channelled funds to promote co-operatives, but in a 2010 presentation to the Parliamentary Select Committee on Trade and International Relations, the then Deputy Minister of Trade and Industry, Maria Ntuli acknowledged that "officials at all tiers of government have a limited understanding of co-operatives as a form of business" and that there was "inadequate institutional capacity to deliver on co-operatives."[137]

The evidence to date indicates that the co-operatives programme miscarries both the policy objectives and the expectations of the poor. This suggests that co-operatives are state-induced and do not constitute enterprise formation on a voluntary basis – a key factor for co-operatives to succeed.[138] The rise in co-operatives can be ascribed to a political and administrative urge rather than the result of desires of people in communities to voluntarily form co-operatives to pursue specific business objectives.[139]

A report underscores that the registration of a cooperative did not mean that it was functional, even in the Companies and Intellectual Property Commission (CIPC) register, a large percentage of co-operatives were found to only have a physical address and no telephone number.[140] Co-operatives' members' anticipation of government contracts for services (e.g. office cleaning or a security contract) as being crucial for success, indicates the need to question if establishing co-operatives is pursued voluntarily or is influenced by the "carrots of the Co-operative Incentive Scheme (CIS) dangled in front of economically desperate people."[141]

The view was expressed that those in the private security industry are operating in terms of the Co-operatives Act, but not in the spirit of the Act.[142] In such cases it is up to the Department of Trade and Industry to amend the Act.[143] Furthermore, the Compensation Act can be enforced on co-operatives and the Registrar of Co-operatives is supposed to hold them accountable.[144]

In the private security industry, there are a handful of co-operatives of which only one is known to be within the law.[145] This is a citrus farm in Limpopo called Letaba Citrus that did not want security contracts because of exploitation and so chased away their service provider. Letaba did not want to have

131 **Co-operatives Act, No 14 of 2005. Available at: http://www.cipc.co.za/files/3113/9452/7969/CooperativesAct14of2005v1.pdf (accessed 28 September 2018).**

132 **South African Institute of Chartered Accountants Website. Available at: https://www.saica.co.za/Technical/LegalandGovernance/Legislation/CooperativesActNo14of2005/tabid/2438/language/en-ZA/Default.aspx (accessed 18 September 2018).**

133 **Department of Trade and Industry Website: Available at: http://www.thedti.gov.za/economic_empowerment/co_ops.jsp (accessed 18 September 2018).**

134 **Ibid.**

135 **Wessels, J, 23 June 2006, Director, Enterprise Observatory of South Africa. Polity Website, Published on Econ3x3. Available at: http://www.polity.org.za/article/cooperatives-has-the-dream-become-a-nightmare-2016-06-24 (accessed 28 September 2018).**

136 **Ibid.**

137 **Ibid.**

138 **Ibid.**

139 **Ibid.**

140 **Ibid.**

141 **Ibid.**

142 **Botes, T, 24 April 2018.**

143 **Macun, I, 28 May 2018.**

144 **Ibid.**

145 **Botes, T, 24 April 2018.**

an in-house security service provider either.[146] The solution was to form a guarding cooperative and this is the only good example of a functioning cooperative for the private security industry.[147] PSiRA has five registered co-operatives on its database, and 11 new pending registrations.

Legislation intended co-operatives to be a vehicle for black economic empowerment (BEE); and the National Development Plan (NDP) is in line with this. All the workers in a cooperative must adhere to the COIDA, UIF and the SDL.

The claim that PSiRA legislation does not provide for the registration of a workers cooperative and is only tailored for the sole proprietor[148] is unfounded as PSiRA is obliged to register co-operatives for the private security industry. The Co-operatives Act must be amended to enable more scrutiny on co-operatives registered to provide security. This falls outside PSiRA's jurisdiction and must be owned by the Co-operatives Registrar and the Department of Trade and Industry.

7 LEARNERSHIPS

7.1 A tool to uplift or to exploit?

The Skills Development Levy (SDL) is a levy imposed to encourage learning and development in South Africa.[149] Where an employer expects that the total salaries will be more than R500 000 over the next 12 months, that employer becomes liable to pay SDL.[150] In essence, 1% of the total amount paid in salaries to employees (including overtime payments, leave pay, bonuses, commissions and lump sum payments) and amounts deducted or withheld by the employer, must be paid to SARS on a monthly basis.[151] The levies for the private security industry are then distributed via the Safety and Security Sector Education and Training Authority (SASSETA). This is to enhance the quality of training for private security personnel.

A learnership is a structured, occupationally-based learning programme quite like an apprenticeship, which leads to a recognised qualification on the South African National Qualifications Framework (NQF).[152] Based on legislation found in section 10 of the Skills Development Act, each learnership has a structured theoretical component and a practical work experience component.[153] The content and duration of the learnership is prescribed in the form of unit standards, which are competencies that a learner must be able to demonstrate in a specific field of learning.[154] Learnerships are administered by the SASSETA.

The PSiRA versus SASSETA discussion with respondents reveals that the former is considered stronger on theory while the latter offers an advantage because of on-the-job training. For example, the latter requires the learner to show that he or she can put out a fire and understand the basic principles of life support. This does not mean knowing cardiopulmonary resuscitation (CPR), but he/she must be able to act in certain situations that may arise. The idea is to offer practical classroom training that prepares learners for various possible scenarios in real life.

