



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Referral
back of
Financial
Intelligence
Centre
Amendment
Bill
[B32B-2015]

7 December 2016

Constitution: Section 79 – Assent to Bills

- (1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
- (2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.
- (3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if-
 - (a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
 - (b) section 74 (1), (2) or (3) (b) or 76 was applicable in the passing of the Bill.
- (4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either-
 - (a) assent to and sign the Bill; or
 - (b) refer it to the Constitutional Court for a decision on its constitutionality.
- (5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.

Chapter 4, Part 8 deals with Bills referred back by the President – distinguishes between procedural and substantive defects.

Rule 203(2) - The committee must consider, and confine itself to, the President's reservations ... and must report to the Assembly on the President's reservations.

Rule 203(3) – If the committee agrees with the President's reservations, the committee must present with its report an amended Bill correcting any constitutional defect in the substance of the Bill, if the reservations relate to the substance. If the defect cannot be corrected, recommend that the Assembly rescind its decision to pass the Bill and reject the Bill, if it regards the Bill as being procedurally or substantively so defective that it cannot be corrected.

Rule 206(1) – A Bill remitted for substantive defects must be returned to the President if the Assembly after having considered the President's reservations decides not to accommodate the President's reservations.

Rule 206(2) – If the Assembly accommodates the President's reservations and passes an amended Bill, the amended Bill must be submitted to the President for assent if the amended Bill a section 75 Bill.

Bills referred back

Year	No	Bill	Bill No	Returned
1999	3	Broadcasting Bill	[B 94F-1998]	2 Feb 1999
		Tobacco Products Control A/B	[B 117H-1998]	2 Feb 1999
		Liquor Bill	[B 131B-1998]	2 Feb 1999
2005	1	Independent Communications Authority of South Africa A/B	[B 32F-2005]	26 Apr 2006
2008	1	Human Sciences Research Council Bill	[B 16-2007]	8 May 2008
2008	3	Films and Publication A/B	[B 27F-2006]	30 Jan 2009
		Competition A/B	[B 31D-2008]	30 Jan 2009
		Broadcasting A/B	[B 72B-2008]	10 Feb 2009
2011	1	Intellectual Property Laws A/B	[B 8B-2010]	26 Sept 2012
2013	1	Protection of State Information Bill	[B 6D-2010]	12 Sept 2013
2014	1	Mineral and Petroleum Resources Development Agency A/B	[B 15B-2013]	23 Jan 2015
2016	2	Performing Animals Protection Amendment Bill	[B 9B-2015]	8 August 2016
		Financial Intelligence Centre Amendment Bill	[B33B - 2015]	28 November 2016

Background – referral of the FIC Amendment Bill

- **President's letter of 28 November 2016 – FIC Amendment Bill referred back in terms of section 79(1) of the Constitution**
- **Focus: proposed new section 45B(1C) – warrantless searches**
- **Reasons:**
 - **limitation of section 14 of the Constitution – Privacy**
 - **standard set by section 36 not met – Limitation of Rights**
 - **Criminal prosecution may result from warrantless search**
 - **No limitation iro subject of search – overly broad discretion**
 - **45B(1C) must be expressly and carefully circumscribed**
- **No amendment by Parliament to the provision as introduced**
- **Original section 45B of the FIC Act – no requirement for warrant – constitutional defect**

Reason for referral of the FIC Amendment Bill

*Although the premises are qualified in that the Centre or, when acting in terms of section 45(1), the supervisory body, as the case may be, must reasonable believe that the residence or premises are used for a business to which the provisions of the Act apply, **there is no requirement for the Centre or supervisory body to specify to an inspector acting in terms of 45B(1C) as to what he or she may search for or require production of from the owner or person apparently in control of the premises. The proposed section 45B(1C) does not require that the Centre of supervisory body must specify that the inspector may only search for or require the production of information related to the business to which the provisions of the Act apply, let alone particular business.** Although the section may be read down in this way, the absence of an appropriate qualification leaves the discretion of the inspector in conducting the search unbounded to that extent; and may potentially reach innocent activity in private homes.*

Bill of Rights

14 Privacy

Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

36 Limitation of rights

(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 extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) **less restrictive means to achieve the purpose.**

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

FIC AMENDMENT BILL - Clause 32 amending section 45B of the principal Act

(1) ~~[Før]~~ An inspector appointed in terms of section 45A may enter the premises, excluding a private residence, of an accountable institution or reporting institution which is registered in terms of section 43B or otherwise licensed or authorised by the supervisory body and inspect the affairs of an accountable institution or reporting institution, as the case may be, for the purposes of determining compliance with this Act or any order, determination or directive made in terms of this Act ~~[an inspector may at any reasonable time and on reasonable notice, where appropriate, enter and inspect any premises at which the Centre or, when acting in terms of section 45(1), the supervisory body reasonably believes that the business of an accountable institution, reporting institution or other person to whom the provisions of this Act apply, is conducted].~~

(1A) An inspector appointed in terms of section 45A may, for the purposes of determining compliance with this Act or any order, determination or directive made in terms of this Act, and on the authority of a warrant issued under subsection (1B), enter—

- (a) a private residence; or
- (b) any premises other than premises contemplated in subsection (1), if the Centre or, when acting in terms of section 45(1), the supervisory body, as the case may be, reasonably believes that the residence or premises are used for a business to which the provisions of this Act apply.

