OPINION

for

THE SPEAKER OF THE NATIONAL ASSEMBLY

on

THE CONSTITUTIONALITY OF WARRANTLESS SEARCHES UNDER THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL [B 33B-2015]

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INTRODUCTION

1 The Speaker of the National Assembly seeks our advice in relation to the constitutionality of clause 32 of the Financial Intelligence Centre Amendment Bill ("**the Bill**").[1]

2 Clause 32 of the Bill proposes amendments to section 45B(1C) of the Financial Intelligence Centre Act 38 of 2001 ("**FICA**"). It deals with searches to be conducted by inspectors appointed by the Financial Intelligence Centre ("**the FIC**").

3 We are instructed that, on 28 November 2016, the President referred the Bill back to the National Assembly under section 79(1) of the Constitution, based on a reservation concerning the constitutionality of warrantless searches under the proposed section 45B(1C).

4 We are asked to consider the constitutional concerns raised by the President and advise on whether the proposed section 45B(1C), as proposed by clause 32 of the Bill, is consistent with the Constitution.

5 We do so by dealing with the following issues in turn:

5.1 The concerns raised by the President;

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[1] Bill 33B – 2015

5.2 The general principles laid down by the Constitutional Court regarding the right to privacy and statutory provisions permitting searches;

5.3 The legislative scheme under the proposed section 45B(1C);

5.4 The constitutionality of the proposed section 45B(1C); and

5.5 The options open to the National Assembly.

6 We ultimately conclude that the proposed section 45B(1C) is consistent with the Constitution.

THE CONCERNS RAISED BY THE PRESIDENT

7 In his referral, the President informed the National Assembly that he considered that the proposed section was likely unconstitutional in light of the Constitutional Court's judgment in *Estate Agency Affairs Board*[2] as well as its judgments in *Magajane*[3] and *Gaertner*.[4]

8 The President's referral is based on the following grounds:

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[2] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC)

[3] *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (10) BCLR 1133 (CC); 2006 (5) SA 250 (CC); 2006 (2) SACR 447 (CC)

[4] *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC)

8.1 A search limits the right to privacy in section 14 of the Constitution, and section 45B(1C) may not survive a limitations analysis under section 36 of the Constitution.[5]

8.2 The warrant requirement is especially pressing in respect of a search that results in criminal prosecution, by requiring an impartial officer to weigh the state's justifications and by stipulating the time, place and scope of the search.[6]

8.3 In allowing warrantless searches, legislation must not extend the scope of permissible searches beyond situations in which the privacy expectation is attenuated.[7]

8.4 Non-compliance with the principal Act may constitute an offence under sections 50 and 52, as well as the proposed section 49A, providing a strong reason for the requirement of a search warrant before a search is conducted.[8]

8.5 Section 45B(1C) is impermissibly overbroad, in that—

8.5.1 it refers to "any premises", which includes private homes;[9]

8.5.2 in contrast with section 22 of the Criminal Procedure Act, it does not require the Centre or supervisory body to specify to an

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[5] President's referral, para 7(a)

[6] President's referral, para 7(b)

[7] President's referral, para 7(c)

[8] President's referral, para 7(d)

[9] President's referral, para 7(e)(i)

inspector what he or she may search for;[10]

8.5.3 the purpose of the provision—the "element of surprise"—could be achieved by allowing warrants to be issued *ex parte*;[11] and

8.5.4 it fails expressly and carefully to circumscribe the authority granted under section 45B(1C).[12]

THE GENERAL PRINCIPLES REGARDING THE RIGHT TO PRIVACY AND STATUTORY PROVISIONS PERMITTING SEARCHES

9 The Constitutional Court has now decided at least five cases regarding the constitutionality of statutory provisions which permit searches. These include the cases referred to by the President in his letter of referral – *Magajane*, *Gaertner*, *Estate Agency Affairs Board* – the earlier judgment in *Mistry*[13] and the more recent judgment in *Kunjana*.[14]

10 For present purposes, the important principles that emerge from those cases are as follows.

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[10] President's referral, para 7(e)(ii)

[11] President's referral, para 7(e)(iii)

[12] President's referral, para 7(e)(iv)

[13] *Mistry v Interim National Medical and Dental Council and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC)

[14] *Minister of Police and Others v Kunjana* [2016] ZACC 21; 2016 (9) BCLR 1237 (CC); 2016 (2) SACR 473 (CC)

11 First, a statutory provision which permits searches of various premises, and especially private homes, will limit the right to privacy contained in section 14 of the Constitution.

11.1 Section 14 of the Constitution protects the right to privacy, including the right not to have one's person or home searched, one's property searched, one's possessions seized, or the privacy of one's communications infringed.