A respondent said she believed that PSiRA grades will be made redundant and that all learners will eventually be forced to undergo SASSETA training.[155] She pointed out that the aim of such a move, is to uplift skills and provide better understanding of how the security industry has evolved. The respondent added that she personally considers SASSETA training "necessary for the future".[156]

Regarding the literacy level of the current private security industry workforce, the respondent noted that some people do not have a matric certificate. Some cannot read and write, some are dyslexic. The SASSETA training model accommodates such people, it places people in a classroom where they are able to learn invaluable skills and knowledge. Unfortunately, the illiterate will not get a qualification in the end, because they cannot be considered fully competent.[157]

The learners who are found to be competent, receive a Certificate in General Security Practices and go for practical training in patrolling, special events and other areas of specialisation.[158] Clients generally want the 'whole package', which means they prefer to engage the services of a private security company that is able to satisfy different security needs.[159] The respondent stated that learnerships are important and PSiRA should not continue with its grades system any longer, as the grades system hold security officers back in terms of future prospects.[160]

The industry should only accept people that have a matric because when dealing with a life and death situation you cannot afford to have someone who is incapable of reading. This would also rid the assumption that those in the private security industry

146 Botes, T, 24 April 2018.

147 Ibid.

148 Brits, W. J, 23 July 2018.

149 SARS Website. Available at: http://www.sars.gov.za/TaxTypes/SDL/Pages/default.aspx (accessed 10 November 2018).

150 Ibid.

151 Ibid.

152 SASSETA Website. Available at: http://www.sasseta.org.za/index.php?page=learningabout (accessed 19 September 2018).

153 Ibid.

154 Ibid.

155 Anonymous respondent, 10 July 2018.

156 Ibid.

157 Ibid.

158 Ibid.

159 Ibid.

160 Ibid.

are stupid and unqualified.[161] In the context of a paltry basic education system, it is true that some matriculants cannot read or write. It is incumbent upon PSiRA to ensure the future legitimacy of the private security industry and to require all security personnel to be literate – this can and should form part of the PSiRA registration requirements.

Learnerships are relevant to skills development because they allow the learner to theoretically and practically apply skills. Outcomes are emphasised and the learner is constantly assessed and supervised.[162] This is important because it helps address the skills gap in the country and leads to nationally recognised qualifications.

7.2 SASSETA: lame leviathan or effective administrator?

SASSETA's website indicates that as part of its education and training objectives, it must also a) promote learnerships by finding workplaces where learners can apply their practical knowledge; b) support individuals and companies who create learning material; c) assist in concluding learnership agreements; and register learnership agreements.[163]

Parties to a learnership are a learner, an employer, and a provider of education and training.[164] The relationship between the three parties is governed by a learnership agreement that they sign. Once concluded, learnership agreements are registered by the SETA with whom the employer is registered.[165]

To engage in a learnership, the learner must be employed by an employer who is capable of providing the required practical experience.[166] Should an employer not be able to fulfil all the practical experience requirements, one or more additional employers may be contracted to supplement this.[167] SASSETA assesses the suitability of every workplace before a learnership agreement is entered into.[168] A provider who is accredited by the SETA to deliver the learning content required by the learnership, is expected to provide structured theoretical learning.

The learners have to be learners for 12 months for both the theory and practical component. The latter forms the major part of the training with limited class time; SASSETA envisaged three months in class and nine months on site.[169] When learners are taken on, they have to be deployed on site. A respondent's company does not take on non-SETA registered learners, as it is not worth the risk should something happen on site.[170]

The SASSETA website further states that an existing employee of a company may become a learner, or may be employed for the purpose and duration of the learnership.[171] For learners in the latter category, the terms and conditions of employment are specified in the sectoral determination.[172] This creates a challenge in terms of the SASSETA mandate to enhance training and skills development, and demonstrates non-alignment with the PSiRA Act which inherently does not support on-the-job training.

The misalignment allows employers to transfer employees to a learnership agreement and inadvertently creates a formally recognised way of exploiting employees-turned-learners. Learners receive a stipend instead of a salary and their entitlement to employee benefits falls away. This often means that individuals working as security officers in an unsupervised environment are classified as learners.

The learnership prescriptions of SASSETA seem to invalidate PSiRA requirements: section 20 (1)(a) of the PSiRA Act states that no person may in any manner render a security service for remuneration, reward, a fee or benefit, unless such a person is registered.[173]

As such, all who wish to engage in learnerships are required to complete Grade E PSiRA training (the official minimum standard) and be registered. It is crucial for PSiRA to invest in awareness campaigns that clarify this information to the industry and help people to avoid the potential traps of exploitation.

An industry circular is needed to assert PSiRA's stance on this and provide useful tips to protect young learners. Learnerships can be beneficial when administered correctly – more information on how to do this is needed. SASSETA should provide PSiRA with access to information regarding how many learners there are, which companies they are contracted to, and the status and outcome of their learnerships. This would help improve control of the learnership environment and help deter exploitation.

7.3 Practical application of learnerships

A company in the Johannesburg central business district (CBD) runs learnerships successfully and says that to get learners for learnerships is not a problem. Learners are often sourced from social media. However, getting funding is difficult.

