



**COUNCIL**  
FOR THE ADVANCEMENT OF THE  
**SOUTH AFRICAN**  
**CONSTITUTION**

**20 January 2017**

**To: The National Assembly  
Standing Committee on Finance**

**WRITTEN SUBMISSIONS REGARDING CONSTITUTIONALITY OF  
SECTION 45B(1C), INSERTED BY SECTION 32 OF THE FINANCIAL  
INTELLIGENCE CENTRE AMENDMENT BILL (B 33B – 2015)**

**1. INTRODUCTION**

- 1.1 The Council for the Advancement of the South African Constitution (**CASAC**) launched an application in the Constitutional Court on 4 November 2016, seeking a declarator that the President had failed to perform a constitutional obligation in terms of section 79(1) of the Constitution, 1996 in that he failed to either assent to and sign the Financial Intelligence Centre Amendment Bill (**FICA Bill**) or refer the FICA Bill back to the National Assembly for reconsideration of specified constitutional reservations without delay. CASAC further sought an order directing the President to assent to and sign the FICA Bill, alternatively, ordering the President to refer the FICA Bill back to the National Assembly for reconsideration if he had reservations about the constitutionality of the Bill. This application followed a letter from CASAC to the President on 19 September 2016, which received no response.
- 1.2 On 28 November 2016 the President addressed a letter to the Speaker of the National Assembly in which he set out his reservations about the constitutionality of a provision of the FICA Bill and referred the FICA Bill back to the National Assembly for reconsideration.

Council for the Advancement of South African Constitution

Telephone: [+27 21] 685 8809 • Facsimile: [+27 21] 685 8819

[info@casac.org.za](mailto:info@casac.org.za)

[www.casac.org.za](http://www.casac.org.za)

- 1.3 The President's reservations are limited to the constitutionality of the proposed new section 45B(1C), which amends section 45B of the Financial Intelligence Centre Act, 2001 (**the Act**). This section deals with warrantless searches.
- 1.4 In this memorandum, we provide our legal opinion on the constitutionality of section 45B(1C) and, while we are of the opinion that the section is constitutional, we also set out CASAC's recommendations for addressing the President's reservations should the section be found by the Committee to be unconstitutional.
- 1.5 It is obvious that any further delay in the promulgation of the FICA Bill leaves South Africa with a deficient statutory and regulatory framework for anti-money laundering measures and the combating of terrorism financing, and continues to undermine its compliance with its international obligations. CASAC therefore urges the Committee to deal expeditiously with the President's reservations and to progress the FICA Bill's enactment as a matter of urgency.
- 1.6 In sum, the proposed section 45B(1C) passes constitutional muster since it justifiably limits the right to privacy in language that is consistent with the Constitutional Court's determinations of the permitted circumstances for and nature of lawful warrantless searches.

## 2. **THE PRESIDENT'S RESERVATIONS**

- 2.1 Section 45B(1C) permits an inspector (who is appointed in terms of section 45A) to enter any premises (including a private residence reasonably believed to be used as a business to which the Act applies) without a warrant either (i) with consent of the owner or person apparently in physical control of the premises; or (ii) if the inspector reasonably believes that a warrant would have been obtained if applied for and the delay in obtaining the warrant is likely to defeat the purpose for which the inspector seeks to enter the premises.
- 2.2 The purpose of the search provisions is for inspectors to determine compliance with the Act or any order, determination or directive made in terms of the Act and to uncover information relating to acts of non-compliance reasonably suspected to have occurred.
- 2.3 The President's reservations in relation to warrantless searches are, in summary, the following:

