
INDEPENDENT LEGAL OPINION ON THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL

By Sethakgi Kgomo. – 06 December 2016

1. GENERAL REMARKS

My point of departure is to situate this opinion within the supremacy of the Constitution that; "the Constitution is the supreme law of the Republic. Any law or conduct that is not consistent with it will be invalid. The obligations imposed by it must be fulfilled". This supremacy clause forms part of the 36 constitutional principles contained in the 1993 Interim Constitution, which constitute the bedrock of the current Constitution of the Republic and is not amendable.

The first task is to determine whether and to what extent the controversial Financial Intelligence Centre Amendment Bill ("FICA Bill") complies with the legal standards contained in the Constitution of South Africa and the fundamental rules of interpretation of statutes. At the very outset, I wish to state that one fundamental constitutional duty imposed on the three branches of the State is ensuring that the power they are exercising separately, on a 'checks and balances' basis, reflects the unqualified commitment to deepen, promote and uphold the fundamental rights contained in a Bill of Rights in Chapter 2 of the Constitution.

2. DUTIES AND OBLIGATIONS OF THE LEGISLATIVE AUTHORITY OF THE REPUBLIC

The national legislature is obliged to ensure that all bills that pass through the two chambers of Parliament are not only textually consistent with the Constitution, but contextually, formatively and substantively advance the basic tenets of equality, human dignity, freedom and social justice.

The members of the national legislature have the collective and several duties to ensure that in the law-making duties, they are guided by the spirit, letter and purpose of the Constitution including their obligation to promote and protect the rights enshrined in the Constitution. This task cannot be delegated to another authority.

3. DUTIES AND OBLIGATIONS OF THE EXECUTIVE AUTHORITY OF THE REPUBLIC

The Executive on the other hand is duty-bound to ensure that through a myriad of day-to-day administrative and executive actions, all functionaries (political figures and State officials) are cognisant of and sensitive to acts of injustices of the past colonial and apartheid administrations in terms of the brutal and enduring violations of the objective and subjective rights of the citizens. Therefore the Executive is

bound to ensure that at all times all Government policies and programmes are geared to promoting and protecting the rights enshrined in the Constitution.

The Executive is constitutionally constrained to exercise arbitrary power over the citizens unless a limitation or restriction of a right is limited by the standards set out in the Limitation Clause of Section 36 of the Constitution. Section 36 imposes a preponderant burden on the State (the Executive in the main) to ensure that no right is limited unless it is justified by a law of "general application" justifying such a limitation.

4. THE JUDICIARY AS THE CUSTODIANS OF THE CONSTITUTION

The Constitution explicitly states that the "Judicial authority of the Republic is vested in the courts", meaning that the primary duty of the judiciary, as custodians of the Constitution, is to ensure that courts (upper courts specifically) shall interpret and apply all law in letter, spirit, and purport to advance, promote and protect the culture of human rights as contained in the Constitution as well as the respective international treaties in which South Africa is a State party.

In their task of interpreting and applying the law, the Courts are enjoined in duty to ensure that every Judgment and Order they make should, in context and purpose, give effect to the fundamental rights contained in the Bill of Rights, so that the Bill of Rights remains a living document in the eyes of all the citizens of South Africa.

5. PRINCIPLES OF INTERPRETATION OF STATUTES AS APPLICABLE TO THE FICA BILL

I would like to remark that among the key principles of interpretation of laws is to determine the **purpose** of the law and not the **intention** of the legislature or intention of the drafters of the Bill, as intention is unimportant. The "purpose" of the Bill, as opposed to the "intention" of the legislature or its drafters is one key principle to be applied in understanding why a particular piece of legislation is before a legislature and/or how and why it has been enacted into law in the first place. Then the purpose of the Bill should, in terms of the principles of statutory interpretation, be sustained throughout the legislative text. This is an absolute requirement in terms of interpretation rules.

The Main Title of the Act (as appearing in most of the Bills) is only of a textual value but not crucially important for the purpose of interpreting a new Bill or an existing legislation. The critical rule is that any textual departure from the constructed purpose of a Bill that is before Parliament would endanger not only the legal taste of the Bill text, but would likely imperil the document *sui generis* when it is put before an upper court for interpretation. In other words a deviation, in terms of the substance, from the defined purpose of the Bill (even if it successfully passed through the legislative chain within Parliament) shall not necessarily mean such a Bill can pass a judicial test to determine its constitutionality.

Therefore the FICA Bill, to me, appears to have not complied with the interpretation standards established in our law, for the simple reason that the core substance of the legislative text had made an unprecedented departure from the defined purpose of the same Bill. This thus creates an impression that the primary drafters might have had an ulterior motive by seeking to cleverly conceal the actual purpose of the Bill thereby misleading Members of Parliament, who may not necessarily be fully literate about the technical depth of the interpretation rules established by the law. The FICA Bill legislative text thus presents no justifiable or exculpatory grounds why the content largely deviated from the defined purpose and why and how no explanatory notes were provided to justify such a detour. The drafters have the burden of exercise their bona fide why they had apparently constructed a potentially destructive Bill by cleverly introducing clauses which have no direct link with the constructed purpose of the Bill.

Moreover the FICA Bill is not in conformance with the requirements of the Limitation Clause in Section 36 of the Constitution, as this would have been expressed forthright in the introductory provisions of the Bill. The FICA Bill did not make an attempt at advancing, promoting and protecting the rights contain in the Bill of Rights as so prescribed by the Constitution. Instead the Bill is, by substantive design, in a brutal and capricious attack to the existing order of rights protected by the Constitution.

Furthermore it is my opinion is that the Bill has, by design, created an apparent conflict with other laws as it ousts the existing legislative framework empowering some State institutions empowered to investigate crime, enforcement of the law, as well as public prosecutions. The Bill has, in my opinion, effectively ousted the Police, the Hawks and the National Prosecution Authority from their core mandate of investigating and prosecuting all acts of so-called white colour crime defined in the same Bill. By ousting these institutions the Bill is effectively vesting those powers into the banks and other financial services entities, creating a dangerous and highly untenable regime in which banks assume powers which oust not only common law rights to a fair procedure, but ousting the rights contained in the Constitution.

It is against the above background that I would confidently say that the text of the FICA Bill as it stands will not pass a constitutional test. It remains to be seen as to whether laws of other countries would take a resembling feature of the draconian spirit of the FICA Bill, in which the rights conferred on each citizen are constructively infringed with no right to due process called Audi Alteram Partem principle is afforded to a prejudiced citizen.

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