The company applies on a quarterly basis for funding from SASSETA using the normal channels for discretionary grants – this does not mean that the grant is automatically granted or guaranteed.[174] The SASSETA Board appointed a 10-member discretionary committee that has the authority to decide on co-funded learnerships (learnerships where the funding is split between each company and the

161 **Anonymous respondent, 10 July 2018.**
162 **SASSETA Website.**
163 **Ibid.**
164 **Ibid.**
165 **Ibid.**
166 **Ibid.**
167 **Ibid.**
168 **Ibid.**
169 **Anonymous respondent, 10 July 2018.**
170 **Ibid.**
171 **SASSETA Website.**
172 **Ibid.**
173 **Private Security Industry Regulation Act, 56 of 2001.**
174 **Anonymous respondent, 31 August 2018.**

SETA).[175] Where most private security companies fall off, is that their applications for funding are completed wrongly; the committee allegedly concentrates on how applications are completed.[176]

An allegation was made against this company as one of the three big companies that receives preferential treatment in the form of SETA's disbursement of learnership grants. It often happens that private security companies come up with baseless allegations against one another and the company in the Johannesburg CBD is not immune to this norm.[177] This is because people tend to see the company in the Johannesburg CBD as a growing competitor in the industry instead of acknowledging the fact that the company has the resources to successfully deliver learnerships.[178]

The learnerships are co-funded, which means 50% of the cost is carried by the SETA and 50% carried by the private security company in the Johannesburg CBD. The incentive for the latter is the tax rebate which amounts to slightly more than the 50% that was originally invested.[179]

The company in the Johannesburg CBD sometimes partners with other smaller private security companies to run learnerships. In some instances, the smaller companies do not have workplaces that are appropriate for the practical component of the learnership and therefore need to partner with a company that can help learners complete their on-the-job training.[180]

Regulations in Sectoral Determination 6 make reference to learnerships for both the employed and unemployed; the latter are entitled to a stipend of R1 500 per month (measured against NQF level 3). As learners progress to higher NQF levels, their stipend increases accordingly.[181] The National Record Learner Database (NLRD) can confirm whether a person is registered for a learnership.

The company in the Johannesburg CBD has, so far, not turned any of its employees into learners. Instead, it offers an option for Recognition of Prior Learning (RPL) for employees that have work experience but have no qualification.[182] Learnerships serve as an incentive and motivation, especially for young people. Getting a qualification transforms individuals; they begin to earn a wage and to contribute to society and their family.[183]

In some cases, learners fail to attend their classes and training even though they have been accepted into a learnership. The company in the Johannesburg CBD calls their parents as a measure to encourage such learners to attend. Learners are typically between 18 and 27 years old. For the first month the learners receive a R500 stipend for transport, the company admitted that they loose a lot during first month. From then onwards learners receive a R2000 stipend, although the regulation stipulates R1500. During the period of practical training learners also qualify for overtime on Sundays and on public holidays.

After completing the learnership, learners are offered permanent employment. Besides the offer of employment, learners also receive a R6 000 bonus for completing the learnership.[184]

If the private security company in the Johannesburg CBD had a choice, it would never take on a PSiRA graded learner. The company prefers to take unemployed individuals through the company's induction programme, then take them through four weeks of theory training, and then deploy them for six months at a work site. Note, the company first informs clients that learners are on site. In this way, individuals are able to complete training that results in a nationally recognised qualification.[185] The qualification consists of 24 unit standards, including fundamentals and electives.[186]

The above-mentioned training process is far removed from the PSiRA grading system. The company in the Johannesburg CBD believes that the PSiRA system leads to ineffective security officers, and that it is plagued with issues of illegal certificates and courses that are considered too short.[187] The training environment that underpins PSiRA grading system gives the impression that trainers do not care about the people they train – this is evidenced by the behaviour of unprofessional security officers around the country.[188] For PSiRA training to have credibility, it must lead to a recognised qualification. Currently PSiRA grades are not recognised by any official entity in South Africa.[189]

The respondent of a different private security company asserted that some of the company's learners are PSiRA registered, but are unable to meet the basic training requirements to enter into a learnership. Learners who just finished high school are preferred.[190] Neither the Sectoral Determination 5 nor Sectoral Determination Agreement specify if the learner must be registered with PSiRA before the learnership can start.[191] These are further silent on whether the learner should be registered at a later stage of the learneship. In fact all learners must be registered with PSiRA before starting a learnership. This is to ensure that as a security service provider, a learner complies with the PSiRA requirements. Sectoral Determination 5 sets the terms and

175 **Anonymous respondent, 31 August 2018.**
176 **Ibid.**
177 **Ibid.**
178 **Ibid.**
179 **Ibid.**
180 **Ibid.**
181 **Ibid.**
182 **Ibid.**
183 **Ibid.**
184 **Ibid.**
185 **Ibid.**
186 **Ibid.**
187 **Ibid.**
188 **Ibid.**
189 **Ibid.**
190 **Ibid, 10 July 2018.**
191 **Botes, T, 23 April 2018.**

conditions for learners and provides clarity as to who can be classified as a learner. Applicable requirements are set very low for vocational training according to the Skills Development Act (SDA).[192]

To enter into a learnership, an individual has to meet the entry requirements set by the SASSETA. Although a minimum age is not specified, learners must preferably have completed grade 12 before applying for a learnership – this does not necessarily mean that they are responsible or mature enough to handle a learnership.[193] There are times when the SASSETA accepts individuals that do not possess a matric certificate as learners for a learnership program.[194]

A learnership agreement must be registered with SAQA. Should a learnership agreement not comply with the Basic Conditions of Employment Act, complainants can apply for a writ of execution – a legal document necessary to enforce an arbitration award at the CCMA.[195] The main challenge with this assertion is that the learnership regime is governed by Sectoral Determination 5 that does not entitle a learner to assume the status of an employee and therefore such a learner is not protected by employee legislation. There is a need for better liaison between DoL, PSiRA, SASSETA and the bargaining council to conduct blitzes on hotspots of exploitation.