- 2.3.1 A warrantless search limits the right to privacy in section 14 of the Constitution and this limitation may not be justifiable in terms of section 36 of the Constitution for the following reasons:
- 2.3.1.1 Information gathered by an inspector may result in criminal prosecution, as non-compliance with the Act may constitute a criminal offence in some cases;
- 2.3.1.2 The authority to conduct searches is impermissibly overbroad in that -
- 2.3.1.2.1 it includes the authority to enter private homes; and
- 2.3.1.2.2 there is no requirement for the Centre or supervisory body to specify the objects of the search (i.e. the search is not limited to information related to the business to which the provisions of the Act apply) which leaves the discretion of the inspector unbounded and may potentially invade innocent activity in private homes;
- 2.3.1.3 Given the breadth of sections 21F (foreign prominent public officials), 21G (domestic prominent influential persons) and 21H (family members and known associates) and the risk of criminal prosecution, the section must be expressly and carefully circumscribed.
- 2.4 At the outset, it is important to note that the President's primary concern that information gathered by an inspector pursuant to a warrantless search may result in criminal prosecution is misguided. As the FICA Bill seeks to amend the definition of "non-compliance" so as to distinguish between administrative non-compliance, which results in administrative sanctions in terms of section 45C (that may be subject to searches with or without a warrant) and criminal offences (to which section 45B would not, in any event, apply), information gathered by an inspector during a warrantless search would not result in criminal prosecution. In other words, the provisions that govern warrantless searches (as well as searches with a warrant) do not pertain to matters that could result in criminal prosecution. As a result, the intrusion into the right of privacy in these circumstances is far less extensive and constitutionally significant, as has been recognised by the Constitutional Court.<sup>1</sup>
- 2.5 The concern that remains is whether the authority to conduct searches is impermissibly overbroad to the extent that it limits the right to privacy to a degree that falls foul of the limitations clause.

---

<sup>1</sup> See *Magajane v Chairperson, North West Gambling Board and Others* 2006 (10) BCLR 1133 9 (CC) at para 86; *Gaertner and Others v Minister of Finance and Others* 2014 (1) BCLR 38 (CC) at para 65.

### 3. CONSTITUTIONALITY OF SECTION 45B(1C)

3.1 In our opinion, section 45B(1C), in so far as it provides for warrantless searches, is not unconstitutional. Warrantless searches limit the constitutional right to privacy, as provided for in section 14 of the Constitution. However, this right may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in terms of section 36 of the Constitution. In terms of the limitations clause, the following factors should be considered in determining whether the limitation of a right is justifiable:

- 3.1.1 The nature of the right;
- 3.1.2 The importance of the purpose of the limitation;
- 3.1.3 The nature and extent of the limitation;
- 3.1.4 The relation between the limitation and its purpose; and
- 3.1.5 Less restrictive means to achieve the purpose.

#### ***The nature of the right***

3.2 The right which is being infringed by the impugned provision is the right to privacy. Section 14 of the Constitution gives everyone the right not to have their person or home searched, their property or possessions seized and the privacy of their communications infringed. The Constitutional Court has held that an individual's right to privacy is bolstered by his/her right to dignity under section 10 of the Constitution.<sup>2</sup> In *Gaertner and Others v Minister of Finance and Others*<sup>3</sup> the Constitutional Court held that "*the right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life.*" Further, in *Minister of Police and Others v Kunjana*<sup>4</sup> the court held that in considering the extent to which a limitation on the right to privacy may be justified, one must consider how closely one infringes the "inner sanctum" of the home.

#### ***The importance of the purpose of the limitation***

3.3 The purpose of the search provisions is for inspectors to determine compliance with the Act or any order, determination or directive made in terms of the Act and to uncover information relating to acts of non-compliance reasonably suspected to have occurred. It is important to note that the FICA Bill will amend the current definition of

---

<sup>2</sup> *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* 2008 (1) SA 1 (CC) at para 76.

<sup>3</sup> *Gaertner* at para 47.

<sup>4</sup> 2016 (9) BCLR 1237 (CC) at para 18.

"non-compliance" to mean "any act or omission that constitutes a failure to comply with a provision of this Act or any order, determination or directive made in terms of this Act and which does not constitute an offence in terms of this Act..."<sup>5</sup> The aim of the search provisions is therefore to uncover acts of non-compliance that would result in administrative sanctions as opposed to acts of non-compliance which are offences under the Act and that may lead to criminal sanctions.

- 3.4 The Act (as amended by the FICA Bill) has an important underlying purpose to combat money laundering activities and the financing of terrorist and related activities in South Africa. It is imperative that accountable institutions and other persons comply with the provisions of the Act and that compliance with the Act is monitored and non-compliance uncovered and sanctions imposed.
- 3.5 Section 45B(1C) allows an inspector, who is otherwise required to obtain a warrant under section 45B(1B), to enter any premises without a warrant in certain circumstances (set out in paragraph 2.1 above). As financial crimes like money-laundering are, by their nature, difficult to detect and conducted in a clandestine fashion, uncovering of conduct that may facilitate such acts requires the limitation of the right to privacy. The absence of having to obtain a warrant allows inspectors to conduct efficient inspections of premises by facilitating the quick discovery of information or evidence that would otherwise be lost or destroyed. The importance of this purpose diminishes the invasiveness of searches under section 45B(1C).

