

**VETTING INVESTIGATIONS FOR ORGANS OF STATE  
IN A CONSTITUTIONAL DEMOCRACY- THE SOUTH  
AFRICAN CONTEXT**

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# Chapter 1: Introduction and background

## 1.1 Introduction

In September 2017, the South African Police Service was criticised in the media for the lack of vetting processes in the top structures of the police<sup>1</sup>.

This research is a descriptive study which focuses on the definition of vetting investigations<sup>2</sup> and the purpose of vetting investigations by unpacking the vetting investigation process and referring to the legislative framework regulating or impacting vetting investigation. This study furthermore identifies the current shortfalls of vetting investigations and the limitations (or lack) of vetting investigations on foreigners. Lastly, this research provides a comparative analysis of vetting investigations in the United Kingdom and the United States of America. This study is not a full account of personal freedoms vis-à-vis the lesser known aspect of state action but merely outlines the powers, process and procedures of vetting investigations. Moreover, this study is strictly aimed at vetting investigations for organs of state including the use of polygraph examination<sup>3</sup> in the public sector and does not extend to the private sector.

Vetting investigation is used to determine the security competence<sup>4</sup> of employees<sup>5</sup>, applicants and service providers<sup>6</sup> in organs of state<sup>7</sup>. Vetting investigation is an

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<sup>1</sup> "Top cops are flouting vetting processes – SAPS manager" [<https://www.news24.com/SouthAfrica/News/top-cops-are-flouting-vetting-processes-saps-manager-20170905>]

<sup>2</sup> Section 1 of the National Strategic Intelligence Act 39 of 1994 (NSIA) defines vetting investigation to mean the "prescribed investigation followed in determining a person's security competence"

<sup>3</sup> Section 2A(4)(a) of the NSIA

<sup>4</sup> Section 1 of the NSIA defines security competence to mean "a person's ability to act in such a manner that he or she does not cause classified information or material to fall into unauthorised hands, thereby harming or endangering the security or interests of the State and is measured against a person's-

(a) susceptibility to extortion or blackmail;

(b) amenability to bribes and susceptibility to being compromised due to his or her behaviour; and

(c) loyalty to the State and the relevant institution."

<sup>5</sup> Section 78 of the Labour Relations Act 66 of 1995 (LRA) defines employee to mean "any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to do any of the following in the workplace- (i) employ and dismiss employees whose contract of employees on behalf of the employee; (ii) represent the employer in dealings with the workplace forum; or (iii) determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace."

offensive counterintelligence<sup>8</sup> mechanism, which the State Security Agency<sup>9</sup> (SSA) utilises in order to protect national security<sup>10</sup> by ensuring that the individuals employed or rendering a service to government are security competent. The SSA is the single intelligence service referred to in section 209 of the Constitution<sup>11</sup> and forms part of the security services in section 199 of the Constitution.<sup>12</sup> Although vetting investigation is lawful, it remains highly contested by many in our constitutional democracy. Why is this so? Is it simply because vetting investigation impacts on the constitutional right to privacy? This research unpacks the many challenges and benefits regarding vetting investigations and aims to provide a guide to practitioners, civil servants and academics alike.

## 1.2 Research questions

### 1.2.1 How does vetting investigations impact on constitutional rights?

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<sup>6</sup> Companies, Close Corporations and any other entity.

<sup>7</sup> Section 239 of the Constitution of the Republic of South Africa, 1996 (the Constitution) defines organ of state to mean “(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution-

- (i) exercising a power or performing a function in terms of the Constitution or a Provincial Constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer”

<sup>8</sup> Section 1 of the NSIA defines counterintelligence to mean “measures and activities conducted, instituted or taken to impede and neutralise the effectiveness of foreign or hostile intelligence operations, to protect intelligence and any classified information, to conduct vetting investigations and to counter any threat or potential threat to national security.”

<sup>9</sup> SSA means the Agency referred to in section 3 (1) of the Intelligence Services Act 65 of 2002.

<sup>10</sup> Section 1 of the NSIA defines National Security to mean “the protection of the people and the territorial integrity of the Republic against-

- (a) the threat of use of force or the use of force;
- (b) the following acts:
  - (i) hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;
  - (ii) terrorism or terrorist-related activities;
  - (iii) espionage;
  - (iv) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;
  - (v) exposure of economic, scientific or technological secrets vital to the Republic;
  - (vi) sabotage; and
  - (vii) serious violence directed at overthrowing the constitutional order of the Republic;
- (c) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of force and carrying out of the Republic’s responsibilities to any foreign country and international organisation in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent.” Further, section 198 of the Constitution provides governing principles of national security.

<sup>11</sup> Section 209 of the Constitution establishes the Intelligence Service [SSA]-

“(1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.”

<sup>12</sup> Section 199 (1) of the Constitution establishes the security services-

“(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.”

- 1.2.2 What is the effect of vetting investigations on existing labour legislation?
- 1.2.3 How does a polygraph examination aid vetting investigations?
- 1.2.4 What are the pitfalls of conducting vetting investigations of foreigners?
- 1.2.5 How is vetting investigations conducted in the United Kingdom and the United States of America?

### **1.3 Research methodology**

The primary method of research is the black letter (doctrinal) study, with a focus on a descriptive analysis and a brief comparative analysis. However, in view of the natural law jurisprudential approach – according to which the content and status of human rights law is derived from the inherent dignity of the person<sup>13</sup>, the human rights issues of human dignity and privacy will briefly be referred to in order to contextualise the doctrinal study. This research will look at books, articles, journals, legislation and case law.

### **1.4 Literature review**

The literature that I reviewed centres on vetting investigations of applicants, employees and service providers both nationally and internationally. The books and articles that were reviewed range from 1994 to 2011, for example:

Lustgarten and Leigh<sup>14</sup>- This work is helpful as it covers issues such as democracy and human rights, including employment vetting and security, the control of foreign nationals, restrictions of the press and the use of criminal law to stifle criticism. This work is old and focuses on the United Kingdom. However, it will aid this research as it covers elements of my research problem. I will be able to unpack how vetting investigations in a parliamentary democracy differs from that of a constitutional democracy.

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<sup>13</sup> Cryer R *et al* (2011) *Research methodologies in EU and international law* Hart 35

<sup>14</sup> Lustgarten L and Leigh I (1994) *In from the cold: National Security and Parliamentary Democracy* Oxford University Press

Anon<sup>15</sup>- This is a guide for the United States of America to assist employers in understanding the fundamental concepts, methodologies and related legal issues associated with pre-employment screening of job applicants and include primary issues, state law, rules and regulations. This guideline is beneficial and comprehensive, but only relates to the United States. It can therefore assist with my research regarding the differences and similarities of vetting investigations as conducted in South Africa and United States of America, which may address the challenges experienced with vetting investigations in South Africa.

Mdluli<sup>16</sup>- This is a South African work on vetting investigation and is a good resource, as it covers the meaning of security vetting of organs of state as well as the intelligence services, background screening or pre-employment screening, categories of persons that can be vetted, the rationale for vetting, how security vetting can be used as a risk management tool to address corruption and fraud, legal mandate of security vetting, the guidelines from granting/denying security clearances and the question of the constitutionality of security vetting. However, my research is different in terms of the focus of the research, as I will concentrate on vetting investigations for organs of state. I will only briefly deal with the definition of vetting investigations but will focus on issues briefly referred to in this book. In my research I will explore the right to privacy *vis-à-vis* national security, and I will look at the use of polygraph examinations in vetting investigations in detail in terms of what it is, when it is used and its admissibility in a court of law. Furthermore, my research will look into the impact of the vetting investigation on an employee in terms of LRA and the limitations thereof. In addition, this research will highlight vetting investigation of foreigners in its current form and what the gaps are in view of the constitutional rights of foreigners.

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<sup>15</sup> Anon (2011) "Pre-employment screening: a good practice guide" *Centre for the Protection of National Infrastructure* 4 1-78

<sup>16</sup> Mdluli BD (2011) *Fundamentals of Security Vetting* BM Consultants

## Chapter 2: Vetting investigations and the Constitution

### 2.1 Purpose of vetting investigations

In order to assess the dynamics of vetting investigations we have to consider it against the backdrop of our constitutional democracy. What is constitutionalism? Put simply, constitutionalism is the legal system that is currently in place in South Africa. Prior to 1994, South Africa had a legal system that was based on parliamentary sovereignty, which means that Parliament could pass laws that could not be challenged. This changed with the introduction of Interim Constitution Act 200 of 1993 and the adoption of the Constitution. “Constitutionalism is the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the Constitution.”<sup>17</sup> Constitutionalism is based on the structure as well as the rights provisions contained in the Constitution. Structural provisions of the Constitution refer to the principles of separation of powers, democracy and the rule of law, whereas the right provisions refer to those rights contained in the Bill of Rights, such as the right to freedom of speech and the right to vote, etcetera. The crux is the concept of constitutionalism according to Malan “These essentialia are: justice (its identification with the constitutional idea with the quest for a just polity); fundamentality; consensuality, that is, the consensual basis of the rule of law; and its identification with the division – the diffusion – and the limitation and balance of power.”<sup>18</sup>

If we agree with this concept of constitutionalism, how do we contextualise it in South Africa? According to Venter, “South Africa’s transformation to constitutionalism in 1994 saw the addition to a mixed legal system of a supreme constitution that requires law to conform to its provisions, principles and values.”<sup>19</sup> This was reiterated in *Pharmaceutical Manufacturers Association of South Africa*: “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law,

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<sup>17</sup> Van Wyk, Dugard, De Villiers, Davis (1994) 2

<sup>18</sup> Malan K “Constitutionalism” *Draft Paper* Chapter 1 2

<sup>19</sup> Venter F (2012) “South Africa: A Diceyan Rechtsstaat?” 57 *McGill Law Journal* 721

including the common law, derives its force from the Constitution and is subject to constitutional control.”<sup>20</sup>

In view of this context, the SSA is established by the Constitution and regulated by the NSIA that is consistent with the Constitution. It is against this backdrop that we unpack what is meant by the term vetting investigation. Vetting investigation has been defined as “the prescribed investigation followed in determining a person’s security competence”. Furthermore, vetting investigation is utilised by all national intelligence structures<sup>21</sup> to assess security competence. It therefore can be said that the purpose of vetting investigations is to assist the protection of national security. Simply put, the elements essential for national security as per the definition emphasises that government protects its people, territory and the infrastructure which also incorporates the information and assets of government.

