Ex parte: NATIONAL TREASURY

In re: PRESIDENTIAL REFERRAL OF THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL [B 33B–2015] TO THE NATIONAL ASSEMBLY

OPINION

J.J. GAUNTLETT SC

F.B. PELSER

Chambers

Cape Town

10 January 2017

A. Introduction

1. Our consultant is National Treasury.

2. This opinion relates to section 45B(1C) of the Financial Intelligence Centre Act,[1] which is intended to be introduced by clause 32 of the Financial Intelligence Centre Amendment Bill [B 33–2015]. The Bill was passed by Parliament. Pursuant to a letter to the Speaker of the National Assembly dated 28 November 2016, the President has (after receiving what the letter terms "certain submission")[2] referred the Bill back to Parliament for its consideration of his reservations regarding the constitutionality of the Bill.

3. The President's reservations relate to warrantless searches contemplated by section 45B(1C). We are asked to advise on the grounds stated in the letter on behalf of the President for the contention that "the introduction of warrantless searches is likely to be unconstitutional".[3]

4. In our assessment that overall stance is not correct. For the reasons set out in the analysis which follows we conclude that certain reformulations may make explicit what should be already implicit. Such reformulations will remove any tenable constitutional concern, and should therefore, in our view, be adopted. Our suggested reformulation of the provisions in issue is enclosed as an addendum.

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[1] Act 38 of 2001.
[2] Para 2 of the President's letter.
[3] Para 7 of the President's letter.

B. The President's reservations

5. The President's position is explained in paragraph 7 of his letter. Whereas this paragraph contains six subparagraphs (the fifth of which containing four further subparagraphs), in substance it advances only two "reasons"[4] for the "view"[5] that "even though the purpose to be served by the Bill is very important and pressing", section 45B(1C) "does not … meet all the concerns set out in paragraphs 36 to 43 of the *Estate Agency Affairs Board* judgment".[6] The reference is to the Constitutional Court's judgment in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* ("*Auction Alliance*").[7]

6. In *Auction Alliance* the Constitutional Court held that the predecessor to section 45B(1C) was unconstitutional. The current Bill has been adopted to remedy *inter alia* this constitutional defect.[8] In doing so the new provision substantially replicates the Constitutional Court's read-in remedy.

7. The two interrelated[9] reasons advanced by the President are, firstly, that "[s]earches [sic] may result in criminal prosecution offer the strongest reason of [sic] the warrant requirement".[10] It is this characteristic which the President asserts "offers a strong reason for the requirement of a search warrant before a search is conducted".[11]

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[4] Para 7(a) of the President's letter.
[5] Para 7(f) of the President's letter.
[6] Para 7(f) of the President's letter.
[7] 2014 (4) BCLR 373 (CC).
[8] Paras 3.34 and 6 of the explanatory memorandum accompanying the Bill.
[9] They are interrelated, because para 7(e) commences "[n]otwithstanding the above", which is a reference to paras 7(a)-(d). Paras 7(b)-(d) refer to "criminal prosecution" and criminal offence"; and para 7(b) itself refers in this regard to overbroadness.
[10] Para 7(b) of the President's letter. Paras 7(c) and 7(d) of the letter further elaborate on the "criminal offence" and "criminal prosecution" rationale.
[11] Para 7(d) of the President's letter.

Secondly, the President is concerned that section 45B(1C) "is impermissibly overbroad".[12] This is, in turn, for four reasons which we analyse below. The analysis necessarily rests on the *Auction Alliance* judgment. A short overview of the most pertinent conclusions in this judgment is therefore required at the outset.

C. Analysis of *Auction Alliance* and the amendment

8. The President's letter does not analyse *Auction Alliance*.[13] From the judgment the Constitutional Court's concern regarding constitutionality is clear. It is that the predecessor to the remedial provision "start[s] from the premise that no searches need warrants".[14] It is in this respect, the Constitutional Court held, that "section 45B [in its pre-amended form] goes too far".[15] The Constitutional Court held that "[w]ithout modulation" the "premise" (*viz* no search needs any warrant; in other words, all searches are authorised without warrants) "cannot be constitutionally acceptable".[16]

9. It is in this context that the Constitutional Court concluded that "less restrictive means should be considered".[17] What this implies is that in certain circumstances warrantless searches may be constitutionally permissible.[18] Indeed, the Canadian *locus classicus* cited by the Constitutional Court itself recognises that a warrant is