11.2 The right to privacy extends beyond the inner sanctum of the home. Even though businesses do have a right to privacy, they have a lower expectation of privacy as to the disclosure of relevant information to the authorities as well as the public.[15]

11.3 This means that the question of whether the statutory provision limits the right to privacy and to what extent will depend, in part, on the nature of the premises to be searched.

11.4 In the present case, however, this issue need not detain us. As we explain below, it is clear that the proposed section 45B(1C) permits searches of any premises, including private homes. It therefore undoubtedly limits the right to privacy.[16]

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[15] *Gaertner* at para 35

[16] See, for example, *Gaertner* at paras 38 - 43

12 Second, like all rights, the right to privacy can be permissibly limited in accordance with section 36 of the Constitution.[17] This means that a statutory provision which permits searches may well pass constitutional scrutiny – provided it complies with the principles and constraints laid down by the Constitutional Court. This is so even if the statute permits searches of private homes and does so in the context of an investigation of a criminal offence.[18]

13 Third, the fact that the search provision seeks to achieve an important purpose is relevant to the limitations. However, it does not – by itself – mean that the provision is necessarily constitutionally permissible.

13.1 The Constitution only regards the limitation of a constitutional right as justified if a substantial state interest requires the limitation.[19] By corollary, the importance of the state purpose diminishes the invasiveness of searches under the impugned provisions.[20]

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[17] Section 36(1) of the Constitution provides:

"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."

[18] *Magajane* at para 50

[19] *Magajane* at para 65; *Kunjana* at para 19

[20] *Gaertner* at para 56; *Kunjana* at para 20

13.2 But the provision must still be proportional to its purpose and contain sufficient safeguards regarding the right to privacy.[21] For this reason, the Court has been prepared to strike down overbroad warrantless search provisions, even where purpose of those provisions – generally parts of regulatory statutes targeted at protecting the public interest, through health, safety, anti-corruption and other measures – has been of utmost importance.[22]

14 Fourth, at least where a statutory provision permits searches of private homes, it is imperative that the default position is that a search warrant is required before the search takes place.

14.1 The requirement of a search warrant involves the party conducting the search to first approach a judicial officer for authorisation to conduct the search.

14.2 The Constitutional Court has explained the value of this approach:

> *"A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guarantees that the state must be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our history provides evidence of the need to*

[21] *Gaertner* at para 68

[22] Eg: *Gaertner* at paras 50 – 56 and 74

adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation."[23]

14.3 Where a statute provides for a default position of warrantless searches that includes private homes, this will almost certainly be unconstitutional.[24]

15 Fifth, and most critically for present purposes, it is constitutionally permissible for a statute to contain an exception to the warrant requirement in cases of urgency, where obtaining a warrant would be impossible without defeating the purpose of the search. This includes searches of private homes.[25] We expand on this issue in some detail below.

THE LEGISLATIVE SCHEME

16 For present purposes, the proposed section 45B consists of three different parts. It is important to consider them in turn, in order to understand the extent of the President's constitutional concerns.

17 The first part is the proposed section 45B(1).

17.1 It provides:

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[23] *Gaertner* at para 69

[24] *Estate Agency Affairs Board* at para 43

[25] *Gaertner* at para 70; *Kunjana* at para 30.

"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."

17.2 This section therefore deals only with premises of an accountable institution or reporting institution. It excludes private residences.

17.3 The section enables an inspector, without a warrant, to enter the premises concerned to inspect the affairs of the institution "*for the purposes of determining compliance*" with the Act.

17.4 The President does not express any concerns about the constitutionality of this provision.

18 The second part consists of the proposed sections 45B(1A) and 45B(1B).

18.1 They provide:

"(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."

18.2 These sections relate to premises other than those mentioned in section 45B(1). In other words, they include but are not limited to private homes.

18.3 No doubt because this section applies to a broad category of premises, including private homes, these sections stipulate a warrant requirement as a default position.

18.4 They empower an inspector to enter any premises which the FIC "*reasonably believes that the residence or premises are used for a business to which the provisions of this Act apply*." They require a warrant to be issued by a magistrate or judge before this occurs.

18.5 They also set out the requirements that must be met for a magistrate or judge to issue a warrant: reasonable grounds for suspecting non-compliance; the likelihood of entry to the premises yielding information

pertaining to non-compliance; and the reasonable necessity of entry to the premises.

18.6 The President does not express any concerns about the constitutionality of this provision.

19 The third part consists of the proposed sections 45B(1C) and 45B(1D).

19.1 They provide:

> *"(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."