How does vetting investigations work? The executive branch of government appoints administrators in the various organs of state to manage the administration thereof. These organs of state operate in different sectors such as energy, justice, economic, social, education, health, and etcetera. These organs of state perform their respective mandates and ultimately ensure that government discharges its duties and render services to all. It then follows that to enable these organs of state to fulfil their respective mandates their employees should be diligent, have integrity and be non-corruptible. These employees form an integral part of the value chain and should be trusted with government information. As a result, vetting investigations to determine security competence of individuals is of utmost importance. Although vetting investigation is not an anti-corruption tool and therefore cannot root out all unsavoury elements within government, it is the minimum threshold to be used to ascertain the security characteristics of individuals. This is necessary to reduce incidents of unauthorised disclosure of state information (leaks),<sup>22</sup> sabotage, corruption<sup>23</sup> and

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<sup>20</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)

<sup>21</sup> Section 1 of the NSIA defines the National Intelligence Structure to mean-

“(a) Nicoc;  
(b) the intelligence division of the National Defence Force, established under the Defence Act 42 of 2002;  
(c) the intelligence division of the South African Police Service; [Para. (c) substituted by s. 1 (f) of Act 37 of 1998.]; and  
(d) the Agency.”

<sup>22</sup> Section 3 of the Protection of Information Act No 84 of 1982 stipulates “Any person who, for purposes of the disclosure thereof to any foreign State or to any agent, or to any employee or inhabitant of, or any organization,

espionage<sup>24</sup> that may occur within organs of state that are stumbling blocks for an efficient and effective government.

What are these organs of state? In terms of section 239 of the Constitution, organ of state<sup>25</sup> is defined as

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-
  - (i) exercising a power or performing a function in terms of the Constitution or a Provincial Constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

Notwithstanding this definition, our jurisprudence also outlines certain instances wherein clarity had to be given by our courts in order to clarify the definition. In *Korf v Health Professions Council of South Africa*, it was held that “public function” means the “engagement in the affairs or service of the public” and “open to or shared by all the people”.<sup>26</sup> Further, it was held in *Greater Johannesburg Transitional Metropolitan Council v Eskom* that “...institutions such as Transnet, ESKOM, Denel and SABC perform their public functions in terms of legislation and thus construed as organs of state.”<sup>27</sup> Moreover, in *DFS Flemingo SA (Pty) LTD v ACSA* the court held that

...an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective (see section 217 of the Constitution)...ACSA was not in accordance with the system that is fair and transparent.<sup>28</sup>

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party, institution, body or movement in, any foreign State, or to any hostile organization or to any office-bearer, officer, member or active supporter of any hostile organization...shall be guilty of an offence and liable on conviction to the penalty...”

<sup>23</sup> “Corrupt activities” as provided for in the Prevention and Combatting of Corrupt Activities Act 12 of 2004

<sup>24</sup> Paragraph 20 on page 12 of the Minimum Information Security Standards, 1996 (MISS) defines espionage to mean-

“The methods by which states, organisations and individuals, attempt to obtain classified information to which they are not entitled.”

<sup>25</sup> For the purposes of this paper it excludes the definition of “national public entities” and “provincial public entities” as defined in the Public Finance Management Act 1 of 1999.

<sup>26</sup> 2000 (1) SA 1171 (T)

<sup>27</sup> 2000 (1) SA 866 (SCA)

<sup>28</sup> 2013 JOL 30834 (GNP)

The above should provide a clear understanding of what vetting investigation is, its purpose and also the context in which it is applicable.

## 2.2 Scope of vetting investigations

Who needs to undergo vetting investigation? In terms of section 2A of the NSIA<sup>29</sup>, the SSA is responsible for conducting vetting investigations of employees, applicants and service providers rendering services to organs of state<sup>30</sup> and excludes the members of the Police Service and members of the Defence Force<sup>31</sup> (members of the Police Service is vetted by their intelligence division, Crime Intelligence and members of the Defence Force is vetted by their intelligence division, Defence Intelligence). This means that ultimately SSA has to ensure that all employees, applicants and service providers are security competent. Since it is a mammoth task to ensure that all government employees, applicants and service providers are vetted, the SSA has established vetting fieldwork units based at certain organs of state to assist with the vetting fieldwork. The concept of vetting fieldwork units was introduced in 2006 in the National Vetting Strategy of South Africa<sup>32</sup> and it was envisaged that these vetting fieldwork units would assist with the backlog experienced by the SSA to conduct vetting investigations of all employees, applicants and service providers. In terms of the strategy, 17 organs of state<sup>33</sup> were identified to establish vetting fieldwork units with certain criteria, namely: “Clients that have already established fieldwork units or started with the process; Clients with more than 800 permanent staff in order to

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<sup>29</sup> Section 2A of the NSIA stipulates “(1) The relevant members of the National Intelligence Structures [SSA] may conduct a vetting investigation in the prescribed manner to determine the security competence of a person if such a person-

(a) is employed by or is an applicant to an organ of state; or

(b) is rendering a service or has given notice of intention to render a service to an organ of state, which service may-

(i) give him or her access to classified information and intelligence in the possession of the organ of state; or

(ii) give him or her access to areas designated national key points in terms of the National Key Points Act 102 of 1980.”

<sup>30</sup> Section 239 of the Constitution

<sup>31</sup> Section 2A(2) of the NSIA provides that the SSA “... on request of the South African Police Service, the Service or the National Defence Force, persons employed by, applicants to or persons rendering a service to the South African Police Service or the Department of Defence.”

<sup>32</sup> Cabinet Memorandum 1 of 2006. See also the Department of Public Service and Administration Circular 68679

<sup>33</sup> National Treasury, National Department of Health, South African Revenue Service, South African Reserve Bank, Department of Correctional Services, Department of Home Affairs, Department of Trade and Industry, State Information Technology Agency, National Prosecuting Authority, National Department of Agriculture, Department of Environmental Affairs and Tourism, Department of Foreign Affairs, National Department of Land Affairs, Department of Minerals and Energy, Department of Justice and Constitutional Development, Department of Water Affairs and Forestry, National Department of Public Works.

justify a vetting fieldwork unit and sustain vetting and re-vetting over the long term; Clients with an established security component; Clients where sensitivity of information requires more intensive security vetting attention.”<sup>34</sup> Subsequent to the implementation of the strategy, the vetting fieldwork units were regulated in terms of section 2A (5A) of the NSIA<sup>35</sup> and currently there are 23 vetting fieldwork units operating within organs of state.

What is the scope of a vetting investigation (also commonly referred to as security vetting)?<sup>36</sup> Vetting investigation is a process that commences with the completion of the Security Clearance Form (Z204 form), record checks, followed with vetting fieldwork, polygraph examinations and concludes with an evaluation which will ultimately determine whether an individual is security competent or not. “A security clearance gives access to classified information in accordance with the level of security clearance, subject to the need-to-know principle”.<sup>37</sup> There are different levels of security clearances namely Confidential,<sup>38</sup> Secret<sup>39</sup> and Top Secret.<sup>40</sup> Confidential security clearances are valid for a period of 10 years, whereas Secret and Top Secret security clearances are valid for a period of 5 years. I will now briefly explain the vetting investigation process.

### **Security Clearance Form (Z204 Form)**

The vetting investigation process is initiated with the completion of the Security Clearance Form (Z204 form) by the applicant or employee of an organ of state. This form requires the subject of the vetting investigation to provide personal information

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<sup>34</sup> Annexure B of the Cabinet Memorandum 1 of 2006

<sup>35</sup> Section 2A (5A) provides “(a) Departments of State may, at the request of the Agency, establish units to be known as vetting field work units.

(b) Vetting field work units may, on request by the Agency, assist a relevant National Intelligence Structure in gathering the information contemplated in subsection (5).”

<sup>36</sup> Paragraph 1.1 of Chapter 5 of the Minimum Information Security Standards provides “Security vetting is the systematic process of investigation followed in determining a person’s security competence.”