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[12] Para 7(e) of the President's letter.
[13] It only cites paras 36-43 of the judgment, which relate in some instances to section 32A of the Estate Agency Affairs Act 112 of 1976 – not to section 45B of the Financial Intelligence Centre Act 38 of 2001.
[14] *Id* at para 43.
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] See too *id* at para 62, which held that the High Court's assumption that only in urgent cases warrantless suspicion-based searches are necessarily unconstitutional should not at that stage be endorsed. The Constitutional Court observed that the assumption "should be tested in due course, after the Legislature has had the chance to formulate, if it can, a statutory basis on which warrantless searches, triggered by suspicion, can take place without constitutional affront." In *Gaertner infra* at para 70 and *Magajane infra* at para 75 the Constitutional Court expressly held that there will be limited circumstances in which the public interest compels an exception to the warrant requirement; and this applies also in respect of regulatory inspections.

only *ordinarily* required.[19] This implies that a warrant is not *always* required. Therefore, in this context the reference to "[l]ess restrictive means" does not necessarily connote a measure other than a warrantless search. It contemplates, instead, the availability of warrantless searches *in more limited circumstances*.

10. The amendment to section 45B indeed addresses this fundamental constitutional flaw identified in *Auction Alliance*. As amended section 45B gives effect to the *in-principle* requirement that a warrant be obtained prior to entering private residences (and premises other than those of accountable institutions or reporting institutions).[20] Thus the remedial provision starts from the correct constitutional premise: as a general rule a warrant is indeed needed.

11. Under the amendment this rule is subject to only two exceptions. The question is whether either or both exceptions are unconstitutional. In addressing these exceptions we shall deal further with the most pertinent aspects of *Auction Alliance* and related judgments.

First exception: Consent

12. The first exception relates to consent.[21] It permits warrantless searches if consent is granted for such search. The consent to be provided must be informed consent (insofar as the person providing the consent must be informed that he or she is under no obligation to admit the inspector in the absence of a warrant).

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[19] *Hunter v Southam Inc* [1984] 2 SCR 145, cited in *inter alia Magajane infra* at pars 56-57.
[20] Section 45B(1A).
[21] Section 45B(1C)(a).

13. In our view there can in principle be no constitutional objection to entering a private residence (or any other premises) after informed consent has been granted.[22] However, consent must be granted by the relevant right-bearer. The relevant right is the right to privacy; and the right-bearer is the *occupant* of the relevant premises.

14. It is therefore the occupant who must consent to any infringement of his or her privacy. Yet the amendment contemplates that consent be granted by "the owner or person apparently in physical control of the premises".[23] The owner of premises is often not the occupant of the premises. Many residential and commercial properties are occupied by tenants, for example. Therefore the amendment does not necessarily require the consent of the right-bearer by providing for consent by the owner of the premises.

15. Likewise, the "person apparently in physical control of the premises" is not necessarily the right-bearer. How control is to be established is, furthermore, not stated. The concept "in physical control of the premises" is left undefined. To the extent that the common law of property may be resorted to in order to determine who is in control of premises,[24] this fails to provide an investigator and right-bearer with the necessary certainty *ex facie* the Act itself.[25] And even to that extent the constitutional right to privacy is subject to the determination of the key-bearer or

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[22] Therefore no question as regards whether a constitutional right to privacy can be waived arises (see e.g. *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) at para 216; *Ex parte Kroese* 2015 (1) SA 405 (NWM) at para 26).

[23] Section 45B(1C)(a).

[24] See e.g. the discussion in Badenhorst *et al* Silberberg and *Schoeman's The Law of Property* 4th ed (LexisNexis, Durban 2003) at 225-258.

[25] *Cf Gaertner infra* at paras 71-72, which requires that a statute which authorises warrantless inspections provide for a constitutionally adequate substitute in the form of sufficient information to the subject of an investigation and the investigator as regards the circumstances in which an investigation may occur.

anyone else capable of controlling physical access to the property.[26] But, as mentioned, this person is not necessarily the right-bearer.

16. The first exception accordingly permits the violation of e.g. a tenant's privacy in respect of his or her private residence if *either* the landlord *or* another person (e.g. a neighbour or domestic employee physically present at the property in the tenant's absence during office hours) grants consent. The consent of the person in control of the premises is not even required to be granted in consultation with or after consultation with the resident.

17. It is clear that a less restrictive means to achieve the same purpose is available. It is to require the consent of the right-bearer him- or herself, as section 63(4) of the Tax Administration Act ("the TAA") does.[27] Section 63(4) of the TAA requires the consent of the *occupant* of residential property.[28] It also imposes a proportionate restriction on the part of the residential premises which may be entered.