### ***The nature and extent of the limitation***

- 3.6 Section 45B(1C) limits the right to privacy in so far as it allows inspectors to enter a private residence and search for information pertaining to an act of non-compliance with the Act. Further, it allows for an inspector to do so without a warrant. On first glance this may appear to constitute an infringement upon the inner sanctum of the home. However, when read with sections 45B(1B) and 45B(1D), it is evident that the limitation is aimed only at facilitating a regulatory inspection (and not at monitoring innocent activity in private homes) and the extent of the limitation is curtailed by guidelines around when and how such inspections are to be conducted.
- 3.7 There have been a number of Constitutional Court judgments which have found provisions dealing with warrantless searches to be unconstitutional. However, these cases involved provisions of legislation which were overly broad and set no guidelines on how

---

<sup>5</sup> Section 1(m) FICA Bill.

searches were to be conducted. These provisions, as well as the factors distinguishing them from section 45B of the FICA Bill, are summarised below:

- 3.7.1 Section 65 of the North West Gambling Act 2 of 2001 empowered an inspector to enter any licensed or unlicensed premises being used for (or suspected to be used for) any gambling activities and, after informing the person apparently in charge of the premises of the purpose of the visit, to make such investigation or enquiry as is deemed necessary. Such investigations could result in criminal prosecution. There was no general requirement for a warrant when it came to unlicensed premises (as opposed to licensed premises which required an administrative warrant), nor for a reasonable suspicion that gambling activities were being conducted on the premises. The provision also failed to guide inspectors as to how to conduct searches within legal limits. In *Magajane v Chairperson, North West Gambling Board and Others* the Constitutional Court found that sections 65(1) and (2), which limited the right to privacy, were not justifiable in terms of section 36 of the Constitution.
- 3.7.2 Section 4 of the Customs and Excise Act 91 of 1964 empowered officers to enter any premises whatsoever and make such examination and enquiry as they deemed necessary for purposes of that Act. This could be done without any previous notice and at any time. There was no prerequisite of a reasonable suspicion, irrespective of the type of search and no warrant was required. Further, they were also empowered to break into dwellings and once inside, could break up floors. In *Gaertner* the court found these extremely intrusive powers to limit the right to privacy and, after conducting a limitations analysis, found the impugned provisions not to be justified in terms of section 36 of the Constitution.
- 3.7.3 Section 11 of the Drugs and Drug Trafficking Act 140 of 1992 grants police officials the power to search any premises if there are reasonable grounds to suspect that an offence under that Act has or is about to be committed and the power to seize anything that would result in an infringement of that Act. No provision was made for first obtaining a warrant. The section did not circumscribe the time, place or manner in which searches and seizures are to be conducted. Finding that less restrictive means to achieve the purpose did exist, the court in *Kunjana* held that sections 11(1)(a) and (g) were unconstitutional.

- 3.8 The proposed section 45B(1C) of the Act, read in the context of section 45B in its entirety, as amended, can be distinguished from these cases as follows:
- 3.8.1 The default position under section 45B is that a warrant is required to enter a private residence or premises other than those contemplated by subsection (1). It is only in certain limited circumstances where an inspector may enter premises without a warrant;
- 3.8.2 An inspector may only enter premises without a warrant where there are reasonable grounds to believe that a warrant would have been issued if applied for and the delay in obtaining the warrant is likely to defeat the purpose for which the inspector seeks to enter the premises;
- 3.8.3 Subsection (1D) provides that an inspector may only enter premises without a warrant at a reasonable time, on reasonable notice (where appropriate) and with strict regard to decency and good order including a person's right to –
- 3.8.3.1 Respect for and protection of dignity;
- 3.8.3.2 Freedom and security; and
- 3.8.3.3 Personal privacy.
- 3.9 The Constitutional Court has held that “adequate safeguards must exist to justify circumstances where legislation allows for warrantless searches”.<sup>6</sup> The provisions of section 45B therefore infringe on the right to privacy to a lesser extent than similar provisions in other pieces of legislation dealing with warrantless searches, as they provide for constitutionally adequate safeguards to justify the warrantless search.
- 3.10 It has been held that a search aimed at criminal prosecution constitutes a significantly greater intrusion on the right to privacy than a regulatory inspection aimed at compliance.<sup>7</sup> Section 45B envisages a regulatory inspection aimed at compliance, as a warrant will only be issued where there are reasonable grounds for suspecting that an act of “non-compliance” (as defined above) has occurred. This therefore intrudes on the right to privacy to a lesser extent.
- 3.11 While the purpose of inspections under section 45B is not to collect evidence for criminal prosecution, it is possible that information could be uncovered during such an inspection that could lead to criminal