<sup>37</sup> Paragraph 1.6 of Chapter 5 of the MISS

<sup>38</sup> Confidential Security clearances are issued to persons who will have access to confidential information. In terms of definition 3.4.2 of Chapter 2 of the MISS “CONFIDENTIAL should be limited to information that may be used by malicious/opposing/hostile elements to harm the objectives and functions of an individual and/or institution”

<sup>39</sup> Secret Security clearances are issued to persons who will have access to secret information. In terms of definition 3.4.3 of Chapter 2 of the MISS “SECRET is the classification given to information that may be used by malicious/opposing/hostile elements to disrupt the objectives and functions of an institution and/or state.”

<sup>40</sup> Top Secret Security clearances are issued to persons who will have access to secret information. In terms of definition 3.4.3 of Chapter 2 of the MISS “TOP SECRET is the classification given to information that can be used by malicious/opposing/hostile elements to neutralise the objectives and functions of institutions and/or state.”

relating to his or her history: employment, health, criminal record, educational qualifications, financial records, and travel as well as information relating to friends and family that may be contacted later on during the process.

## Record Checks

Upon the completion of the Security Clearance Form (Z204 form), the SSA or relevant vetting fieldwork unit (as the case may be) conducts record checks on the subject. Section 2A (5) of the National Strategic Intelligence Act, 1994 (Act 39 of 1994) provides that the SSA–

...may, in the prescribed manner, gather information relating to-

- (a) criminal records;
- (b) financial records;
- (c) personal information; or
- (d) any other information which is relevant to determine the security clearance of a person:

Provided that where the gathering of information contemplated in paragraphs (c) and (d) requires the interception and monitoring of the communication of such a person, the relevant members shall perform this function in accordance with the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act 70 of 2002).

The above-mentioned record checks conducted are *inter alia* a criminal record check *via* the South African Police Service database, a movement history and citizenship check *via* the Department of Home Affairs database, credit record check *via* TransUnion or Experian database,<sup>41</sup> financial transactions check *via* the Financial Intelligence Centre database and the intelligence threat or hit check *via* the SSA database. The listed record checks are not a closed list and other databases may be utilised if the need arises.

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<sup>41</sup> TransUnion and Experian databases are software solutions that can be used by businesses or consumers. These companies offer similar services by providing comprehensive credit information and credit history on individuals. These databases assist business in determining an individual's ability to fulfil financial or credit contractual obligations.

## Vetting Fieldwork

The next step in the vetting investigation process is the vetting fieldwork. Once again the vetting fieldwork is conducted by the SSA or the relevant vetting fieldwork unit (as the case may be). A trained Vetting Investigator conducts interviews with declared<sup>42</sup> and undeclared<sup>43</sup> references, as well as the subject, to gain a holistic picture of the subject and to determine the subject's security characteristics. The vetting fieldwork comprises several factors that need to be covered during the investigation process namely; "Family background, Personal relationships and/or own family, Social life and/or after work life, Employment behaviour, Personal finances or involvement in financial crimes, Legal action and/or personal interaction with the law, Values, Loyalty and Personality."<sup>44</sup> These factors are considered collectively to ascertain whether the subject is security competent, in other words, "a person's ability to act in such a manner that he or she does not cause classified information or material to fall into unauthorised hands, thereby harming or endangering the security or interests of the State and is measured against a person's-

- (a) susceptibility to extortion or blackmail;
- (b) amenability to bribes and susceptibility to being compromised due to his or her behaviour; and
- (c) loyalty to the State and the relevant institution."<sup>45</sup>

## Polygraph examination

A polygraph "means an instrument used to ascertain, confirm or examine in a scientific manner the truthfulness of a statement made by a person"<sup>46</sup> and is utilised during the vetting investigation process. The SSA "...may use a polygraph to determine the reliability of information gathered during the investigation."<sup>47</sup> Polygraph examinations are only conducted by the SSA and not by private companies, vetting

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<sup>42</sup> Declared references refer to the individuals identified by the subject in the Security Clearance Form (Z204 form) as references to be contacted during the vetting investigation process.

<sup>43</sup> Undeclared references refer to the individuals that were not identified by the subject in the Security Clearance Form (Z204 form) as references but were recruited by the relevant Vetting Investigator.

<sup>44</sup> Annexure C of Cabinet Memorandum 1 of 2006

<sup>45</sup> Section 1 of the NSIA.

<sup>46</sup> Section 2A(4)(b) of the NSIA.

<sup>47</sup> Section 2A(4)(a) of the NSIA.

fieldwork units or organs of state. Simply put, the polygraph examination either confirms or refutes the information gathered during vetting fieldwork. The use of polygraph examination will be discussed in more detail later in this chapter.

## **Evaluation**

Evaluation is the last stage of the vetting investigation process. The trained analysts of the SSA has to do the final assessment of the subject's security competence taking into consideration the Security Clearance Form (Z204 form), the record checks, vetting fieldwork and the polygraph examination results. Upon completion of the assessment of the individual, the Vetting Evaluator will make a recommendation to the Director-General: SSA, who may, after evaluating the information gathered during the vetting investigation, issue, degrade, withdraw or refuse to grant a security clearance.<sup>48</sup>

The vetting investigation process outlined above differs for Confidential security clearances, Secret security clearances and Top Secret security clearances. In the case of Confidential vetting investigations, it is not very extensive as it is limited to record checks, and only in the case of a "hit" requires fieldwork. As for Secret vetting investigations, there are no polygraph examinations conducted. Top Secret vetting investigations are the most extensive as it covers the entire process from record checks to evaluation. Notwithstanding the aforesaid, the SSA is not precluded from using its discretion when dealing with individual cases as to what resources to utilise in order to make a determination about the security competence of a subject. It is important to note that the vetting investigation process as outlined above is extensive and is usually conducted on employees. Applicants and service providers are confined to a less rigorous process of Personnel Suitability Checks and security screening, respectively.

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<sup>48</sup> Section 2A(6) of the NSIA.

## **Personnel Suitability Checks**

Personnel Suitability Checks<sup>49</sup> are routinely conducted on applicants of organs of state. The Personnel Suitability Checks are limited to credit checks, qualification verification checks and criminal record checks. These checks are usually done by the relevant Human Resources department (using different private companies) on the shortlisted candidates for a specific job. The Personnel Suitability Checks must be distinguished from vetting investigations: the former provides an outcome as to whether an applicant is suitable for a specific position, whereas the latter provides an outcome whether or not the applicant is security competent. The SSA also provides assistance with the Personnel Suitability Checks for all organs of state, but due to the time constraints, organs of state usually opt to do it in-house and pay private companies to assist.

## **Security screening**

Security screening or company screening<sup>50</sup> is conducted on service providers to ascertain whether or not organs of state may utilise their services. In terms of paragraph 5.1 of Chapter 5 of the MISS:

The onus is on the department/institution concerned in each case to indicate expressly in documents sent to the State Tender Board or private contractors whether there are security implications that should be taken into account in advance when they perform their duties for the department/institution involved. If there are such implications, reasons must be given for the inclusion of a clause in the tender document indicating the degree of clearance required, as well as a clause to ensure the maintenance of security during the performance of the contract. The clause could read as follows:

"Acceptance of this tender is subject to the condition that both the contracting firm and its personnel providing the service must be cleared by the appropriate authorities to the level of CONFIDENTIAL/SECRET/TOP SECRET. Obtaining a positive recommendation is the responsibility of the contracting firm concerned. If the

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<sup>49</sup> Cabinet Memorandum 1 of 2006. See also Regulation 57 (c), Chapter 1, Part 4 of the Public Service Regulations, 2016

<sup>50</sup> Annexure C of Cabinet Memorandum 1 of 2006. See also section 112 (i) of the Municipal Finance Act 56 of 2003.

principal contractor appoints a subcontractor, the same provisions and measures will apply to the subcontractor.

“Acceptance of the tender is also subject to the condition that the contractor will implement all such security measures as the safe performance of the contract may require.”

The SSA uses databases for records on the service providers, their directors and employees, namely; the Companies and Intellectual Property Commission; South African Revenue Service; South African Police Service; Department of Home Affairs; TransUnion or Experian; Financial Intelligence Centre and the SSA. In certain cases, the SSA may also do site inspections to verify whether or not the service provider is operational. The outcome of a security screening or company screening conducted by the SSA is a screening letter awarded to the organ of state, stating that they are permitted to use the service provider for the duration of the contract.

It is noteworthy that the SSA performs its vetting investigation functions subject to certain checks and balances to promote transparency and accountability in our democracy. The Joint Standing Committee on Intelligence is the body that was established in terms of the Intelligence Services Oversight Act 40 of 1994<sup>51</sup> and exercises parliamentary oversight over the intelligence and counterintelligence (including vetting investigations) functions of the SSA. In addition, the Inspector General of Intelligence<sup>52</sup> is responsible for monitoring and reviewing the SSA’s intelligence and counterintelligence (including vetting investigation) functions. Moreover, the Inspector General investigates complaints of maladministration, abuse of power, as well as transgressions of the Constitution, laws and policies by the SSA.

### **2.3 Right of privacy *vis-à-vis* national security**

Section 14 of the Constitution provides:

“Everyone has the right to privacy, which includes the right not to have –

- (a) their person or home searched;
- (b) their property searched;

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<sup>51</sup> Section 2 to 6

<sup>52</sup> Section 210 (b) of the Constitution provides “...civilian monitoring of the activities of those services [SSA] by an inspector appointed by the President...” See also section 7 of the Intelligence Services Oversight Act 40 of 1994.