18. In our view, in order to constitute a justifiable infringement of the right to privacy, the Bill should follow the formulation of the TAA. Therefore section 45B(1C)(a) should be amended to refer to the consent of the *occupant* of the relevant part of the premises. See the addendum for our suggested reformulation.

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[26] *Cf Scholtz v Faifer* 1910 TS 243.

[27] Act 28 of 2011.

[28] Section 63(4) of the TAA forms part of the functional equivalent of section 45B of the Amendment Act, dealing with warrantless searches. It provides

> "A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant."

Second exception: Where a warrant would be self-defeating

19. The second exception contemplates circumstances where reasonable grounds exist for an inspector to believe that a court will issue a warrant on application were application to be made, but where the delay in obtaining a warrant is likely to defeat the purpose of obtaining it.[29] This exception follows the formulation adopted by the Constitutional Court in *Auction Alliance*.[30] The Court read in a virtually *verbatim* formulation, holding that it constitutes a just and equitable remedy pending remedial legislation by Parliament.[31] As mentioned, the Amendment Act is intended to serve as this remedial legislation.

20. It is therefore understandable that the remedial legislation tracks the Constitutional Court's own remedial formulation. It indeed stands to reason that statutory text which replicates the Constitutional Court's own remedy must *per se* pass constitutional muster.

21. However, the Constitutional Court's judgment does not suggest a categorical confirmation of the constitutionality of its own formulation. Its formulation was merely intended as interim remedy to temper unconstitutionality. The judgment itself repeatedly records the Court's reluctance to make any final determination as regards when a warrantless search would be constitutionally compliant.[32] Therefore adopting the Constitutional Court's formulation does not *per se* guarantee constitutionality.

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[29] Section 45B(1C)(b)(i) and (ii).
[30] Para 6(d) of the order in *Auction Alliance supra*.
[31] Para 6 of the order in *Auction Alliance supra*.
[32] *Id* at paras 62, 65 and 66.

22. Facially section 45B appears not to incorporate one of two important qualifications set out in the Constitutional Court's remedial reformulation. Whereas the Constitutional Court's remedy requires a warrant in cases where the subject of a search is suspected of a criminal offence,[33] section 45B does not explicitly replicate this requirement.[34] Although it is not clear from the judgment whether this qualification should be understood as a precondition for constitutionality in the circumstances of this statute,[35] this is, for two reasons, inconsequential.

23. First, the Constitutional Court's previous judgment in *Magajane v Chairperson, North West Gambling Board* addressed criminal investigations.[36] In *Magajane* Van der Westhuizen J reasoned that "[w]hether the inspection involves a search for criminal evidence is an important measure of the extent of the limitation".[37] It is *inter alia* this judgment to which the President's letter refers broadly.[38] *Magajane* is the actual source of the concern that "overbroad" "authorisation" should not "potentially reach[] to innocent activity in private homes".[39]

24. It is therefore important to recognise that *Magajane* itself actually accepts that "[t]he assessment must be made on the facts of each case", because the distinction between criminal and civil enforcement or regulation "might not be conclusive".[40] An

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[33] Para 6 of the order in *Auction Alliance*.
[34] The first part of section 45B(1A)(a) of the Constitutional Court's formulation ("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") is not repeated in section 45(1A) of the Amendment Act.
[35] See *id* at para 66.
[36] *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC).
[37] *Id* at para 69.
[38] Para 7(b) of the President's letter, referring generally to paras 73-96 of *Magajane*.
[39] Para 7(b) of the President's letter.
[40] *Magajane supra* at para 70.

assessment on the facts of a concrete case is required.[41] Thus an abstract constitutional challenge or referral to the Constitutional Court is unlikely to succeed.

25. Crucially, in *Magajane* the Constitutional Court contemplated that *even in respect of searches aimed at criminal prosecution* warrantless searches may indeed be justified.[42] The potential presence of criminality therefore does not necessarily imply the constitutional necessity of an arrest warrant.

26. This is particularly important in the current context. Because, unlike the statute in issue in *Magajane*, the FICA Amendment Bill does not vest any individual responsible for investigations with powers under the Criminal Procedure Act, 1977.[43] Criminal investigations and prosecutions are not the function of FIC (or supervisory bodies under this Act), or the purpose of the Act itself. Criminal investigations and prosecutions are the competency of other authorities acting under other authorising statutes. For purposes of determining the constitutionality of the Bill, the constitutionality of empowering provisions of criminal law enforcement agencies and their empowering statutes must be presumed. Constitutional conduct by criminal law enforcement agencies pursuant to constitutional empowering provisions provides an additional layer of protection for the right to privacy.