19.2 These sections involve a limited exception to the default warrant requirement in sections 45B(1A) and 45B(1B).

19.3 They provide that where a warrant would otherwise be required for entry into premises (including a private home), an inspector may enter without a warrant only in circumstances of significant urgency. The manner in which an inspector may search the premises is curtailed by subsection (1D): he or she must do so at a reasonable time; on reasonable notice; and with strict regard to decency, good order, and the rights to dignity, freedom and security, and personal privacy.

19.4 In terms of section 45B(1C), warrantless searches may only take place when two requirements are satisfied.

19.4.1 First the inspector must on reasonable grounds believe that a warrant would be issued if applied for. In other words, the inspector must on reasonable grounds believe that a magistrate would conclude that there are reasonable grounds for suspecting non-compliance with the Act, that entry is likely to yield information in this regard, and that entry is reasonably necessary for purposes of the Act.

19.4.2 Second, the inspector must on reasonable grounds believe that the delay in obtaining the warrant would be likely to defeat the

purpose of entering the premises. Unless this is the case, the provision cannot be used.

19.5 It is this section 45B(1C) about which the President has expressed constitutional reservations.

IS THE PROPOSED SECTION 45B(1C) UNCONSTITUTIONAL?

20 A determination of the constitutionality of section 45B(1C) is, as with any law, a two-part inquiry.

20.1 First, does the provision limit a constitutional right, in this case the right to privacy?

20.2 Second, if so, is the limitation reasonable and justifiable under section 36 of the Constitution?

21 The first inquiry can be resolved immediately. In light of the five judgments of the Constitutional Court to which we have made reference, a search of this kind unquestionably limits the right to privacy. So we can turn at once to the second leg of the limitations analysis.

22 In relation to this limitations analysis, we have considered the judgments of the Constitutional Court referred to by the President – that is *Estate Agency Affairs Board*, *Gaertner* and *Magajane*. We have also considered the judgments in

Mistry and in *Kunjana*.

23 In our view, in light of these judgments, the proposed section 45B(1C) is consistent with the Constitution. We say so for the following reasons.

24 **First, section 45B(1C) is quite different from the provisions struck down as unconstitutional in *Estate Agency Affairs Board, Gaertner, Magajane, Mistry* and *Kunjana*.**

24.1 In every one of those five cases, the statutory scheme at issue made clear that the default position was to permit warrantless searches, often including private homes. It was this default position of warrantless searches that was the key constitutional flaw concerned.

24.2 For example, in the recent judgment of *Kunjana*, the provisions at issue[26] granted police officials the power to conduct a warrantless search in any premises at all on the basis of a reasonable suspicion. The search could take place without a warrant irrespective of whether the offence had been or was about to be committed and irrespective of whether the matter was too urgent to obtain a warrant. The Court held that this was unconstitutional.

24.3 Similarly, in *Estate Agency Affairs Board*, the two provisions involved[27] allowed searches without complying with any requirement for a warrant

[26] Sections 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992

[27] Section 32A of the Estate Agency Affairs Act 112 of 1976 and section 45B of FICA

at all. Again this was irrespective of whether the matter was too urgent to obtain a warrant. The Court explained the core constitutional flaw in the provisions as follows:

> *"The conclusion is unavoidable that in their present form both provisions fail to pass constitutional scrutiny. The fundamental reason in each case is their initiating premise: that all the searches they authorise require no warrant. In this, they afford no differentiation as to the nature of the search or the nature of the premises searched. The result is that they go too far, in authorising warrantless searches in circumstances where no justification can exist for not requiring the Board to obtain a warrant."*

24.4 Thus, the Court made clear that a default position of warrantless searches would generally not be constitutional "*where no justification can exist for not requiring … a warrant*".

24.5 The present provisions, however, are entirely different. As our discussion above demonstrates, particularly when it comes to private homes, sections 45B(1A) and (1B) stipulate a default position whereby a warrant is required.

24.6 Section 45B(1C) then merely creates a narrow but important exception to this default position. It provides, as we have explained above, that the need for a warrant may be dispensed with only where the inspector on reasonable grounds believes that the delay in obtaining the warrant would defeat the purpose of the search. (The inspector must also on reasonable grounds believe that a warrant would be granted if applied for.)

24.7 Thus, none of the cases mentioned by the President are analogous to the present situation. None of them concerned a default position in which a warrant was required – they all concerned precisely the opposite.