- (c) their possessions seized; or
- (d) the privacy of their communications infringed.”

Section 14(d) of the Constitution applies to vetting investigations. Notwithstanding this right, it is important to note that the limitation clause (section 36 of the Constitution) expressly provides for cases where rights can be limited. It stipulates -

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and the extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
- (2) ...

For purposes of vetting investigations, there are cases where the right to privacy, [particularly section 14(d) of the Constitution] needs to be limited. In *Midi Television (Pty) Ltd v Director of Public Prosecutions* the law on general application is explained

Law of general application that purports to curtail the full exercise of a constitutionally protected right might take the form of legislation, or a rule of the common law, or even a provision of the Constitution itself. In each case the extent to which the intrusion that it purports to make upon a protected right is constitutionally valid is to be evaluated against the standard that is set by the provisions of s 36 because there are no other grounds upon which it is permissible to limit protected rights. Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them.<sup>53</sup>

In terms of section 2A(5) of the NSIA the SSA -

- ...may, in the prescribed manner, gather information relating to-
  - (a) criminal records;
  - (b) financial records;

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<sup>53</sup> 2007 (3) All SA 318 (SCA)

- (c) **personal information;**<sup>54</sup> or
- (d) any other information which is relevant to determine the security clearance of a person:

Provided that where the gathering of information contemplated in paragraphs (c) and (d) requires the interception and monitoring of the communication of such a person, the relevant members shall perform this function in accordance with the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act 70 of 2002).

It follows that the NSIA and the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 are laws of general application and can be used to limit individual's rights, in the case of the latter.

Is the limitation of the right to privacy as indicated above reasonable and justifiable? One needs to balance the right of privacy against national security. As stated earlier, vetting investigation is a counterintelligence tool used in order to protect national security. National security is ultimately aimed at ensuring peace and stability in South Africa, as well as to protect the state's assets, information and people. Section 198(d) of the Constitution states: "National security is subject to the authority of Parliament and the national executive." This means that the determination of the concept of national security should be prescribed in national legislation. Section 1 of the NSIA defines "National Security" as -

the protection of the people and the territorial integrity of the Republic against-

- (a) the threat of use of force or the use of force;
- (b) the following acts:

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<sup>54</sup> My own emphasis. Section 1 of the Protection of Personal Information Act 4 of 2013 (PPIA) states that "personal information means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, an existing juristic person, including, but not limited to-

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- (d) the biometric information of the person;
- (e) the personal opinions, views or preferences of the person;
- (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the person; and
- (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person"

- (i) hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;
- (ii) terrorism or terrorist-related activities;
- (iii) espionage;
- (iv) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;
- (v) exposure of economic, scientific or technological secrets vital to the Republic;
- (vi) sabotage; and
- (vii) serious violence directed at overthrowing the constitutional order of the Republic;

acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of force and carrying out of the Republic's responsibilities to any foreign country and international organisation in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent.

It is evident from the definition of national security that certain acts and conduct need to be prevented in order for the state to function optimally. The acts that directly interplay with vetting investigation are indicated in (iii) to (vi) of the definition above namely, "**espionage; exposure of a state security matter** with the intention of undermining the constitutional order of the Republic; **exposure of economic, scientific or technological secrets** vital to the Republic; **sabotage**."<sup>55</sup> Vetting investigation by its nature is intrusive. It interrogates every facet of the individual's life as per the vetting factors mentioned above, but the ultimate purpose is to ensure that government employees are security competent and would not sell government information or sabotage government processes or infrastructure. If one balances the individual right to privacy against national security, which if breached could result in instability or economic loss, national security will, in my view, carry more weight than the individual's right to privacy:

It is accepted that this stipulation caters sufficiently for the practice of security vetting to be deemed constitutional. Although there are limitations to the right to privacy and vetting therefore considered constitutional, the state is still bound to honour the constitutional principle - it should still honour the privacy of the affected individual by

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<sup>55</sup> My own emphasis.

using the personal information obtained during the vetting process solely for the purpose of vetting and for that purpose alone.<sup>56</sup>

Furthermore, it is noteworthy that in terms of the PPIA (the legislation promulgated to give effect to the right to privacy clause and the protection of personal information as therein defined) there are also certain exclusions for the purposes of national security. Section 6(1) (c) of the PPIA stipulates that “This Act does not apply to the processing of personal information by or on behalf of a public body which involves national security...”

Moreover, section 12(2)(d)(iv) of the PPIA stipulates that “Personal information must be collected directly from the data subject, except...in the interest of national security.” In both provisions cited there are exclusions when it comes to compliance with the PPIA. Therefore, the SSA may process the subject’s personal information and may additionally obtain personal information regarding the subject from the references interviewed during the vetting fieldwork process, for the purposes of conducting vetting investigation as a counterintelligence tool that is utilised for the protection of national security.

To sum up according to Mdluli:

...it may be an infringement of a person’s constitutional rights when he or she is required to provide information regarding his or her financial records, health status, previous marriage (s) and legal actions, for example. Nonetheless, coupled with the fact that the employees has consented to the security screening, the infringement of his or her rights is permissible and also justifiable in terms of section 36 of the Constitution.<sup>57</sup>

#### **2.4 Polygraph examination as a tool in vetting investigation**

As explained briefly above, polygraph examination is part of the vetting investigation process. What is polygraph examination? Polygraph “means an instrument used to ascertain, confirm or examine in a scientific manner the truthfulness of a statement made by a person”.<sup>58</sup> Polygraph examinations conducted on polygraph examinees

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<sup>56</sup> Annexure D of the Cabinet Memorandum 1 of 2006

<sup>57</sup> Mdluli 161

<sup>58</sup> Section 2A(4)(a) of the NSIA.

consist of 3 phases, namely; “pre-test, in-test and post-test”<sup>59</sup> and is utilised during the vetting investigation process. Practically, due to the amount of work entailed and capacity constraints, the SSA only uses polygraph examinations in Top Secret vetting investigations. Nonetheless, the legislation provides that the SSA “...may use a polygraph to determine the reliability of information gathered during the investigation.”<sup>60</sup> Are polygraph examination results admissible in a court of law? It is, although the evidentiary emphasis placed on polygraph examination is limited. In *DHL Supply Chain SA (Pty) Ltd v De Beer No and others* “...the result of the polygraph test cannot on their own be conclusive of the finding of guilt, there must be evidence, other than the polygraph result to support such a finding...polygraph testing although admissible standing alone cannot prove guilty.”<sup>61</sup> Also, in *Mustek Ltd v Tsabadi NO & others*: “...a properly conducted polygraph test is evidence in collaboration of the employers evidence... the polygraph test results could be used in conjunction with other forms of evidence to satisfy the dismissal of an employee. The polygraph test results on their own cannot justify the dismissal of an employee.”<sup>62</sup> In the same vein, when polygraph examination is done in the vetting investigation it is used to confirm or refute the information gathered during the investigation and cannot on its own justify a refusal of a security clearance.

What happens if a subject fails a polygraph examination? The onus is on the SSA to either conduct another polygraph test or opt to conduct further investigation. The Evaluator has a duty to consider all the merits of the investigation before making a recommendation on whether to refuse or issue a security clearance. It is noteworthy that a negative polygraph test result alone is not sufficient grounds upon which to refuse a security clearance.

What if the subject of the vetting investigation refuses to undergo polygraph examination? In the exceptional cases where subjects refuse to undergo polygraph examination, the SSA cannot make a determination about the security competence of the individual and will merely advise the relevant organ of state of such and it

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<sup>59</sup> Annexure C of the Cabinet Memorandum 1 of 2006

<sup>60</sup> Section 2A(4)(b) of the NSIA.

<sup>61</sup> 2013 (34) 1530 (LC)

<sup>62</sup> 2013 (1) 8 (LC)

therefore becomes the head of the organ of state's prerogative as to the action to be taken against such individual.

## **2.5 The relationship between vetting investigation, Promotion of Access to Information and the Promotion of Administrative Justice Act**

Section 32 and 33 of the Constitution provide for the right to access of information held by the state and the right to lawful, reasonable and procedurally fair administrative action respectively. These rights are given effect to in the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Can information gathered during the vetting investigation of a subject be requested in terms of PAIA? In terms of section 44(2)(b) -

Subject to subsection (4), the information officer of a public body may refuse a request for access to a record of the body if...the record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise which was made to the person who supplied the material; and to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence...

It is clear from the above that the information collected during the vetting investigation falls within an exception, as such information was collected from the subject of the vetting investigation in strictest confidence in pursuit of ascertaining his or her security competence, and cannot be divulged. It is the responsibility of the SSA to adhere to the confidentiality requirements.

Vetting investigation is an administrative action<sup>63</sup> as defined in section 1 of the PAJA. The result of a vetting investigation if refused, withdrawn or degraded can prejudice the subject as the security clearance is required for the post occupied or to be

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<sup>63</sup> Section 1 of the PAJA stipulates that " administrative action means any decision taken, or any failure to take a decision, by –(a) an organ of state, when- (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or a natural or juristic person, other than an organ of state, when exercising a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect..."

occupied. Therefore the SSA bears the onus to ensure that when making determinations of an individual's security competence it must be procedurally fair<sup>64</sup> and reasons<sup>65</sup> for a negative decision must be provided. The subject has the opportunity to appeal against a negative decision to the Minister of State Security in terms of section 2A(8) of the NSIA and if not satisfied, he or she may also approach a competent court to institute proceedings for judicial review<sup>66</sup> and an appropriate remedy.