27. Second, the Amendment Act only authorises warrantless investigations "for the purposes of compliance".[44] Compliance is the opposite of non-compliance. Non-compliance is defined as "any act or omission that constitutes a failure to comply with

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[41] *Ibid.*
[42] *Id* at para 76, emphasis added.
[43] *Magajane supra* at para 13.
[44] Section 45B(1A), to which section 45B(1C) cross-refer.

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".[45] Therefore a warrantless investigation does not relate to criminal investigation or prosecution. It relates to administrative regulation. The President's letter fails to make this important distinction.

28. Thus, when section 45B is construed with reference to the definition section, neither *Magajane* nor *Auction Alliance* supports what appears to be the primary premise of the President's concern:[46] "the risk of criminal prosecution" (of politically-exposed persons in particular, it appears).[47] In order to prevent any misconception of the provision, it should be spelt out in section 45B itself that it does not contemplate criminal investigations or prosecutions.

29. Correctly understood, section 45B is entirely reconcilable with the Constitutional Court's conclusion in *Auction Alliance* that "in urgent cases"[48] a departure from the now "modulat[ed]" premise (*viz* a search warrant is in principle required in respect of premises other than those of an accountable institution or reporting institution) is permitted.[49] As mentioned, by virtue of the amendment the "fundamental reason" for the previous unconstitutionality (being the "initiating premise" that "all the searches … require no warrant")[50] has been removed. Now the departure point is the converse: a warrant is in principle required.

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[45] Section 1(m), as amended by the Amendment Act.
[46] The concern regarding criminality is the subject-matter of paras 7(b), (c), (d) and (e) of the President's letter. It is only paras 7(a) and (f) – respectively the introductory and concluding subparagraphs of the substantive part of the President's letter – which do not refer to criminality.
[47] Para 7(b) of the President's letter.
[48] *Id* at para 62.
[49] *Id* at para 43.
[50] *Id* at para 40.

30. The exception in section 45B(1C)(b) is therefore, in our view, capable of section 36 justification[51] in the light of what the Constitutional Court described in *Auction Alliance* as a "vital national objective" to be "secure[d]".[52] For this exception in reality presupposes the practical impossibility of first obtaining a warrant. Such circumstances indeed appear to underlie the remedial reading-in relief in *Auction Alliance* itself, which is also consistent with other Constitutional Court caselaw.[53] The Constitutional Court accepted as self-evident that "the law recognises that there will be limited circumstances in which the need of the State to protect the public interest compels an exception to the warrant requirement in certain circumstances."[54] While cautioning that "the State will be hard-pressed to show the need for provisions authorising warrantless searches", the Constitutional Court nonetheless accepted that "[t]here may, however, be instances where warrantless searches are justified, such as those provided for in the Criminal Procedure Act".[55]

31. However, it is correct, as the President's letter to the Speaker of the National Assembly states,[56] that overbreadth (the second concern identified by the President) is constitutionally problematic. It is also correct that the Constitution requires that an empowering provision sufficiently circumscribes a conferred discretion.[57] It is therefore indeed necessary that the Amendment Act limits the investigator's

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[51] As regards which see e.g. *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) at paras 25*ff*; *Magajane supra* at paras 60*ff*.
[52] *Id* at para 42.
[53] *Cf Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) at para 6 of the order; *Magajane supra* at para 75.
[54] *Magajane supra* at para 75.
[55] *Id* at para 76.
[56] Paras 7(b) and 7(e) of the President's letter.
[57] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 47; *Mistry v Interim Medical and Dental Council of South Africa supra* at paras 28-30; *Magajane supra* at para 71.

discretion at least *to some extent*[58] as regards the time, place and scope of a search.[59] This is the apparent purpose of section 45B(1D). It is, however, inherently impossible to predetermine and categorically circumscribe the circumstances in which section 45B(1C)(b) will justifiably find application; or the particular times of day during which a warrantless search may be conducted, or other associated particulars. Warrantless searches necessarily require *some* degree of discretion to be exercised by an investigator.