SASSETA is a key stakeholder in the training of private security personnel. Unfortunately, the relevant SASSETA official that controls learnerships was approached on several occasions to participate in this report. No cooperation was forthcoming. A more nuanced approach is needed from SASSETA which should be formulated around ensuring that learnerships do not turn into avenues for exploitation of workers and around fortifying – in collaboration with PSiRA – the value of learnerships.

192 Macun, I, 28 May 2018.

193 Anonymous respondent, 10 July 2018.

194 Ibid.

195 Macun, I, 28 May 2018.

8 SOCIAL MOBILITY VIA THE ESTABLISHMENT OF A BARGAINING COUNCIL

8.1 A new dawn for private security wages?

Multiple parties, including the South African National Employers' Association (SANSEA) and 10 trade unions, have participated in the process of establishing a bargaining council for the security industry.[196] The Labour Relations Act section 28, 1 (a) to (l) gives the parties legal powers to establish their own council. At the time of this report, the application for a bargaining council was at an advanced stage[197] at the Department of Labour and had been approved as at 21 June 2018.

To have a bargaining council for the private security industry will mean that the industry will be able to determine its own wages. According to the Department of Labour, collective bargaining will be good for the industry and promote the sector while also taking the burden off the state. Benefits include improved cooperation between employers and trade unions, inspectors will not have to enforce Sectoral Determination 6 any longer, and there will be improved levels of compliance as a result.[198] There has been an anomaly in the private security industry due to the lack of a bargaining council, its aim is to employ agents to limit exploitation and PSiRA should be consulted to determine if other role players should be included.[199]

Bargaining councils already exist for the road freight, logistics, motor industry and civil engineering sectors. When there is no bargaining council, there is no specific regulation through collective agreement.

Expanding on how collective agreements regulated labour broking before legislation, Mr Macun of the Department of Labour said the motor industry council – which is one of the largest in the country – set a limit that not more than 30% of motor workers may work on a temporary employment arrangement.[200] Perhaps with sufficient consultation between relevant stakeholders, PSiRA may find a similar kind of arrangement useful for the private security industry.

The national minimum wage is going to force the end-user to pay the right price. This is probably going to cause a problem because they have to pay R20 per hour in metropoles, but not in the rural areas. The changes are provided for faraway areas where they

196 Ibid.

197 Ibid.

198 Ibid.

199 Ibid.

200 Ibid.

cannot be enforced and where unemployment rates are highest.[201]

Many senior union members want every person to get paid the same rate and do not care about rural areas; they look at how many companies open operations and do not look at how many close shop. To them, the private security industry seems to be growing.[202] The allegation was made that a tender for security officers at the DoL resulted in the government entity paying R3 an hour less, stating that they could only pay that much.[203] This allegation is an indictment on government entities that contribute to the underpayment of wages for private security personnel.

It was mentioned that in the KwaZulu-Natal (KZN) midlands there were Chinese owned businesses that had no interest in complying. The bargaining council for the clothing industry in that instance worked with the DoL to conduct blitzes and send inspectors.[204] There is a need for a clear strategy because exploitation is ongoing. The DoL is not just enforcing rules, but also trying to elicit cooperation.[205] PSiRA must monitor its own industry as the DoL is poorly resourced and has few inspectors.[206]

PSiRA regulates the private security industry, but the additional responsibility of addressing labour related issues limits the optimal use of the authority's resources. This is why the establishment of a bargaining council is a positive step in the right direction for the private security industry.

A critical function of a bargaining council is to educate those who accept low wages and to create a sense of solidarity in the battle against fly-by-nights. The Association of Mineworkers and Construction Union (AMCU) has expressed interest in joining the trade union for the private security industry and this will hopefully strengthen the movement further.[207] PSiRA's statistics must be updated to provide the accurate size of the private security industry. Currently the active and inactive records are not clearly defined.[208]

SATAWU has been involved in the establishment of the bargaining council for the private security industry. The proposed council's constitution was first drafted in 1998, when the Department of Labour was approached.[209] At that time, the bargaining council could not be registered because there were insufficient numbers: the requirement was 50+1 representation of the private security industry.[210] This figure is calculated by looking at how many security officers are active in the industry.