(1B) A magistrate or judge may issue a warrant contemplated in subsection (1A)—

- (a) on written application by the Centre or a supervisory body setting out under oath or affirmation why it is necessary for an inspector to have access to the premises; and
- (b) if it appears to the magistrate or judge from the information under oath or affirmation that—
 - (i) there are reasonable grounds for suspecting that an act of non-compliance has occurred;
 - (ii) entry to the residence or premises is likely to yield information pertaining to the non-compliance; **and**
 - (iii) entry to the residence or premises is reasonably necessary for the purposes of this Act.

FIC AMENDMENT BILL - Clause 32 amending section 45B of the principal Act

(1C) An inspector otherwise required to obtain a warrant under subsection (1B) may enter **any** premises without a warrant—

(a) with the consent of the owner or person apparently in physical control of the premises after that owner or person was informed that he or she is under no obligation to admit the inspector in the absence of a warrant; or

(b) if the inspector on reasonable grounds believes that—

(i) a warrant will be issued under subsection (1B) if the inspector applied for it; and

(ii) the delay in obtaining the warrant is likely to defeat the purpose for which the inspector seeks to enter the premises.

(1D) Where an inspector enters premises without a warrant, he or she must do so—

(a) at a reasonable time;

(b) on reasonable notice, where appropriate; and

(c) with strict regard to decency and good order, including to a person's right to—

(i) respect for and the protection of dignity;

(ii) freedom and security; and

(iii) personal privacy.

(1E) Subsection (1D)(c) applies with the necessary changes where an inspector enters premises on the authority of a warrant.

'non-compliance' means 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, and 'fails to comply', 'failure to comply' and 'not complying' have the corresponding meaning;

MEMORANDUM

The Bill also gives effect to the Constitutional Court's decision in the matter of *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) (27 February 2014). Section 45B of the FIC Act was declared by the Constitutional Court to be unconstitutional, as it allows for the inspector to conduct inspections, for the purpose of determining compliance with the FIC Act, without a warrant in certain instances. **The Bill amends section 45B of the FIC Act, to provide for a warrant requirement, and to state in which circumstances a warrant would not be required.**

CONSTITUTIONAL COURT CASES

- ***Gaertner and Others v Minister of Finance and Others*** [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC)
- ***Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others*** (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) (27 February 2014)
[43] Even so, in starting from the premise that no searches need warrants, section 45B goes too far. Without modulation, that premise cannot be constitutionally acceptable. The possibility of less restrictive means should be considered. It follows that the High Court's conclusion that the provisions must be declared incompatible with the Constitution and therefore invalid was correct.
- ***Magajane v Chairperson, North West Gambling Board and Others*** [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC)

ESTATE AGENCY AFFAIRS BOARD V AUCTION ALLIANCE (PTY) LTD AND OTHERS

During the period of suspension, section 45B(1) of the Financial Intelligence Centre Act is deemed to read as follows, what is underlined being the reading in:

“(1) For the purposes of determining compliance with this Act or any order, determination or directive made in terms of this Act, an inspector may at any reasonable time and on reasonable notice, where appropriate, enter and inspect any premises, except a private residence, at which the Centre or, when acting in terms of section 45(1), the supervisory body reasonably believes that the business of an accountable institution, reporting institution or other person to whom the provisions of this Act apply, is conducted.

(1A)(a) Where the Centre or a supervisory body acting after consultation with the Centre suspects that a criminal offence has been or is being committed by the person who is the subject of the search, or where it seeks to search premises that are a private residence, an inspector in terms of subsection (1) may conduct a search only on the authority of a warrant issued by a magistrate or judge.

(b) A magistrate or judge may issue a warrant only on written application by an inspector setting out under oath or affirmation the grounds why it is necessary for an inspector to gain access to the relevant premises.

(c) The magistrate or judge may issue the warrant if it appears from information on oath or affirmation that—

(i) there are reasonable grounds for suspecting that a contravention of the Act has occurred;

(ii) a search of the premises is likely to yield information pertaining to the contravention; and

(iii) the search is reasonably necessary for the purposes of the Act.

(d) An inspector otherwise required to obtain a warrant under paragraph (a) may enter and search any place without the warrant referred to in paragraph (c) if the inspector on reasonable grounds believes that—

(i) a warrant would be issued in terms of paragraph (c) if the inspector applied for it; and

(ii) the delay in obtaining the warrant is likely to defeat the object of the search.”

QUESTIONS ON NEW PROVISION 45B(1C)

Warrantless searches permissible?

If so, application to criminal prosecution?

Does 45B(1C) apply to criminal prosecution and is it overbroad / discretionary?