32. Conferring discretion on an investigator is therefore not in itself impermissible.[60] It is, in fact, necessary – lest constitutional rights be infringed by a lack of flexibility, or important public purposes (*in casu* the fight against terrorism and corruption) be undermined by procrustean provisions. Terrorism and corruption erode democracy and corrode constitutional rights.[61] Regulatory measures preventing them therefore require effectiveness.[62]

33. Nonetheless section (1D) is capable of more precise formulation without defeating the effectiveness of warrantless investigations. It does not suffice, for instance, merely to refer to "decency" (as section 45B(1D)(c) does). The Constitutional Court required in *Gaertner* that "the legislation *must provide* for a *manner* of conducting searches that accords with common decency".[63] In other words, the legislation must do more than *require* decency; it must stipulate *what* decency involves, and *how* decency is to be

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[58] This qualification (*viz* "to some extent") is necessary, because the Constitutional Court's observation regarding the limitation of investigator's discretion in respect of time, place and purpose is made in respect of "periodic inspections" (*Magajane supra* at para 77). Inspections of premises other than those contemplated in section 45B(1) may not always be periodic in nature.
[59] *Magajane supra* at paras 71 and 77; *Gaertner supra* at para 72.
[60] *Dawood supra* at para 53.
[61] *Cf Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 57 and *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) at para 1.
[62] *Cf* article 5(1) of the UN Convention Against Corruption.
[63] *Gaertner supra* at para 72.

accorded.[64] To address this aspect we propose a reformulation as set out in the addendum.

34. As regards other concerns regarding an apparent open-endedness of an investigator's discretion, this too appears overstated. On a correct constitutional construction the Amendment Act does contain at least some explicit and implicit restrictions on warrantless searches, and on an investigator's discretion.

35. As already mentioned, it is explicit in section 45B(1C)(b) that it authorises warrantless inspections *only* where a warrant will be granted but the delay in obtaining a warrant will defeat its purpose. What this means is that section 45B(1C)(b) only authorises warrantless entries in circumstances where the ordinary means (obtaining a warrant) is unavailing. Therefore the President's suggestion that the element of surprise – which, according to the President, "motivates the proposed section 45(1C)(ii) [sic]"[65] – can be accomplished by *ex parte* applications for warrants misses, with respect, the point. The point is avoiding a delay (such as to negate the purpose of the provision),[66] not achieving surprise (such as to foster it).[67] The preparation, lodging and moving of an *ex parte* application inherently require time and may in some situations – which the Constitutional Court stresses are exceptional, but nonetheless foreseable[68] – frustrate the purposes of the Act.

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[64] *Cf Dawood supra* at para 54.
[65] Para 7(e)(iii) of the President's letter.
[66] As the Constitutional Court put it in *Gaertner supra* at para 85, warrantless investigations are warranted when there is "a need to act swiftly", when "coupled with a belief – on reasonable grounds – that a warrant would otherwise have been authorised".
[67] The reference to "surprise" in the Constitutional Court's judgment relates to the High Court's judgment (*Auction Alliance supra* at para 39, referring to para 52 of the High Court's judgment).
[68] See the discussion in para 29 above.

36. However, while this justifies – in appropriate circumstances – not obtaining a warrant, it does *not* without more justify warrantless infringements of the right to privacy. This is because the unavailability of a warrant does not *per se* presuppose the absence of any other form of oversight. Accordingly the absence of any less restrictive means to achieve the purpose – as section 36(1)(e) of the Constitution contemplates – is not established merely by recognising that a warrant itself cannot be obtained. In certain circumstances where a warrant cannot be obtained urgent internal authority by a senior FIC official may be obtained. Institutional authorisation is of course not a substitute for independent, judicial authorisation. But it does provide a less restrictive and more protective means of achieving the same purpose: a warrantless inspection. This substitute may take the form of authority granted by the Director of FIC (or another suitably qualified, experienced and senior FIC official) in circumstances where a warrant cannot be obtained but would be granted if sought. It introduces an institutional check on an investigator's own assessment and therefore reduces the risk of abuse. Simultaneously it confers the discretion on the highest (or a sufficiently high) official within FIC (whose level of responsibility and experience justifies a less circumscribed discretion),[69] and not on an investigator whose subjective involvement and seniority or experience may unduly risk infringing the right to privacy.

37. Nonetheless, even then effective enforcement may still require an exception in circumstances where a delay in obtaining prior institutional authority may defeat the purpose of obtaining it. But this reality does not render a blunt dichotomy (in terms of which a warrant is either required; or no intermediate protection of privacy is provided at all) compliant with section 36 of the Constitution. Where less restrictive

[69] *Cf Dawood supra* at para 53.

means may suffice, legislation must provide for less restrictive means. Otherwise the proportionality criterion of the limitations analysis under section 36 of the Constitution cannot be satisfied.

38. Thus the *explicit* limitation in section 45B on warrantless entries should, in our view, be amplified by an intermediate form of authorisation imposing an institutional check in appropriate circumstances. This is done in the addendum.