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<sup>64</sup> Section 3 of the PAJA outlines what procedurally fair administration is.

<sup>65</sup> Section 5 of the PAJA

<sup>66</sup> Section 6 of the PAJA

## Chapter 3: Vetting investigations and labour law

### 3.1 Impact of refused security clearances

After evaluating the information gathered during the vetting investigation, the SSA makes a decision regarding the subject's security competence. In those instances where the SSA degrades, withdraws or refuses to grant a security clearance to the subject, the subject may appeal to the Minister of State Security. The appeal process is outlined in section 2A(8) of the NSIA:

(a) A person whose security clearance has been refused, withdrawn or degraded may in the prescribed manner appeal to the Minister responsible for the relevant National Intelligence Structure.

(b) Such appeal shall-

(i) be lodged within 60 days from the date on which the decision was made known by the head of the relevant National Intelligence Structure or such later date as the Minister permits; and

(ii) set out the grounds for the appeal.

(c) After considering the grounds of appeal and the head of the relevant National Intelligence Structure's reasons for the decision, the Minister responsible for the relevant National Intelligence Structure shall as soon as practicable-

(i) confirm, set aside or vary the decision; or

(ii) substitute any other decision for the decision of the relevant National Intelligence Structure.

(8A) The Minister responsible for the relevant National Intelligence Structure may establish a panel of appeal to assist him or her in the consideration of an appeal lodged in terms of this Act.

In terms of the above provision the subject may appeal against the decision of the SSA to the Minister of State Security when he or she feels that the SSA never came to correct decision. If the outcome of the appeal is unsuccessful, the subject may approach a competent court to review the decision of the SSA.

What is the effect of a refusal of a security clearance? In terms of paragraph 9.2 of Chapter 5 of the MISS "After the investigation the screening authority will merely

make a recommendation regarding the security competence of the person concerned to the head of the requesting institution, and this should in no way be seen as a final testimonial as far as the utilisation of the person is concerned.”

The above clearly shows that the SSA, after refusing the security clearances of individuals, defer to the head of the respective organ of state as to what action to be taken with respect to that individual. The SSA does not have the authority to dictate to organs of state, but can recommend that due to the fact that the individual is not security competent, such individual poses a security risk and should be moved to a position where he or she will not have access to sensitive or classified information, nevertheless the prerogative resides with the head of organ of state.

### **3.2 Recourse by heads of organs of state**

The head of an organ of state as (the “Accounting Officer”)<sup>67</sup> is the head of administration and bears the overall responsibility for the provision and maintenance of security in terms of paragraph 1.2 of chapter 3 of the MISS. As stated above, the SSA merely makes a recommendation as to the security competence of an individual. Nonetheless “...this should in no way be seen as a final testimonial as far as the utilisation of the person is concerned.”<sup>68</sup>

The head of organ of state has the option to either move the individual to a less sensitive post where he/she will not have access to sensitive or classified information, or keep the individual at the current post subject to a few conditions. In the event that the head of organ of state elects to keep the individual

...the head of the institution may still, after careful consideration and with full responsibility, use the person concerned in a post where he/she has access to classified matters if he/she is of the opinion that the use of the person is essential in

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<sup>67</sup> Section 36(1) and (2) of the Public Finance Management Act 1 of 1999 stipulates-

“(1) Every department and every constitutional institution must have an accounting officer.

(2) Subject to subsection (3)-

(a) the head of a department must be the accounting officer for the department; and

(b) the chief executive officer of a constitutional institution must be the accounting officer for that institution.”

<sup>68</sup> Paragraph 9.2 of Chapter 5 of the MISS

the interest of the RSA or his/her institution, on the understanding that a person satisfying the clearance requirements is not available.

Subsequently, the head of organ of state must comply with the following security requirements, namely: to furnish the SSA annually with a certificate<sup>69</sup> regarding such an individual's security conduct and report to the SSA any conduct by the individual posing a security risk;<sup>70</sup> continuous supervisions of persons of these persons and ensure that those persons sign a Declaration of Secrecy;<sup>71</sup> ensure that no information comes into possession of the individual that is not essential for the performance of his/her duties.<sup>72</sup>

Notwithstanding the above listed options, the head of an organ of state may dismiss an individual if the previous stated options mentioned are not viable. The dismissal of an individual should be procedurally and substantively fair in accordance with the LRA.<sup>73</sup>

### 3.3 Labour Relations Act and vetting investigations

This section contains a brief overview of the impact of labour law on vetting investigations. Section 23(1) of the Constitution states "Everyone has the right to fair labour practices". Furthermore, the LRA is national legislation promulgated to regulate labour relations in South Africa and give effect to this constitutional right. In addition, to this constitutional provision and the LRA, it should be noted that section 17(2)(d) of the Public Service Act No 103 of 1994 also provides for dismissal of government employees.<sup>74</sup>

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<sup>69</sup> The certificate is issued by organs of state and usually takes form of a letter that is signed by the relevant head of organ of state. The letter must include the details of the person employed without a security clearance and indicate if he/she were involved in any security breaches.

<sup>70</sup> Paragraph 10.4 of Chapter 5 of the MISS

<sup>71</sup> In terms of definition 12 of Chapter 2 of the MISS Declaration of Secrecy means "An undertaking given by a person who will have, has or has had access to classified information, that he/she will treat such information as secret."

<sup>72</sup> Paragraph 10.5 of Chapter 5 of the MISS

<sup>73</sup> The LRA does not apply to the SSA and the Department of Defence and therefore all labour related issues are dealt with in terms of the Intelligence Services Act 65 of 2002 and the Defence Act 42 of 2002 respectively.

<sup>74</sup> Although misconduct is not defined in law, it is often described "as the wilful contravention of a rule laid down in the workplace by the employer. The source of this rule is usually summarised in the employee's contract or in a policy or disciplinary code of the company, or it is general practice in the workplace that could justify dismissal." See "For what reasons can an employer dismiss an employee", Solidarity Legal Services, accessed on 12 June 2014, <http://www.solidaritylegalservices.co.za/faqs/for-what-reasons-can-an-employer-dismiss-an-employee/>

Section 188 of the LRA stipulates -

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-
  - (a) that the reason for dismissal is a fair reason-
    - (i) related to the employee's conduct or capacity; or
    - (ii) based on the employer's operational requirements; and
  - (b) that the dismissal was effected in accordance with a fair procedure.
- (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

Schedule 8 of the LRA (the Code of Good Practice: Dismissal) provides that “All employers must adopt disciplinary rules that establish the conduct required of their employees.”<sup>75</sup>

Furthermore, Schedule 8 also states: “Efforts should be made to correct employee’s behaviour through a system of graduated disciplinary measures such as counselling and warnings,”<sup>76</sup> and “Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.”<sup>77</sup>

Matters on dismissal, unfair or otherwise have been dealt with extensively by our courts. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration* the court stated:

A dismissal for misconduct is based on the employees fault i.e. intentional or negligent noncompliance to company rules or standards. A degree of blameworthiness is therefore ascribed to the employee. In respect of misconduct, the employer must prove that the employee contravened a rule, was aware of or could reasonably be aware of the rule, that the rule was valid and there was consistency in the application of the rule (substantive fairness). The employer is required to give the employee an opportunity to respond to the allegations (procedural fairness). This may take the form of a disciplinary hearing or an interview for lesser transgressions.<sup>78</sup>

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<sup>75</sup> Paragraph 3(1)

<sup>76</sup> Paragraph 3(2)

<sup>77</sup> Paragraph 3(4)

<sup>78</sup> 2014 (1) BLLR 20 (LAC)

Furthermore, *National Commissioner of the South African Police Service v Myers and Others* held

In justifying the appropriateness of dismissal as a sanction the chairperson of the disciplinary hearing had regard to Myers' period of service and seniority within the SAPS which in his view were indicative of the fact that Myers was or should have been aware of the SAPS rule...The chairperson held that Myers had deliberately violated the rule. He found Myers insolence to have been a factor which aggravated the misconduct. He stated that Myers, as an employee, was required to be obedient to his employer and to act in good faith in the exercise of his duties.<sup>79</sup>

It is important to note that the above is only a broad overview of dismissal for misconduct. Nonetheless, it is my view that if vetting investigations as provided for in the NSIA, the MISS and the relevant Code of Conduct of the organ of state are not complied with by employees, such employees can be dismissed for misconduct, provided that the relevant organ of state ensures that the LRA is adhered to and the dismissal is procedurally and substantively fair. Thus the onus resides on the head of organ of state to ensure the following: 1) vetting investigation as a rule was implemented within in the organ of state, 2) the employee failed or refused to comply with the rule to undergo vetting investigation, 3) the head of organ of state provided a mechanism such as training as a corrective or progressive measure to give the employee an opportunity to comply with the rule. If the employee still fails or refuses to comply with the vetting investigation process, despite the above steps taken by the employer, it is my view that the employee may be dismissed for misconduct.