For example, if PSiRA has 450 000 active, registered security officers then the bargaining council would need 260 000 to be registered with the Department of Labour. There was a conscious effort to approach employers and ask how many were actively employed. This led to a re-calibration of the final figure because not all who are registered with PSiRA are necessarily active in the private security industry.[211]

By subtracting those employed by Eskom, Transnet, the Passenger and Rail Agency of South Africa (PRASA) it became possible to come to the actual number.[212] Cash-in-transit personnel were also excluded as they fall under the Road Freight Bargaining Council, and those who install alarms were excluded because this is conceived as IT work.[213] Negotiations to establish a task team to work towards the realisation of a bargaining council for the private security industry began in 2014 and the figure that eventually lead to the approval for the establishment of a council was 350 000.[214]

8.2 Rolling back wage issues to focus on PSiRA's core mandate

The remark was made that PSiRA will have a "rude awakening" when the R8.00 that is paid to the regulator by security officers annually, is redirected to the bargaining council.[215] It is only in the private security industry that we see employees and employers funding the industry regulator. In all other industries, for example Financial Services Board (FSB) and Road Accident Fund (RAF), employees do not fund the industry regulator. When PSiRA was promulgated, unions were 'sleeping' and now the main responsibility of the union is the bargaining council.[216]

"It is in government's interest that those in the private security industry be fit and proper persons, and hence they should fund their regulation because it is government that is concerned about state security."[217] This remark represents a misunderstanding of the PSiRA and the legislation that established the regulation of the private security industry in South Africa. The fees paid by both private security companies and security officers are essentially licence fees that allow them to operate in the industry. It is a *de facto* endorsement by the state which is, for all intents and purposes, the only actor with legal claim over the monopoly over the means of violence.

It is encouraging that the Private Security Bargaining Council will have an inspectorate to enforce proper payment of wages and monitor its own affairs, and

201 Macun, I, 28 May 2018.
202 Ibid.
203 Ibid.
204 Ibid.
205 Ibid.
206 Ibid.
207 Ibid.
208 Ibid.
209 Mr Bhembe, SATAWU, 11 July 2018.
210 Ibid.
211 Ibid.
212 Ibid.
213 Ibid.
214 Ibid.
215 Ibid.
216 Ibid.
217 Ibid.

will be doing the same thing as PSiRA inspectors but with a dedicated focus on wages.[218] Since the bargaining council has the 50+1 required to be established, there is consensus that the Sectoral Determination 6 (SD6) and its prescriptions will fall away completely, if the 50+1 is maintained. If this figure drops, then the payment of wages may return to the SD6 guidelines.[219]

The criticism was made that many people are excluded and that the parties involved are not representative of the private security industry.[220] The example was made of Sectoral determination 6, whose outflow was enforced onto parties who were not allowed to attend forums and make contributions to the agreement and were not consulted.[221] If employers associations were excluded, that means that thousands of companies were not included in the determination of wages.[222] It was alleged that the Department of Labour roadshows tend to take place after negotiations have started and a binding agreement has been reached.[223]

The establishment of the Private Security Bargaining Council is a step in the right direction and will allow PSiRA to give its undisturbed attention to issues related to registration, vetting, law enforcement, and compliance. This will strengthen PSiRA's regulatory sphere of influence and signal a change in direction, as opposed to the focus on wage and labour disputes that currently inundates PSiRA's compliance and law enforcement units. Underpayment of wages goes against the PSiRA Code of Conduct and compliance regulations. Ideally, the Private Security Bargaining Council and PSiRA should approach private security regulation in a mutually beneficial manner.

9 INSOURCING VERSUS OUTSOURCING

One respondent who described his services as "facilitating clients' security needs" for residential estates (also called security complexes), believes that in-house (or in-sourcing) is always the better option. He said that labour broking is not needed in the private security industry as the business model negates the need for this[224] and so-called labour broking in the private security industry has different dimensions. For instance, the body corporate of the residential estate that he serves, pays for additional training of security guards. Every year, this residential estate requires that there be rotation for training on firefighting, electronic security and hospitality skills.[225]

He pointed out that the bigger a residential estate is, the more likely there will be poor management and it may even be possible to intimidate security officers into joining a protest or other wrongdoing. Effective management is crucial and size plays a role in this: the more security personnel on a site, the more need for robust management; it is a principle that can be applied in any context.[226]

There should be more pressure on body corporates to consider tender bids more carefully instead of simply opting for the cheapest tender bid. If there is a tick-box that is included in the tender document, it should include certified copies of: who will manage the security officers' pension and provident fund deductions, night time allowance, sectoral determination for the region and 13th cheque. Note that rural areas have no template to follow.[227]

The respondent believes that in-house security costs less and leads to optimum training and better wages, while outsourcing is problematic and may lead to poorly trained, timid guards and poor management.[228] He noted that university security needs to have specialised skills.

Competition for good security is fierce. Unfortunately clients always go for the cheaper option and there is a general lack of welfare management for private security staff in South Africa.[229] This indicates a need for stricter guidelines during the tender stage – the minimum salary is one part, but should only be a minuscule part.[230]

When a security officer can be swayed to wrongdoing, it is most probable that he/she has grievances that have not been resolved.[231] True to the culture of not speaking up, which is prevalent in South Africa, many security officers will not speak of their grievances –[232] it is unacceptable as this leads to compromised security.