39. Implicit (if not explicit) in section 45B, read with the Act in its entirety, is that the investigator may only exercise section 45B powers for the purpose for which the power to conduct an investigation is conferred.[70] Therefore the President's concern (*viz* the absence of an explicit "requirement for the Centre or supervisory body to specify to an inspector acting in terms of section 45B(1C) as to what he or she may search for or require production of"; and that the provision "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")[71] is overstated. It appears to overlook the implicit restriction imposed by section 45B(2). Section 45B(2) provides for what an inspector "may" do "in conducting an inspection". By necessary implication an inspector may do nothing else. No general search and seizure power is explicitly conferred.[72]

40. In this context a material omission should, however, be remedied. It is the absence of the operative word – "inspection", used in section 45B(2) – from section 45B(1A) and

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[70] Accordingly the power is not merely circumscribed by reference to the purpose of the Act, which the Constitutional Court held does not suffice (*Gaertner supra* at para 38).
[71] Para 7(e)(ii) of the President's letter.
[72] Section 45(2)(f) only permits the seizure of a document which may constitute evidence of non-compliance.

section 45B(1C). As the Bill currently stands, section 45B(1C) only cross-refers to section 45(1B). Section 45(1B) in turn only contains the word "enter" (and not also the word "inspect", as section 45B(1) does). Therefore the important limitation on an investigator's powers contained in section 45B(2) should be expressly included by inserting the operative word triggering the operation of section 45B(2). This is done in the addendum in respect of all relevant provisions.

41. The above recommendations address the main concerns identified in the President's letter. In the interests of completeness we nonetheless also address the remaining two objections, particularly in the light of the President's suggestion that section 45B(1C) may be unconstitutional in respects which his letter does not state but which the National Assembly might identify.[73]

42. The first is that "[a]ny premises" renders the amendment "impermissibly overbroad" because this phrase "include[s] private homes".[74] This is not strictly speaking an issue of overbroadness of the provision containing the words "any premises". For it is not by virtue of the phrase "[a]ny premises" that private homes are caught (whether inadvertently or otherwise) in that provision's potential over-extensive field of application. Private homes are *expressly* ("private residence") included in a *separate* subprovision.[75] Any concern over including private homes is therefore more correctly a question of whether the express reference to "private residence" (not its implied inclusion in a different provision) infringes the right to privacy unjustifiably. And whether this is the case is to be assessed (and addressed, if necessary) with reference

[73] Para 7(f) of the President's letter.
[74] Para 7(e)(i) of the President's letter.
[75] Section 45B(1A)(a).

to the circumstances in which a private residence (not any other premises) may be entered and inspected.

43. In the light of the Constitutional Court's repeated emphasis on the strong protection of privacy in private homes, we advise that this aspect be expressly circumscribed in addition to what may be implied, read-down or otherwise addressed through other reformulations. This should be done by making it explicit that the private residential premises liable to entry and inspection are reasonably believed to be used for business purposes by an accounting institution or reporting institution. To the extent that the current formulation may be construed to operate any wider (by including e.g. the private residences of clients or employees of an accounting institution; and *a fortiori* unrelated third parties) it extends too far.[76]

44. In our view the restriction currently contained in the proviso to section 45B(1A) as it stands does not sufficiently restrict the availability of warrantless searches of private homes. This is because it operates identically for private residences and "any premises" other than private homes. The proviso therefore fails to give effect to the Constitutional Court's concern that "in respect of private homes the right [to privacy] remains as strong as one can imagine",[77] and that the more public an undertaking (or premises) "the more attenuated the right to privacy and the less intense any possible invasion".[78] We therefore propose the amendment set out in the addendum to distinguish (in the context of warrantless entries and inspections) between two categories of premises to which *different* degrees of privacy attach.

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[76] *Auction Alliance supra* at para 34, referring to *Gaertner supra* at para 38.
[77] *Gaertner supra* at para 63.
[78] *Id* at para 58.

45. The final concern identified in the President's letter also relates to overbreadth. It concerns the "breadth of sections 21F (foreign prominent public official), 21G (domestic prominent influential person) and 21H (family members and known associates).[79] These provisions clearly deal with politically exposed persons. Because of the "breadth"[80] of these provisions, section 45B(1C) should be "expressly and carefully circumscribed", the President's letter asserts.[81] What this reflects is the President's apparent recognition that implicit restrictions be made explicit. And what it accepts is that when the implicit restrictions are made explicit "carefully" then the President's final concern is simultaneously addressed. Thus also this concern is not self-standing. The President therefore appears to accept that there is nothing problematic about the categories of persons to which this concern applies (foreign prominent public officials; domestic prominent influential persons; and immediate family members and known close associates). They are sufficiently identified or defined in Schedules 3A and 3B and section 21H.[82] The President expressed no concern that any of these provisions (or the schedules to which they relate) is imprecise or overbroad. Thus the final concern identified by the President will be addressed by the other reformulations contained in the addendum.