Case on vetting investigations is limited. Nonetheless, there are two reported cases in which the Labour Court had to consider the results of the vetting investigation process and the LRA. The first case was decided in 2009 and the second case was decided in 2016. In *Public Servants Association obo SMD Mamabolo v P Kirstein and Others*<sup>80</sup> the facts are as follows:

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<sup>79</sup> 2012 (33) ILJ 1417 (LAC)

<sup>80</sup> 2010 ZALCJHB 49

The applicant was employed as a Director at the Department of Home Affairs since 1 December 1997. His job description included being responsible for a National Key Point and the National Population Register (which included being able to amend, insert, and remove entries). In terms of the applicant's contract of employment, he was required to obtain a security clearance from the SSA [formerly known as the National Intelligence Agency (NIA)]. The applicant underwent the vetting investigation process and was refused a security clearance. The Director-General for the Department of Home Affairs made the applicant aware of the negative results of the vetting investigation process on 28 May 2008 in a letter advising him that his services would be terminated. The SSA's refusal to grant a security clearance to the applicant was used as *prima facie* evidence for the termination, despite on-going disciplinary proceedings for misconduct which could not be completed due to the dismissal of the applicant. The applicant appealed to the SSA in terms of section 2A(8) of the NSIA but was unsuccessful and subsequently lodged an unfair dismissal dispute on 30 January 2009. The arbitrator found that the dismissal was substantively and procedurally unfair, but did not order that the applicant be reinstated - only compensation equivalent to 7 months remuneration was to be paid.

The applicant, dissatisfied with the arbitration award approached the Labour Court to review and set-aside or correct the arbitration award. The respondents opposed the review and applied for a counter-review of the arbitration award. The applicant's grounds for review were among others: the arbitrator failed to apply his mind in reaching a decision; the arbitrator considered irrelevant considerations; no consideration was given to the applicant's reinstatement; the arbitrator acted unlawfully or unreasonably in failing to order reinstatement. The respondents' grounds for counter-review were, among others, that the arbitrator erroneously concluded that dismissal was for misconduct and not failure to obtain a security clearance; arbitrator erred in deciding dismissal was unfair due to the SSA delay in completing the vetting investigation process; and in all circumstances the arbitrator erroneously concluded that the dismissal was unfair.

The Labour Court considered the grounds for review brought by the applicant, but found that the findings and the arbitration award given by the arbitrator was reasonable and could not be faulted,

He found that notwithstanding lack of proof that top secret security clearance was a requirement for the applicant's position, he was obliged to accept the validity of the NIA decision in the absence of a challenge. Accordingly, he determined that a reinstatement order would not be practical until the NIA decision (also referred to as the "negative security clearance") had been reviewed and set aside. Given that the applicant failed to exercise his remedies in this regard he found that the maximum compensation in terms of section 194 of the LRA was not appropriate, and that if the applicant were to succeed in a review he would in any event have a contractual claim for reinstatement. He therefore found that but for the negative security clearance, reinstatement would have been appropriate, and awarded compensation equal to 7 months' remuneration as being just and equitable in the circumstances...<sup>81</sup>

Similarly, the Labour Court, when considering the counter-review, found that the findings and the arbitration award given by the arbitrator was reasonable and could not be faulted and the dismissal was indeed substantively and procedurally unfair. The Labour Court dismissed the application for partial review with costs, condoned the late filing of the counter-review, and dismissed the counter-review with costs.

In this case it is noteworthy that the court was not competent to make a determination as to the validity of the vetting investigation results or interrogate the process thereof. However, the court refused to reinstate the applicant due to the "failed security clearance." In addition, the court stated that the results of vetting investigations does not give the employer the right to forgo the conditions of substantive and procedural fairness as prescribed in the LRA. This emphasises the argument made earlier that vetting investigations is not punitive in nature and the onus resides with the relevant head of organ of state to enforce vetting investigations in line with the LRA.

In the case of *Nogcantsi v Mquma Local Municipality and others*<sup>82</sup> the facts are as follows: On 19 February 2014, the appellant accepted a written offer of appointment as a protection officer in the office of the municipal manager for a 3 year fixed-term contract with a 6 month probation period subject to "vetting and screening process". Further, clause 1.1 of the contract of employment stated that the contract would be

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<sup>81</sup> 2010 ZALCJHB 49

<sup>82</sup> 2017 (4) BLLR 358 (LAC)

“automatically terminated” if the outcome of the vetting was negative. On 11 March 2014, the appellant was advised in writing by the municipal manager that the vetting process revealed negative information about the appellant, and consequently the contract was terminated with immediate effect. On 23 October 2014, the appellant referred the matter for arbitration alleging that he was dismissed and the dismissal was substantively and procedurally unfair. On 4 November 2014, the arbitrator found that clause 1.1 of the contract of employment (which stated that the employment was subject to the “vetting and screening process”) was applicable and binding, and therefore the negative outcome meant that the contract could be “automatically terminated”. Further, the arbitrator stated that the appellant was not dismissed but that his services were automatically terminated.

The appellant, dissatisfied with the arbitrator’s findings and the arbitration award, took the matter on appeal to the Labour Court. The appellant contended that the arbitrator erred in finding that the contract terminated automatically and did not constitute a dismissal. The Labour Court found that the arbitrator was correct in his findings and that the appellant failed to establish the existence of dismissal ‘...on the basis that the appellant *"agreed to the terms of the contract and did not dispute that he understood that should he not be positively vetted, his employment contract would terminate"*’. The appellant approached the Labour Appeal Court, alleging that the court *a quo* erred in finding that it was reasonable for the arbitrator to find that the appellant had not been dismissed and that the contract had been automatically terminated. The Labour Appeal Court found that clause 1.1 was a resolutive condition, which means that the contract exists, but came to an end upon fulfilment and as such the contract is treated as it never existed. Therefore the contract being terminated as a result of a negative security clearance was found not to be in conflict with the LRA. The appeal was dismissed with costs.

In this case, the vetting and screening process was treated as a resolutive condition for employment at the organ of state and not as a dismissal as per the LRA, with the requirements for substantive and procedural fairness. Once again, the court was not competent to interrogate the vetting investigation or the process. It is my view that this decision to treat the vetting and screening process as a condition for employment is correct, as it is line with both the NSIA and the LRA and illustrates

that vetting investigations and fair labour practice are not mutually exclusive, and may be used as a precedent to prevent vexatious litigation on this matter in the future.

## Chapter 4: Vetting investigations and foreigners

### 4.1 Foreigners' rights and obligations

Can foreigners<sup>83</sup> be forced to undergo vetting investigations? The NSIA does not differentiate between the vetting investigation of South African citizens and foreigners. The MISS sets out the following guidelines for the vetting investigation of foreigners:

- 3.1 Confidential Clearance. A confidential clearance may be considered in respect of an immigrant who has been resident in the RSA for ten consecutive years of which at least those five years preceding the clearance were spent as a South African citizen. He/she must provide sufficient proof that any former citizenship has been relinquished.
- 3.2 Secret Clearance. A secret clearance is only considered in respect of an immigrant who has been resident in the RSA for fifteen consecutive years of which at least those ten years preceding the clearance were spent as a South African citizen, also on the condition that the person has relinquished his/her former citizenship.
- 3.3 Top Secret Clearance. After an immigrant has been resident in the RSA for a period of twenty consecutive years (of which fifteen years were spent as a South African citizen), a top secret clearance may be considered, on the condition that such a person has relinquished his/her former citizenship. Every case will be dealt with on merit owing to the unique nature of each situation. This means that not all immigrants who comply with the requirements will automatically qualify for a top secret clearance.<sup>84</sup>

However, in practice foreigners are not vetted. The two most common reasons for employing foreigners in organs of state are firstly, in lieu of a bilateral or multilateral agreements (exchange programmes) or secondly, because of scarce skills. In both

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<sup>83</sup> Section 1 of the Immigration Act 13 of 2002 states that "Foreigner means an individual who is neither a citizen nor a resident, but is not an illegal foreigner."

<sup>84</sup> Paragraph 3 of Chapter 5 of the MISS

instances, security is not always a consideration. In the former, the diplomatic relations of the country is prioritised and in the latter, it speaks to fragmented pieces of legislation or government policy that has conflicting objectives. The NSIA and the MISS provide for vetting investigation of all applicants, employees and service providers of organs of state for the protection of national security without exceptions, yet in practice foreigners are excluded. It is common cause that the vetting investigation is cumbersome and understandably, the process explained in Chapter 2.2 above cannot be adequately completed on foreigners due to time constraints as well as cost-factors. What does that mean for those employed government? If we cannot ascertain the security competence of a foreigner, it clearly identifies a gap in the vetting investigation process. How do organs of state mitigate the security risk of foreigners who are not security competent?

