

28 November 2016

Dear Madam Speaker,

**REFERRAL OF THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT  
BILL (B 33B – 2015) TO THE NATIONAL ASSEMBLY**

1. The above Bill was passed by Parliament and referred to me for assent and signing into law.
2. I have given consideration to the Bill in its entirety and certain submissions regarding the constitutionality of the Bill.
3. After consideration of the Bill and having applied my mind to it, I am of the view that certain provisions of the Bill do not pass constitutional muster.
4. The Constitution requires that the President must assent to and sign a Bill referred to him by the National Assembly. However, in terms of section 79(1) of the Constitution, if the President has reservations about the constitutionality of the Bill, he may refer it back to the National Assembly for reconsideration.
5. In terms of section 79(1) of the Constitution, I hereby refer the attached Bill to the National Assembly for reconsideration for the reasons set out below.
6. The following provisions of the Bill deal with searches, and I quote them for convenience:
  - a. **"Powers of access by authorised representative to records in respect of reports required to be submitted to Centre 25 27A.**  
  
"27A. (1) Subject to subsection (2), an authorised representative of the Centre has access during ordinary working hours to any records kept by or

on behalf of an accountable institution in terms of section 22, 22A or 24, and may examine, make extracts from or copies of, any such records for the purposes of obtaining further information in respect of a report made or ought to be made in terms of section 28, 28A, 29, 30 (1) or 31.

- (2) The authorised representative of the Centre may, except in the case of records which the public is entitled to have access to, exercise the powers mentioned in subsection (1) only by virtue of a warrant issued in chambers by a magistrate or regional magistrate or judge of an area of jurisdiction within which the records or any of them are kept, or within which the accountable institution conducts business.
- (3) A warrant may only be issued if it appears to the judge, magistrate or regional magistrate from information on oath or affirmation that there are reasonable grounds to believe that the records referred to in subsection (1) may assist the Centre to identify the proceeds of unlawful activities or to combat money laundering activities or the financing of terrorist and related activities.
- (4) A warrant issued in terms of this section may contain such conditions regarding access to the relevant records as the judge, magistrate or regional magistrate considers appropriate.
- (5) An accountable institution must without delay give to an authorised representative of the Centre all reasonable assistance necessary to enable that representative to exercise the powers mentioned in subsection (1)."

b. **Amendment of section 45B of Act 38 of 2001, as inserted by section 16 of Act 11 of 2008**

"32. Section 45B of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:

"(1) [For] 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].”;

- (b) by the insertion after subsection (1) of the following subsections:

“(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)—<sup>1</sup>

- (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.

(1C) An inspector otherwise required to obtain a warrant under

<sup>1</sup> The warrant contemplated in section (1A) will stipulate conditions of search and specify premises to be searched.

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.”;

(c) by the insertion after subsection (2) of the following subsection:

“(2A) When acting in terms of subsection (2)(b) or (d), an inspector of—

- (a) the Centre;
- (b) a supervisory body referred to in item 1 or 2 of Schedule 2; or
- (c) any other supervisory body meeting the prescribed criteria, may order from an accountable institution or reporting institution under inspection, the production of a copy of a report, or the furnishing of a fact or information related to the report, contemplated in section 29.

(2B) If the inspector of a supervisory body, referred to in subsection (2A)(b) or (c), obtained a report, or a fact or information related to the report, under subsection (2A), that supervisory body must request information from the Centre under section 40(1C) relating to the report contemplated in section 29 which may be relevant to such inspection.

(2C) For purposes of subsection (2B), the Centre must provide the information to the inspector of the supervisory body in accordance with section 40.”;

- (d) by the substitution for subsection (4) of the following subsection: “(4) The Centre or a supervisory body may recover all expenses necessarily incurred in conducting

- an inspection from an accountable institution[,] or reporting institution [or person] inspected.”;
- (e) by the substitution in subsection (5)(b) for subparagraph (iv) of the following subparagraph:  
“(iv) except information contemplated in subsections (2A) and (2C), if the Director or supervisory body is satisfied that it is in the public interest.”;
- (f) by the deletion in subsection (6) of paragraph (b); and
- (g) by the deletion of subsection (7).”

7. The proposed new section 45B(1C), which amends section 45B of the principal Act by the introduction of warrantless searches is likely to be unconstitutional for the following reasons:

- a. A search limits the right to privacy in section 14 of the Constitution. To pass constitutional muster, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including those listed in section 36(1)(a) to (e) of the Constitution. The proposed section 45B(1C) may not meet this standard of justification for the reasons that follow.
- b. Searches may result in criminal prosecution offer the strongest reason of the warrant requirement. In those circumstances, legislation that authorises warrantless searches, such as the proposed section 45B(1C) must provide a constitutionally adequate substitute for a warrant. The authorisation must not generally be overbroad because this would create an impermissible threat to the right to privacy. The legislative provisions must not extend the scope of permissible searches beyond the situations in which the expectations of privacy is low – potentially reaching to innocent activity in private homes. The provisions should also not give inspectors too much discretion in their searches, endangering the privacy of property owners and occupiers who are not adequately informed of the limits of the search or inspection. A warrant mitigates the effects of a statute's broad scope, as a neutral officer would weigh the State's justifications for the search and would stipulate the time, place and scope of the search. These statements come directly from judgments of the Constitutional Court in, especially, *Magajane v Chairperson, North West Gambling Board and Others* 2006 (10) BCLR 1133 (CC) at paragraphs 73 to 96 and, to some extent, *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (4) BCLR 373 (CC) (which referred to *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC)).
- c. Non-compliance with the Act may constitute a criminal offence. Sections 50 (and as proposed to be amended by section 40 of

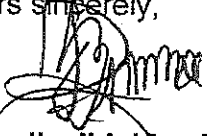
the Bill) and 52 of the Act, as well as the proposed section 49A (which criminalises any contravention of the proposed section 26B, provide relevant examples.

- d. Therefore, information gathered by an inspector in terms of the proposed section 45B(1C) may result in criminal prosecution. This offers a strong reason for the requirement of a search warrant before a search is conducted to determine *inter alia* compliance with the Act.
- e. Notwithstanding the above, the authority to conduct searches under the proposed section 45B(1C) is impermissibly overbroad:
  - i. "Any premises" include private homes, which are a person's inner sanctum with respect to privacy. (*Magajane* paras 88)
  - ii. 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 reasonably 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 or 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. (*Magajane* para 94. One may contrast this provision with the provisions of section 22 of the Criminal Procedure Act, 51 of 1977, which are limited by those of section 20 thereof).
  - iii. The element of surprise that motivates the proposed section 45B(1C)(ii) may be met by allowing warrants to be issued without notice to other parties (*ex parte*). (*Estate Agency Affairs Board* para 39).
  - iv. Given the breadth of sections 21F (foreign prominent public official), 21G (domestic prominent influential person) and 21H (family members and known associates), and the risk of criminal prosecution referred to above, the authority granted under 45B(1C) needs to

be expressly and carefully circumscribed in order not to invade the right to privacy unreasonably and unjustifiably.

- f. I am of the view that even though the purpose to be served by the Bill is very important and pressing, the proposed section 45B(1C) does not, in the respects identified, and others that the National Assembly may identify, meet all of the concerns set out in paragraphs 36 to 43 of the *Estate Agency Affairs Board* judgment referred to above.

Yours sincerely,



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**President of the Republic of South Africa**

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