D. Conclusion

46. For the reasons set out above, we conclude that section 45B(1C) addresses the crucial constitutional defect identified by the Constitutional Court in *Auction Alliance*. Now

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[79] Para 7(e)(iv) of the President's letter.
[80] The reference to "breadth" is in our view not correct. The scope of the Bill is surely significantly narrowed, by PEPs being limited to these persons. The issue is rather one of precision.
[81] Para 7(e)(iv) of the President's letter.
[82] Schedule 3A lists domestic prominent public officials; Schedule 3B describes sufficiently clearly who are foreign prominent influential persons; and immediate family members are defined in section 21H. Section 21H does not, however, define "known close associates".

the departure point is that a warrant is in principle required. The inquiry narrows to whether provision made for warrantless searches – flagged by the Constitutional Court as capable of being justified only by exceptional circumstances, but for which provision nonetheless may legitimately be made by the lawmaker – is made in the Bill in terms which are constitutionally-compliant. Residual concerns identified in the President's letter and other ancillary issues identified above are capable of being put beyond legitimate debate by more explicit drafting. To address these we recommend some minimal amendments to section 45B. These are formulated in the addendum, which (in the interest of clarity) reflects our revisions in so-called "track changes".

47. We shall make ourselves available to deal with any issues for further advice or clarification, should this be required.

We advise accordingly.

J.J. GAUNTLETT SC

F.B. PELSER

Chambers
Cape Town
10 January 2017

ADDENDUM:

SECTION 45B OF THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001 AS PROPOSED TO BE AMENDED BY CLAUSE 32 OF FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL [B 33B–2015]

[Editorial note: Revisions in the first colour indicate amendments to section 45B pursuant to B 33B–2015 as adopted by Parliament in 2016. Revisions in the second colour indicate amendments suggested by counsel, to be incorporated into a new version of the Bill to be deliberated on by the Portfolio Committee in January 2017.]

45B. Inspections

(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~~

(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 and inspect—

(a) a private residence; or

(b) any premises other than premises contemplated in subsection (1) or paragraph (a) (in this section referred to as "unlicensed business premises"),

if the Centre or a supervisory body 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 enter and inspect~~have access to~~ the private residence or unlicensed business 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 and inspection ofto the private residence or unlicensed business premises areis likely to yield information pertaining to the non-compliance; and

(iii) entry and inspection ofto the private residence or unlicensed business premises areis reasonably necessary for the purposes of this Act.

(1C) An inspector otherwise required to obtain a warrant for entry and inspection of a private residence or unlicensed business premises in terms offor entry and inspection of a private residence or unlicensed business premises underin terms of subsection (1A),, may enter and inspect that residence or those premises without a warrant—

(a) with the consent of—

——(i) in the case of a private residence, —
(aa) the person apparently in control of the business reasonably believed to be conducted at the private residence; and
(bb) the occupant of the part owner or person apparently in physical control of the private residenceprivate residence to be entered and inspected;
;

(ii) in the case of unlicensed business premises, the person apparently in control of the business reasonably believed to be conducted at the premises,

after informing him or her 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) with the prior authority of the Director or the head of a supervisory body, or a senior staff member of the Centre or a supervisory bodydelegated to perform the function, if the Director, head or senior staff member 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 and inspect the private residence or unlicensed businessprivate residence or unlicensed business premises; and

(iii) in respect of a private residence: the premises are used for business purposes by an accounting institution or reporting institution which is registered in terms of section 43B or otherwise licensed or authorised by the supervisory body; and

(iv) in respect of any premises (including a private residence) other than those contemplated in section 45B(1): if the Centre or, when acting in terms of section 45(1), the supervisory body, as the case may be, reasonably believes it is necessary to enter and inspect the private residence or unlicensed business premises in order to perform any or all of the actions contemplated in section 45B(2)(a) to (f); or.

(c~~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, and in obtaining prior authority under paragraph (b), ~~–~~is likely to defeat the purpose for which the inspector seeks to enter and inspect the premises; and

(iii) in respect of a private residence, the premises are used for business purposes by an accounting institution or reporting institution which is registered in terms of section 43B or otherwise licensed or authorised by the supervisory body; and

(iv) in respect of any premises (including a private residence) other than those contemplated in section 45B(1), if the Centre or, when acting in terms of section 45(1), the supervisory body, as the case may be, reasonably believes it necessary to enter and inspect such residence or premises in order to perform any or all of the actions contemplated in section 45B(2)(a) to (f).