---

<sup>6</sup> *Kunjana* at para 30.

<sup>7</sup> *Magajane* at para 86; *Gaertner* at para 65.

liability. However, the fact that there are guidelines in place and a general requirement to obtain a warrant, mitigate the extent of this intrusion.

- 3.12 In addition, warrantless searches aimed at obtaining evidence for criminal prosecution are permitted in terms of the Criminal Procedure Act 51 of 1997 (**CPA**). This means that warrantless searches in the context of criminal prosecution are not completely prohibited, despite being a greater intrusion on the right to privacy. As is explained below, the wording of the proposed section 45B(1C) closely resembles that used in the CPA. Moreover, the Constitutional Court has identified the provisions of section 22 of the CPA as being an example of adequate safeguards which justify a warrantless search.<sup>8</sup> The extent of the limitation of the right to privacy is thus minimal, reasonable and justifiable.

#### ***The relation between the limitation and its purpose***

- 3.13 There is an inherently rational connection between the purpose of the law and the limitation imposed by it. Compliance with the Act is enforced through inspections, which will inevitably limit the right to privacy. In the absence of the entitlement to enter premises (including without a warrant in certain circumstances) the purpose of the provision, that is, to determine compliance with the Act and to obtain information pertaining to an act of non-compliance before it is lost or destroyed, could not be achieved.

#### ***Less restrictive means to achieve the purpose***

- 3.14 In *Kunjana* the court indicated that a statutory provision authorising a warrantless search procedure should be crafted so as to limit the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances. The wording of the proposed amendments to section 45B of the Act already contemplates less restrictive means as could have been used in respect of warrantless searches. The Constitutional Court in *Gaertner* held that where legislation authorises warrantless regulatory inspections, provision must be made for a constitutionally adequate substitute to ensure certainty in the conduct of the inspections and limit the discretion of inspectors. In this regard, inspectors' discretion should be limited as to time, place and scope. Legislation should also provide for a manner of conducting searches that accords with common decency. The provisions of section 45B(1D), as set out in paragraph 3.8.3 above, do just that.

---

<sup>8</sup> *Kunjana* at para 30.

3.15 The Constitutional Court has stated that less restrictive means in the context of searches without warrants could involve imposing a general duty to obtain a warrant, with exceptions similar to those provided in section 22 of the CPA.<sup>9</sup> In its currently proposed form section 45B(1C) does in fact have similar wording to section 22 of the CPA. The only apparent difference is that section 22 of the CPA refers to specific articles defined in section 20 as being the objects of the search (broadly those items involved in the commission or suspected commission of an offence). To the extent that the amended section 45B does not expressly set out the objects of the search, this could be seen as an additional less restrictive mean that could be used.

***Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others*  
2014 (4) BCLR 373 (CC)**

3.16 The current section 45B was declared by the Constitutional Court to be inconsistent with the Constitution in *Estate Agency Affairs Board*. In its current form, the provisions seeking to amend the Act relating to searches do, on the whole, deal with the concerns raised by the Constitutional Court in this case. Section 45B(1C) is drafted using similar language to that which the Constitutional Court read in during the period of suspension of invalidity (see the order in paragraph 73 of that judgment). In this regard the court specifically provided for searches without a warrant and the same wording used in the Court's order (and which appears in section 22 of the CPA) has been reproduced in the proposed section 45B(1C).

3.17 As the Constitutional Court's own wording has been reproduced in the proposed section 45B(1C), it is unlikely that the it would find this section to be unconstitutional. On this basis and balancing the factors set out above, it is our view that section 45B(1C) is constitutional and that any limitation on the right to privacy is justifiable.