Mr Bhembe of SATAWU pointed out that security officers should be empowered to raise their issues and take ownership of problem-solving without fear that they might lose their jobs, as is the case when they are outsourced. In most cases, management is not willing to take ownership of issues affecting security officers. Management prefers to focus on retaining client contracts rather than employee contracts.[233] Furthermore, property owners/managers don't know what the issues of security officers are, whether they, for example, receive the laundry and night

218 Mr Bhembe, SATAWU, 11 July 2018.
219 Ibid.
220 Brits, W. J, 23 July 2018.
221 Ibid.
222 Ibid.
223 Ibid.
224 Anonymous respondent, 07 June 2018.
225 Ibid.
226 Ibid.
227 Ibid.
228 Ibid.
229 Ibid.
230 Ibid.
231 Ibid.
232 Ibid.
233 Ibid.

time allowance to which they are entitled.[234] Security officers often feel that they have the worst job in the world and that no one cares about them.

PSiRA must be more circumspect about the type of entities it registers. The legitimacy of registering trusts, sole proprietorships and partnerships must be tested through transparent mechanisms that show they are not increasing legal avenues for exploitation of security officers.

10 THE LINK BETWEEN WAGES AND COMPLIANCE

The statement was made that PSiRA has lost much of its relevance because it no longer controls the training conducted in the industry. The responsibility for training has shifted to SASSETA and the responsibility for vetting fingerprints, which falls under PSiRA, can easily be shifted to the South African Police Service. It was reiterated that National Treasury should be funding PSiRA.[235]

According to Mr Bhembe of SATAWU, a compliant private security company charges a client R14 000 per month for each security officer deployed at client's premises. The security company pays R5 000 per month on average to each security officer deployed and keeps the remaining R9 000.[236] Interestingly, as a result of the #FeesMustFall campaign, most security officers deployed at universities became in-sourced and their salary was increased to about R8 000 or R9 000 per month.[237]

A battle on wages is imminent as SATAWU is demanding that private security companies pay a minimum of R8 500 for Grade A officers, R8 000 for Grade B and R7 500 for Grade C as a take home salary (including benefits).[238] If private security companies do not pay this minimum salary, clients will have to in-source their security personnel (which is preferable for security officers instead of working for a PSC).[239] SATAWU is neutral about this issue and is not for nor against the in-sourcing of workers.

Clearer guidelines must be set to ensure that security officers' rights are protected when insourcing and/or outsourcing takes place. Consultation in this regard is important. When a primary employer is keen to reduce the cost of business by reducing its wage bill, such an employer can easily change security employees' status to outsourced security officers, using the justification that security is not 'core business'.[240] Transnet is a case in point – it changed the status of employees and halved their salary.[241] It seems that certain private security companies keep a separate set of books to give the impression of being compliant.[242]

Note that the minister declared Sectoral Determination 6 for employers and employees – not for independent contractors. The sectoral determination does not apply to independent contractors.[243]

Though social security provision is very important, there are people that work in the private security industry for many years and have no proper provident fund benefits.[244] In the end, these people are forced to rely on social grants.

The private security industry should introduce a system of hourly wages as such a system will ensure that security guards are paid what they are worth and get treated fairly regarding rest periods and so on. Security officers must have breaks when working under pressure, for example in the situation of a control room where operators monitor security cameras. It has been proven that an officer cannot work more than four hours monitoring a security camera, as he/she loses concentration and becomes distracted – a rest break is necessary.[245]

The use of independent contractors continues to flourish in the private security industry because the current PSiRA price structure is unaffordable and there are many private security companies competing in the market.[246] This issue presents PSiRA's law enforcement and legal department with unlimited challenges in trying to ensure that prescribed wages are paid to private security personnel. Although adherence to labour legislation is enforced to a marginal extent by PSiRA where possible, wages are determined by the Department of Labour.

The Department of Labour, having demonstrated its incapacity to enforce Sectoral Determination 6 and 5, has left a vacuum for PSiRA to fill, albeit with limited resources. Labour relations is beyond the scope of PSiRA's mandate and high-level engagement must be used to implore the DoL to create concerted education campaigns directed at consumers about the rates prescribed for private security services. It is incumbent upon the PSiRA to present the problem to the Portfolio Committee on Police and enable a meaningful resolution.

Robert Fitch, author of the book Solidarity for Sale, is reported to have summarised the problem of exploitation as follows: "As long as capital sees labo[u]r — as it must — as a cost to be cut, there will

234 Anonymous respondent, 07 June 2018.
235 Mr Bhembe, SATAWU, 11 July 2018.
236 Ibid.
237 Ibid.
238 Ibid.
239 Ibid.
240 Ibid.
241 Ibid.
242 Brits, W. J, 23 July 2018.
243 Ibid.
244 Ibid.
245 Ibid.
246 Ibid.

be a need for working-class institutions of resistance. Without which the moral and material standard of living of working people must fall. On the one hand, there will be less to distribute. On the other, the principles of distribution will increasingly resemble not those proclaimed in the Kantian kingdom of ends but those already at work in the animal kingdom.''[247]

11
DO PENALTIES LEAD TO COMPLIANCE?

A fine from PSiRA only amounts to R1 500 and can hardly be regarded as punitive for owners of private security companies.[248] The fines imposed by the Department of Labour are similarly insignificant.

Knowing fully well that they are non-compliant, some owners of private security companies budget for these weak fines. Other owners of private security companies are non-compliant due to ignorance. Mr Botes of SASA stated that PSiRA Act section 38 (3)(g) is ambiguous and may refer to non-registered private security companies as well as to private security companies that are guilty of illegal practices. In fact, section 38 (3)(g) squarely places the responsibility on the consumer, a complicit enabler of non-compliance.