(1D) Where an inspector enters and inspects a private residence or unlicensed business premises without a warrant, he or she must do so—

(a) at a reasonable time within ordinary business hours or, if the inspector on reasonable grounds believes that the purpose for which the entry and inspection is sought, is likely to be defeated by a delay, as closely to ordinary business hours as the circumstances reasonably permit;

(b) on reasonable notice, where appropriate;

(c) with strict regard to an affected person's right to—

(i) dignity;

(ii) freedom and security;

(iii) privacy; and

(iv) other constitutional rights; ~~-~~and

(de) with strict regard to decency and good order as the circumstances require, in particular by~~cluding to a person's right to~~—

(i) entering and inspecting only such areas or objects as are reasonably required for purposes of section 45B(2)~~respect for and the protection of dignity;~~

(ii) conducting the inspection discreetly and with due decorum;~~freedom and security and~~

(iii) causing as little disturbance as possible; and

(iv) concluding the inspection as soon as possible~~personal privacy. decency and good order, including~~—

~~(i) having regard to aa bb cc dd and~~

~~cii with strict regard to decency and good order, including to a person's right to by~~—

~~aa respect for and the protection of dignity~~
~~bb freedom and security and~~
~~cc ddpersonal privacy.~~

(1E) Subsection (1D)(c) and (d) ~~also~~ apply with the necessary changes~~ies~~ where an inspector enters premises on the authority of a warrant.

(2) An inspector, in conducting an inspection, may—

(a) in writing direct a person to appear for questioning before the inspector at a reasonable time and place determined by the inspector;

(b) order any person who has or had any document in his, her or its possession or under his, her or its control relating to the affairs of the accountable institution, reporting institution or person to whom this Act applies—

(i) to produce that document; or

(ii) to furnish the inspector at the place and in the manner reasonably determined by the inspector with information in respect of that document;

(c) open any strongroom, safe or other container, or order any person to open any strongroom, safe or other container, in which the inspector reasonably suspects any document relevant to the inspection is kept;

(d) use any computer system or equipment on the premises or require reasonable assistance from any person on the premises to use that computer system to—

(i) access any data contained in or available to that computer system; and

(ii) reproduce any document from that data;

(e) examine or make extracts from or copy any document in the possession of an accountable institution, reporting institution or person to whom this Act applies or, against the issue of a receipt, remove that document temporarily for that purpose; and

(f) against the issue of a receipt, seize any document obtained in terms of paragraphs (c) to (e), which in the opinion of the inspector may constitute evidence of non-compliance with a provision of this Act or any order, determination or directive made in terms of this Act.

(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;

(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(1A)(c) 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.

(3) An accountable institution, reporting institution or other person to whom this Act applies, must without delay provide reasonable assistance to an inspector acting in terms of subsection (2).

(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.

(5)

(a) Subject to section 36 and paragraph (b), an inspector may not disclose to any person not in the service of the Centre or supervisory body any information obtained in the performance of functions under this Act.

(b) An inspector may disclose information—

(i) for the purpose of enforcing compliance with this Act or any order, determination or directive made in terms of this Act;

(ii) for the purpose of legal proceedings;

(iii) when required to do so by a court; or

(iv) except information contemplated in subsections (2A) and (2C), if the Director or supervisory body is satisfied that it is in the public interest.

(6)

(a) An inspector appointed by the Director may, in respect of any accountable institution regulated or supervised by a supervisory body in terms of this Act or any other law, conduct an inspection only if a supervisory body failed to conduct an inspection despite any recommendation of the Centre made in terms of section 44(b) or failed to conduct an inspection within the period recommended by the Centre.

~~*(b) An inspector of a supervisory body may conduct an inspection, other than a routine inspection in terms of this section, only after consultation with the Centre on that inspection.*~~

(c) An inspector appointed by the Director may on the request of a supervisory body accompany and assist an inspector appointed by the head of a supervisory body in conducting an inspection in terms of this section.

~~(7) No warrant is required for the purposes of an inspection in terms of this section.~~

(8) For purposes of section 45B, "compliance with this Act or any order, determination or directive made in terms of this Act" means compliance with an accountable institution's or reporting institution's obligations under section 46, 46A, 47, 51(2), 51A(4)(c), 56(2), 58(2), 61, 61B, 62 or 62E or an order, determination or directive related to any of those sections.