Paragraph 3.6 of the MISS states -

- 3.6 Employing Immigrants who do not meet Clearance Requirements.** If on account of his/her indispensable expertise, it is considered essential to employ an immigrant while he/she does not satisfy the clearance requirements as laid out above and he/she is to be utilised in a post, the work of which is classified, the vetting authority will be unable to make a positive recommendation with regard to the issue of a security clearance in respect of such a person, but can merely institute an investigation to determine whether such an immigrant is suitable from a security point of view for the post concerned. In such an event the head of the employing institution may authorise that the immigrant be used in the post (see Chapter 5, paragraph 10.2), on the condition that the employing institution must
- submit a certificate to the National Intelligence Agency and the responsible screening institution in which the absolute necessity of employing such immigrant is set forth and it is also declared that no RSA citizen with the same expertise is available or can be recruited in the RSA and, in cases where an immigrant from a state formerly seen as controversial has been employed, that an immigrant from a non-controversial country could not be obtained;

- provide the responsible screening institution with a description of and an indication of the sensitivity of the responsibilities attached to the post to be occupied by the immigrant;
- declare that it accepts full responsibility for compliance with the security requirements connected with the employment of such immigrant;
- ensure that no classified information or material that is not needed for the performance of his duties comes into the possession of the incumbent of the post; and
- reconsider the authorisation every year and relate in writing to both the National Intelligence Agency and the responsible screening authority any incident which could pose a threat to security or any incidence which may bring his/her security competence into question.

3.6.1 Take note: When the person concerned changes his/her posting, the authorisation is automatically terminated.

3.7 In respect of immigrants already employed in sensitive positions and in whose case the conditions laid out in Chapter 5, paragraph 3.6 above have not yet been complied with, the employing institution must immediately give effect to those conditions as set out in paragraph 3.6.

In my view the lack of vetting investigations of foreigners not meeting the security clearance requirements will always constitute a risk. The components of vetting investigations such as loyalty to the state will always pose a concern as these individuals may commit acts of espionage because they prefer their country of origin. A typical example: should the individual commit a crime in South Africa, he or she may flee the country using his or her foreign passport and if South Africa does not have an extradition treaty with that country he or she can avoid the consequences of the crime. It means that ultimately foreigners are not treated the same as South African citizens in terms of the intense security scrutiny that citizens have to undergo before being considered for employment at organs of state. Unequal treatment of citizens and foreigners in so far as it pertains to vetting investigation is a serious problem as government has many foreigners employed, whilst South Africa is facing high rates of unemployment. It would seem that some interventions in government policy of legislation must be made in an attempt to address this issue.

## 4.2 Rights and obligations of Dual citizenship holders

In terms of paragraph 3.4 of Chapter 5 of the MISS, a dual citizenship holder is treated different than a citizen or a foreigner as far as it pertains to vetting investigation: “Dual Citizenship. Each application for a security clearance in respect of persons with dual citizenship must be assessed on the merits of each individual case.” In view of what was argued in respect of foreigners and the risks they pose, what makes dual citizenship holder’s different? In my view there is no difference. It is submitted that paragraph 3.4 (as outlined above) is contradictory to paragraphs 3.1 to 3.3 of Chapter 5 of the MISS. It seems that dual citizens have the same rights and obligations of South African citizens with respect to vetting despite having a foreign citizenship. In practice, foreigners are requested *inter alia* to relinquish their foreign citizenship in order to satisfy the loyalty factor of the vetting investigation to make them eligible to be granted a security clearance. How are dual citizenship holders with a foreign citizenship “assessed on the merits of each individual case”? It is submitted that if a security clearance cannot be granted to foreigners without relinquishing their foreign citizenship, then the same rule should be applied to dual citizenship holders. The application of the same rule to foreigners and dual citizenship holders alike will prevent the SSA from acting in an arbitrary manner when making determinations about the loyalty of an individual.

## Chapter 5: Comparative analysis of vetting investigations

Although there is limited material available on vetting investigations in other countries, I will briefly outline the vetting investigation process in the United Kingdom and the United States of America. The rationale is to measure our current vetting investigation process against more developed (first world) countries. I will not be unpacking the background as to the different dispensations under which these countries operate, but merely describe their respective vetting investigation process.

### 5.1 Vetting investigations in the United Kingdom

The United Kingdom is a parliamentary democracy, which means that the legal system is fundamentally based on common law and not a written constitution like South Africa. Nonetheless, vetting investigation in the United Kingdom is similar to that of South Africa. According to Lustgarten and Leigh

Employment relationships are regulated by the contractual arrangements between employer and employee, but are subject to fundamental statutory rights...National security appears in an employment context partly as an exception to the statutory floor of rights...the purpose of vetting is to attempt exclude the disloyal or those considered prone for various reasons to disloyalty...<sup>85</sup>

The guidelines for vetting investigation in the United Kingdom is based on the following-

no one should be employed in connection with work the nature of which is vital to the security of the state who:

(a) is, or has been, involved in, or associated with any of the following activities threatening national security:

- (i) espionage,
- (ii) terrorism,
- (iii) sabotage,

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<sup>85</sup> Lustgarten and Leigh 133

- (iv) actions intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means; or
- (b) is, or has recently been, a member of any organisation which has been advocated such activities; or
- (c) is, or recently has been associated with any such organisation, or any of its members, in such a way as to raise reasonable doubts about his or her reliability; or
- (d) is susceptible to pressure from any such organisation or from a foreign intelligence service or hostile power; or
- (e) suffers from defects of character which may expose him or her to blackmail or other influence by any such organisation or by a foreign intelligence service or which may otherwise indicate unreliability.<sup>86</sup>

There are 4 different levels of vetting investigations namely: Enhanced Positive Vetting, Positive Vetting (Top Secret), Reliability Checks and Counter Terrorist Checks. I will briefly explain what the different levels entail.

The Enhanced Positive Vetting is restricted to intelligence and security services and is conducted in terms of the Security Service Act, 1984 by MI5 (British Domestic Intelligence). "EPV comprises not merely departmental, criminal, security, and credit-worthiness checks but also in-depth interviews with the applicant and home and work acquaintances."<sup>87</sup> The process is as follows: completion of the questionnaire; interview with applicant; interviews with referees; after investigation a recommendation is made to the Permanent Head of the Department. The vetting factors considered at this level are *inter alia* criminal or discreditable personal conduct; large debt; family members living in a foreign country; psychological inadequacies; political attitudes.

The Positive Vetting (Top Secret) is conducted by the Personnel Security Investigation Unit of the Ministry of Defence and is used in the case of diplomats and members of the police and those who require access to Secret material. "The checks carried out are the same as those for EPV, but at a lesser depth."<sup>88</sup> The process is

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<sup>86</sup> Lustgarten and Leigh 133

<sup>87</sup> Lustgarten and Leigh 135

<sup>88</sup> Lustgarten and Leigh 137

as follows: completion of the questionnaire, interviews of the applicant, after investigation a recommendation is made to the Permanent Head of the Department. The same vetting factors are used.

The Reliability and Counter-Terrorist checks are the 2 other less intensive vetting investigations. In terms of the Reliability Checks, this form of vetting is conducted on service providers as well as to individuals with access to categories of confidential information: "Reliability checks involve a criminal record check; presumably the major interest will be recorded offences of dishonesty." The Counter-Terrorist checks "...the purpose is to search for any connections with or vulnerability to terrorist organisations in the case of those with access to public figures or sensitive establishments..."<sup>89</sup> This form of vetting can take place without the individual being aware of it.

The Permanent Head of a Department makes the decision regarding individual's vetting. Upon receipt of a negative vetting investigation in the case of Enhanced Positive Vetting or Positive Vetting (Top Secret), the individual may appeal the decision. The Permanent Head of Department can refer the matter on review to the Minister for 'participation'. The Minister establishes a panel, known as the "Three Advisors" consisting of a retired Permanent Secretary, a retired Deputy General Secretary and a retired High Court judge.

## **5.2 Vetting Investigations in the United States of America**

The United States of America is a constitutional democracy. In terms of its Constitution, treason is considered a crime and the Espionage Act, 1917 stemmed from this constitutional clause. Further, the Executive Order 1165 provides for "... procedures and practices in classification of national security information."<sup>90</sup> According to Breckinridge "The protection of secret or classified information is subject to occasional exception for public purposes, but its control within the

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<sup>89</sup> Lustgarten and Leigh 140

<sup>90</sup> Breckinridge SD (1986) *The CIA and the US Intelligence System* Westview Press

government is managed under a complex system of security.”<sup>91</sup> The United States Merit Systems Protection Board, 2005 stated “The investigations play an important role selecting employees for positions of high trust. The focus is on trustworthiness and integrity of the applicants, as evidenced by their behaviour and relationships with others over a long period of time.”<sup>92</sup>

In terms of a report issued by the Office of the Inspector General of the Department of Defense

Security Clearances and Access. Executive Order 12958 states that a person may have access to classified information provided that a favourable determination of eligibility for access has been made, the person has signed an approved nondisclosure agreement, and the person has a need to know the information. The favourable determination of eligibility for access results in a security clearance being granted. Even after a clearance has been granted, the custodian of any classified information is responsible for controlling access by determining who has a “need-to-know.” Personnel security clearance investigations are intended to establish and maintain a reasonable threshold for trustworthiness through investigation and adjudication before granting and maintaining access to classified information. The initial investigation provides assurance that a person has not demonstrated behaviour that could be a security concern. Reinvestigation is an important, formal check to help uncover changes in behaviour that may have occurred after the initial clearance was granted.<sup>93</sup>

There are 3 levels of security clearances in the United States namely, Top Secret, Secret and Confidential. The Top Secret security clearance is valid for a period of 5 years, the Secret security clearance is valid for a period of 10 years and the Confidential security clearance is valid for 15 years.