According to an anonymous respondent, PSiRA's claim of issuing one million rand in fines is questionable because the authority commonly settles for fines of R2 000[249] for petty transgression as well as for wilful exploitation such as an employer who 'steals' R100 000 a month (which amounts to R1.2 million a year) from employees. There is no point in imposing a R20 000 fine on such an employer.[250]

The respondent alleged that PSiRA offered T-numbers to some employers in the beginning of 2018 because it feared losing money and she believes that this explains the reluctance of PSiRA to let go of its security officer grading system.[251] She stated that many in the private security industry feel that the governance of PSiRA is wanting, as demonstrated by the existence of fly-by-night operators. The industry feels low and believes that PSiRA is only there for the money (referring to annual fees).[252] There seems to be consensus in the industry that there's little benefit in being PSiRA registered.[253]

The private security industry is not willing to name and shame, but all the same PSiRA must get rid of fly-by-nights and hire more inspectors. PSiRA must stop the practice of only inspecting those who are compliant.[254] The correct way forward is to inspect companies to verify if they are paying UIF, provident fund and prescribed PSiRA rates. Furthermore, PSiRA should keep its website updated and publish such information.[255] Rules exist for a reason and the private security industry would be a better place if PSiRA made corruption difficult and prevented bribes being paid to PSiRA inspectors.[256]

According to the respondent, the enforcement component of regulation is not practical and has no dedicated focus in addressing what affects security officers.[257] She believes that the main issue with PSiRA is the way it treats security officers, a manner which is inhumane and degrading as seen at all PSiRA offices where queues are long – consider that security officers are the people that fund PSiRA.[258] SARS has more people to attend to but does not have long, winding queues.[259] Learnerships are contained in the demands from the unions and Sectoral Determination 5 is another form of exploitation, although it is legislated and if a person works alone he or she must be paid the same as a security officer.[260]

Renewal of PSiRA certificates may entail a cumbersome process but it may also help get rid of 'bakkie brigades'. However, this process will not eliminate the issue of one security officer being able to register at two, three and even four different private security companies and be linked to all of them. There is no clarification as to what should happen in such cases. Will PSiRA de-link people who are erroneously linked to PSCs?[261]

One of the respondent's security officer was identified as doing night shift at another company, and his worry is that an inspector goes on site and finds this security officer to be linked to another company. The issue of multi-linked security officers can be attributed to either identity fraud or just plain negligence and should not be allowed to happen.

If company A does not inform PSiRA that a security officer no longer works for the company, then that security officer remains linked to it. In some cases, a security officer works for company A during the week and company B on weekends, and PSiRA cannot prohibit this as it is also allowed for directors of companies.

The respondents also queried the following: if a foreigner is legally registered but does not have permanent residency, what happens to him if he must renew his PSiRA certificate?[262] Currently, all

247 Yates, M. D, 30 March 2006.
248 Mr Bhembe, SATAWU, 11 July 2018.
249 Botes. T, 24 April 2018.
250 Ibid.
251 Anonymous respondent, 10 July 2018.
252 Ibid.
253 Ibid.
254 Ibid.
255 Ibid.
256 Ibid.
257 Mr Bhembe, SATAWU, 11 July 2018.
258 Ibid.
259 Ibid.
260 Ibid.
261 Anonymous respondent, 31 August 2018.
262 Ibid.

those who were legally registered under the Security Officers Board (SOB) are fully entitled to renew their PSiRA certificates.

12 RECOMMENDATIONS

The private security industry is characterised by a) a broad spectrum of variation in labour subcontracting and by b) a lack of a defined set of standards that are fit-for-purpose for the private security industry when it comes to labour subcontracting. Based on the research conducted and the analysis presented in this report, the following recommendations are made:

12.1 Segment, rationalise and initiate re-registration process

The PSiRA registration process must undergo a fundamental overhaul which will allow effective scrutiny that pre-empts the mushrooming of non-compliance once companies are registered. Resources must be directed towards improved control and regulation of the private security industry.

12.2 Empower PSiRA Inspectorate to pre-empt exploitation

More evidence-based scrutiny should be applied at the stage of infrastructure inspection to determine the credentials of labour brokers before their registration is approved. This should include probing how many security personnel the prospective labour broker manages and probing the status of the security personnel he/she deploys.

12.3 Set clear distinguishing criteria for independent contractors

Develop a legally binding mechanism which sets clear criteria to distinguish 'independent contractor' status reached through a voluntary and self-determined understanding.

12.4 Set a distinction between skilled and unskilled security personnel

A distinction between skilled and unskilled private security officer is needed to ensure better protection for the latter. This must protect those working in traditionally lower paying occupations, for example security guards who are more prone to exploitation than what close protectors are. Ensure that all security personnel are literate; this should form part of the registration requirements at PSiRA.

12.5 Set legally binding terms for labour brokers and independent contractors

Set the minimum amount that an independent contractor can get paid per hour, similar to the minimum wage. Consult relevant stakeholders, such as the Private Security Bargaining Council and establish if a minimum wage can be applied to temporary employment arrangements in the private security industry.