4. **CASAC'S RECOMMENDATIONS IF SECTION 45B(1C) IS FOUND TO BE UNCONSTITUTIONAL**

4.1 Should the Committee nevertheless find section 45B(1C) to be unconstitutional, CASAC recommends that the National Assembly expeditiously address the President's reservations by pursuing one of two possible options – it can either (i) amend section 45B(1C) to bring it in line with the Constitution; or (ii) excise section 45B(1C) from the Bill, in which case the President may promulgate the Bill without the

---

<sup>9</sup> Gaertner at para 73.

potentially offending provision. Each of these options is elaborated upon below.

**Option 1: Amending section 45B(1C) to bring it in line with the Constitution**

4.2 The first option is to amend the potentially offending provision to bring it in line with the Constitution. In these circumstances, regard must be had, as has been done above, to the limitations clause in the Constitution. The only factor that could, in our view, potentially result in a finding that the limitation on the right to privacy is not justifiable is whether there are any less restrictive means available to achieve the purpose of the provision. Specifically, the President raises a concern around the fact that there is no express limitation in respect to the object of the search and states that an absence of an appropriate qualification in this regard leaves the discretion of the inspector in conducting the search unbounded.

4.3 As is explained above, the Constitutional Court has acknowledged that there may be instances where warrantless searches are justified, such as those provided for in the CPA. The provisions relating to warrantless searches in the CPA should therefore be considered and it is submitted that provisions mirroring those in the CPA would pass constitutional muster. By amending section 45B(1C) to refer to specific information or objects which form the basis of a search (i.e. those related to the business to which the provisions of the Act apply), an inspector's discretion would be further narrowed. This would address the President's concern in paragraph e(ii) of his letter and would render the impugned section constitutional (if it is indeed considered by the Committee to be unconstitutional as currently drafted).

**Option 2: Excising section 45B(1C)**

4.4 Another way to deal with the potential unconstitutionality of section 45B(1C) would be to excise the entire sub-section from section 45B and to promulgate the FICA Bill without this section. The deletion of section 45B(1C) would impact sections 45B(1D) and 45B(1E) as these make reference to searches without a warrant. To deal with this, section 45B(1E) could be deleted and section 45B(1D) amended to read as follows:

*“(1D) Where an inspector enters premises on the authority of a warrant, he or she must do so with strict regard to decency and good order, including to a person's right to –*

*(a) respect for and protection of dignity;*

*(b) freedom and security; and*

*(c) personal privacy."*

- 4.5 The consequence of excising this section from the FICA Bill would be that there would be no provision for warrantless searches. This means that searches by inspectors of private residences and of premises other than those contemplated in section 45B(1) may only be done with a warrant issued by a magistrate or judge.
- 4.6 This does not mean that searches can never be done by authorities without a warrant. The provisions of the CPA will still apply to the extent that there is a commission of an offence or suspected commission of an offence (as this will include an offence under the Act). Section 22 read with section 20 of the CPA will entitle a police official to search any premises without a warrant for the purposes of seizing any article referred to in section 20.
- 4.7 If, upon further reflection and debate, the Committee is of the view that warrantless searches are necessary, the Act can be further amended at a later stage to include provisions for warrantless searches consistent with those contained in the CPA. This would allow for the objectives of the FICA Bill to be achieved in the interim and not be frustrated by further significant delays in promulgating the FICA Bill.

## 5. **CONCLUSION**

- 5.1 In our opinion, section 45B(1C), as inserted by section 32 of the FICA Bill, is constitutional. Accordingly, the Bill should be sent back to the President in terms of Rule 206(1) of the Joint Rules of Parliament. If found by the Committee to be unconstitutional, either one of the recommendations set above should be adopted to ensure compliance with the Constitution.
- 5.2 The FICA Bill is of great significance and importance in the fight against corruption, specifically money laundering, trafficking and the financing of terrorism. The President's reservations specified in his letter must, therefore, be considered by this Committee as a matter of urgency. To delay the promulgation of this Bill due to concerns around one particular section would be a grave injustice to the objectives sought to be achieved by its enactment. For this reason we implore the Committee to deal with this matter expeditiously.