The employee applies for a security clearance to the Department of Defense which is subject to the Defense Industrial Personnel Security Clearance Review Program and the Industrial Security Regulation. The investigation is conducted by the Defense Investigative Service or Defense Industrial Clearance Office. “As a rule,

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<sup>91</sup> Breckinridge 91

<sup>92</sup> Coloprete FA (2012) *Pre-employment background investigations for public safety professionals* CRC Press Taylor & Francis Group

<sup>93</sup> Office of the Inspector General of the Department of Defense – Report NO. 04-INTEL-02 (12 December 2003)

security clearance should be granted if, based on all available information, the applicant's loyalty, reliability, and trust-worthiness are such that entrusting the person with classified information or assigning the person to sensitive duties is clearly consistent with the interests of national security"<sup>94</sup>

The investigation process differs in different states due to the various Federal and State Laws. Ordinarily, an Employment eligibility verification form [I-9] is completed, this verifies an employee's identity and establishes if he or she is allowed to accept employment within the United States. Thereafter, a Personal History Statement (Background Investigation Questionnaire) which provides the foundation for an investigation is conducted. There are fingerprints taken to conduct criminal record checks, photographs to confirm identity, interviews with the applicant and references as well as an integrity testing (polygraph examination or voice stress analysis).<sup>95</sup>

There are 13 adjudication criteria for considering whether to grant a security clearance. Allegiance to the United States; foreign influence, foreign preference, sexual behaviour, personal conduct, financial considerations, alcohol consumption, drug involvement, psychological conditions, criminal conduct, handling protected information, outside activities and use of information technology systems.<sup>96</sup> Once these criteria have been considered the relevant Central Adjudication Facilities and Appeal Boards have the authority to grant, deny or revoke the security clearances at any of the levels.<sup>97</sup>

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<sup>94</sup> Church KJ "Loss or Denial of Security Clearance: An Employee's Rights" Santa Clara High Tech. L.J 4

<sup>95</sup> Office of the Inspector General of the Department of Defense – Report NO. 04-INTEL-02 (12 December 2003) at [<https://fas.org/sgp/othergov/dod/dodig1203.pdf>] Accessed on 12 July 2017 at 11:00

<sup>96</sup> Page 2 of Chapter 2 of the Office of the Inspector General of the Department of Defense

<sup>97</sup> Page 7 of Chapter 2 of the Office of the Inspector General of the Department of Defense

## Chapter 6: Conclusion

This paper has described vetting investigation process for organs of state. The research outlined that the SSA, an intelligence service as established by the Constitution, conducts vetting investigation as a counterintelligence mechanism to protect national security. Furthermore, the right to privacy of an individual may be limited when balanced against that of national security. It explained that vetting investigation is an administrative action that should be procedurally fair and the SSA should ensure that it does not act in an arbitrary manner when exercising its mandate, cognisant of the fact that they perform counterintelligence functions (including vetting investigations) in line with legislation and subject to parliamentary oversight in the form of the Joint Standing Committee on Intelligence and civilian oversight in the form of the Inspector General on Intelligence. The oversight bodies create a system of checks and balances to prevent maladministration and abuse of power by the SSA and its officials.

The paper also explained the thorny issue of how to mitigate the risk that employees who are not security competent pose in terms of the existing labour prescripts. In addition, the study explains the options that employees that are refused security clearances have in terms of the appeal procedure as well as judicial review. Moreover, the study identified gaps that currently exist in the vetting investigation process in relation to foreigners or dual citizenship holders who cannot be vetted and deemed security competent due to the fact that their loyalty to South Africa is questionable, and as such remain a security risk. Lastly, the paper provided a brief comparative study of vetting investigations in the United Kingdom and the United States of America; this revealed that all countries safeguard employees, information and assets of the state in fulfilment of national security and as such vetting investigations is of utmost importance. Certain differences were identified, such as the levels of clearances and the terminology used. Nonetheless it is generally similar in terms of the purpose, methodology, evaluation/adjudicative procedures, irrespective of whether it was a constitutional or parliamentary democracy. Great emphasis was placed on the integrity and trustworthiness of government officials.

It is noteworthy that the current form of vetting investigations may not always be effective due to the limitations discussed above. The following are recommendations to be considered to address some of these limitations.

Firstly, there should be a holistic approach by government in as far as the employment of foreigners is concerned. This means that the various legislative measures and policies regarding the employment of foreigners that are currently fragmented should be reviewed, and either amended or repealed to give effect to the national interest and national security objectives. This refers to the Immigration Act 13 of 2002, the Department of Labour scarce skills list,<sup>98</sup> the Department of Public Service and Administration Policy on the employment of foreigners,<sup>99</sup> and the NSIA and the MISS which all prescribes different and sometimes conflicting mechanisms for the employment of foreigners in organs of state.

Secondly, the NSIA should be amended to provide for sanctions for non-compliance to the vetting investigations of applicants, employees and service providers of organs of state. In respect of applicants, the advertisements for posts should clearly state that post is subject to vetting investigation and a positive security clearance. Further, the contract of employment should provide for a resolute condition, i.e. automatic termination by virtue of not obtaining a security clearance. In respect of employees, awareness of vetting investigation as a rule to be done and if employees fail or refuse to undergo vetting investigation, they may be dismissed for misconduct. In respect to service providers, vetting investigation should be advertised as a tender requirement before awarding a tender to a service provider. Additionally, Service Level Agreements should contain a provision for automatic termination by virtue of not obtaining a positive clearance or a “permit to use” letter. The Accounting Officers of the relevant organs of state should be held liable for those who have not undergone vetting investigations and if it can be proven to be the cause of security breaches at the organ of state, this will foster a culture of accountability in protecting government’s people, infrastructure and assets.

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<sup>98</sup> Department of Labour scarce skills list [retrieved at <http://www.labour.gov.za/DOL/documents/useful-documents/skills-development/scarce-skills-1>] Accessed on 4 September 2017 at 13:41

<sup>99</sup> Department of Public Service and Administration Policy on the Utilisation of Foreign Nationals to address Human Resource and skills needs in the Public Service, 2009

Thirdly, the NSIA should be amended to include the vetting investigation of political appointees (Director Generals, Ambassadors, etc.),<sup>100</sup> Cabinet or Deputy Ministers/Members of the Executive Council/Municipal Councils and members of the Judiciary. In respect of Cabinet or Deputy Ministers/Members of the Executive Council/Municipal Councils, they are excluded in terms of the NSIA because they are not considered “employees of an organ of state” and are appointed in terms of sections 91, 93, 132, and elected in the case of local government in terms of section 157 of the Constitution. Further, paragraph 1.5 of Chapter 5 of the MISS states: Political appointees will not be vetted, unless the President so requests or the relevant contract so provides...” In practice, the President of the Republic of South Africa or the relevant Premier or Mayor in his or her discretion requests who should be subject to vetting investigations, which means contrary to the NSIA, there are certain instances where political appointees may undergo vetting investigation. It is my submission that such vetting investigation should not be determined by discretion, but should be applied consistently. Vetting investigations are for determining security competence and it is important that political appointees (as a result of their responsibilities and access of classified information, such as Cabinet Memoranda’s and the operational plans of certain organs of state) should be security competent.<sup>101</sup> In respect of the judiciary, they are appointed by the President of the Republic of South Africa in terms of section 174 of the Constitution and currently members of the judiciary are exempted from vetting investigations. Currently the Best Practice Guidelines for Judicial Appointment<sup>102</sup> is being developed to introduce a form of vetting for the judicial candidates (in Kenya, vetting investigation of the judiciary is regulated in terms of law.)<sup>103</sup> It is my submission that vetting investigations of members of the judiciary should be introduced as a condition of appointment.

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<sup>100</sup> In the United States of America even political appointees are vetted in terms of the Presidential Appointments Vetting Guide, 2016 “Individuals being considered for politically-appointed positions will have to be extensively vetted by the president elect’s legal team and later by the new administration. The attorneys look for potential red flags—financial, ethical or personal issues that might disqualify potential appointees from serving in an administration or require some action to eliminate potential conflicts of interest.” [http://presidentialtransition.org/publications/viewcontentdetails.php?id=1190] Accessed on 31 August at 14:34

<sup>101</sup> Political appointees (Director Generals, Ambassadors, etc.), Cabinet or Deputy Ministers/Members of the Executive Council/Municipal Councils are also susceptible to blackmail, extortion and corruption.

<sup>102</sup> Oxtoby C “Best Practice Guidelines for Judicial Appointment” *Draft Paper*

<sup>103</sup> Vetting of Judges and Magistrates Act 2 of 2011

I am of the view that should the recommendations as outlined above be implemented, vetting investigations will become more effective and the objective of assisting with the protection of national security will be realised.

## **List of Abbreviations**

LRA	:	Labour Relations Act 66 of 1995
MISS	:	Minimum Information Security Standards, 1996
NSIA	:	National Strategic Intelligence Act 39 of 1994
PAIA	:	Promotion of Access to Information Act 2 of 2000
PAJA	:	Promotion of Administrative Justice Act 3 of 2000
PPIA	:	Protection of Personal Information Act 4 of 2013
SSA	:	State Security Agency

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