12.6 Increase awareness

Engage relevant stakeholders – for example the Consumer Goods Council – to ensure that consumers are informed of strict compliance criteria on tender documents for independent contractors, in-sourced or out-sourced security personnel. Criteria should include certified copies of documents that provide details about: who will manage the security officers, pension and provident fund deductions, night time allowance, sectoral determination for the region and 13th cheque. The Department of Labour must take responsibility for this aspect of labour related infringements in conjunction with PSiRA.

12.7 Improve coordination between PSiRA and SASSETA

Improved coordination between the two entities is crucial so that private security companies receive the correct information regarding how they can access funding from SASSETA to provide learnerships in their training centres and gain tax incentives. Overall, this would be in the interest of PSiRA, SASSETA and the country which would gain from better trained security personnel. Private security companies would also benefit financially if given the right information on how to enhance their training regime.

12.8 Effective and executive oversight

PSiRA should make a presentation to the Portfolio Committee on Police in order that the portfolio committee may provide oversight for the relationship between the PSiRA, the DoL and SASSETA. Labour relations is beyond the scope of PSiRA's mandate and high-level engagement must be used to fill the vacuum created by the DoL and SASSETA. Funding directed to the DoL to monitor wage adherence and funding directed to SASSETA to monitor learnerships must henceforth be directed to PSiRA.

12.9 SASSETA access to information

SASSETA must provide PSiRA with access to information regarding how many learners there are, which companies they learn in, and the status and outcome of their learnership. This would be conducive to improving control of the learnership environment and would help deter exploitation.

12.10 Improve liaison between DoL, PSiRA, SASSETA

Advocate for a more transparent approach from the SASSETA which should be formulated around ensuring that learnerships do not turn into avenues for the exploitation of security workers and around fortifying – in collaboration with PSiRA – the value of learnerships.

SASSETA's view that employees can become 'learners' is one major shortcoming which inadvertently creates a formally recognised way of exploiting employees-turned-learners. It leads to lower wages and is clearly a transgression of the PSiRA Act, and an approved form of exploitation. This ought to change and more is needed in terms of consultation between SASSETA and PSiRA to establish relevant criteria for learners, including an acceptable age limit.

12.11 Establish an MoU between PSiRA and dti

Establish a memorandum of agreement with the dti in order to ensure that co-operatives are more closely scrutinized and comply with the PSiRA requirements. This is largely informed by the emergence of the relatively new forms of contracting in the private security industry.

12.12 Establish an MoU between PSiRA and the Private Security Bargaining Council

The establishment of the Private Security Bargaining Council is a step in the right direction and will allow PSiRA to give its undisturbed attention to issues related to registration, vetting, and law enforcement, and compliance. This will strengthen PSiRA's regulatory sphere of influence and signal a change in direction, as opposed to the focus on wage and labour disputes that currently inundates PSiRA's compliance and law enforcement units. Underpayment of wages goes against the PSiRA Code of Conduct and compliance regulations. Ideally, the Private Security Bargaining Council and PSiRA should approach private security regulation in a mutually beneficial manner.

12.13 Develop an improved security management regime

This is crucial to enable specialised skills with a specific focus on welfare management for private security staff in South Africa. There is a need for more robust management, a principle that must be applied in all contexts.

12.14 Improve circumspection at registration stage

PSiRA must be more circumspect about the type of entities it registers. The legitimacy of registering trusts, sole proprietorships and partnerships must be tested through transparent mechanisms that show they are not increasing legal avenues for exploitation of security workers.

13 CONCLUSION

This report has examined various organisational, international and South African perspectives with reference to changing labour subcontracting practices. This refers to the use of labour broking, independent contractors, co-operatives and learnerships. Although consumers play a massive role based on their penchant to opt for the cheapest services, consumer awareness is all but lacking in this regard.

An affirmation of the value of flexible labour and employment structural policies for some in the industry is found to have merit. Indeed, some trades flourish under more flexible labour contracting models. Some are, however, dogged by challenges that are reinforced by exploitation of casual labour; a tenet ingrained in neo-liberal policies where profit and privatisation is king and the state is effectively rolled back.

It is not sufficient to blame employer resistance informed by cost-cutting business dogma, as this is a global challenge and one that is supported by strict capitalist doctrines that value profit at all costs.

This report has revealed the shortcomings that abound in the narrow conception about agents in society that are responsible for advancing workers' rights. This has exposed unions' inability to advocate for improved workers' rights, the role played by SATAWU in the establishment of a bargaining council for the industry is a welcome development. Shortcomings are exacerbated by international macro-economic policies that encourage labour broking and other forms of labour contracting.

South Africa needs a new, robust debate at the national level to address challenges regarding fair labour practice in the private security industry. As the issue is bigger than PSiRA and affects other sectors of the South African economy, it is necessary that policy-makers and those affected have the resolve to engage.

Security officers are at the frontline of providing security in almost every facet of life in South Africa. It is therefore imperative for PSiRA to continue focusing on effective training and coherent registration. This will produce a better service which is critical, especially in view of the finding that mistreated security officers compromise security.

A meaningful solution can only be drawn when there is political will to strengthen and empower those who suffer the most, namely the black and poor population. Labour broking is not unique to South Africa. However for private security provision, labour broking should be assessed and evaluated in the context of its implications for safety and security. If issues are left to fester, they may impact on broader socio-political issues and the stability of the country. In the end, only a change in government policy can effectively tackle worker exploitation in South Africa.

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