25 **Second, the Constitutional Court has made clear that a warrant requirement may be dispensed with in urgent situations – even in respect of private residences and even where criminal offences are involved.**

25.1 The proposed section 45B(1C) is not unusual. It is very similar to provisions of both the Criminal Procedure Act ("**CPA**")[28] and National Prosecuting Authority Act ("**NPA Act**").[29]

25.2 Section 20 of the CPA entitles the State to seize a wide range of articles thought to relate to a suspected offence. Section 21 of the CPA creates a default position of a warrant being required before a search and seizure of such articles occurs. However, section 22 then creates an exception in cases of urgency. It provides as follows in respect of all premises (thus including private homes):

> *"A police official may without a search warrant search any ... premises for the purpose of seizing any article referred to in section 20-*
>
> *(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the ... premises consents to such search and the seizure of the article in question; or*
>
> *(b) if he on reasonable grounds believes-*

[28] Act 51 of 1977

[29] Act 32 of 1998

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

25.3 Similarly, section 29(1) of the NPA Act entitles an Investigating Director to enter and search any premises (thus again including a private home) on which anything connected with the investigation is expected to be found. Section 29(4) of the NPA Act stipulates a default position whereby a warrant is required before this occurs. However, section 29(10) of the NPA Act then again creates an exception in cases of urgency. It provides:

"(a) The Investigating Director ... may without a warrant enter upon any premises and perform the acts referred to in subsection (1)- premises and perform the acts referred to in subsection (1)-

(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that-

(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

(b) Any entry and search in terms of paragraph (a) shall be executed by day, unless the execution thereof by night is justifiable and necessary, and the person exercising the powers referred to in the said paragraph shall identify himself or herself at the request of the owner or the person in control of the premises."

25.4 These sections of the CPA and NPA Act thus adopt a virtually identical approach to the provisions presently at issue. They create a default regime requiring a warrant, but an exception to this where urgency means that a warrant cannot be obtained and the person concerned believes a warrant would have been granted.

25.5 This is perfectly understandable. To take a practical example: suppose that the police learn from an informant that illegal drugs or illegal guns are in the process of being removed from a private house and dissipated and that the process will shortly be completed. It would be absurd for the police to have to first draft an application for a warrant, then find a judicial officer to hear the application and then argue it. By the time this concluded, the drugs and guns would no longer be there. The CPA and NPA Act thus recognise that in such urgent situations, it is necessary to allow a search without a warrant.

25.6 Critically, both section 22 of the CPA and section 29 of the NPA Act were cited with approval by the Constitutional Court in *Gaertner* when it was fashioning a reading-in[30] order to cure the constitutional breaches of privacy occasioned by the statute being challenged in that case.[31] The Court held:

> *"[D]uring the period of suspension, there is a need for a reading-in. When SARS officials wish to search homes (private residences) pursuant to the powers conferred by section 4, they must apply for a*

[30] A "reading-in" is an order given by the Court to cure a statute that has been found to be unconstitutional.

[31] The Customs and Excise Act 91 of 1964.

warrant in terms similar to those required by section 22 of the Criminal Procedure Act or section 29 of the National Prosecuting Authority Act: the exception provided for in those pieces of legislation (a need to act swiftly coupled with a belief – on reasonable grounds – that a warrant would otherwise have been authorised) also to be applicable to this reading-in."

25.7 The Court went on to craft its order in precisely this way. While its order creates a default requirement of a warrant for a search of a private residence, it includes the following express exception for cases of urgency:

> *"(f) An officer may enter and search a private residence without the warrant referred to in paragraph (c) if—*
>
> *(i) the officer on reasonable grounds believes—*
>
> *(aa) that a warrant would be issued in terms of paragraph (c) if the officer applied for it; and*
>
> *(bb) that the delay in obtaining the warrant is likely to defeat the object of the search."*

25.8 Given that the very purpose of the reading-in order was to protect the privacy of the persons involved,[32] it appears clear that the Court considered this an appropriate regime to protect the right to privacy.

25.9 The Court then subsequently adopted the identical approach in *Estate Agency Affairs Board.* There, it had to grant a reading-in in respect of both the Estate Agency Affairs Act and FICA. Again, the purpose was to protect the right to privacy. Again the Court opted for a regime whereby

[32] *Gaertner* at para 86

the default was a requirement of a search warrant to search a private residence, but with an exception for cases of urgency. The FICA exception created by the Court read:

> *"(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."*

25.10 Thus, in both *Gaertner* and *Estate Agency Affairs Board,* the Court appears to have accepted that the right to privacy permits an exception to the warrant requirement where urgency does not permit a warrant to be obtained. It bears emphasis that both cases concerned searches of private homes and both cases concerned searches which might result in criminal prosecutions.

25.11 The principle that this kind of urgency justifies dispensing with the warrant requirement is put beyond doubt by the series of statements made by the Court regarding section 22 of the CPA.

25.11.1 In *Magajane,* the Court cited section 22 of the CPA as an instance "*where warrantless searches are justified*".[33]

[33] *Magajane* at para 76.

25.11.2 In *Gaertner*, the Court held that the "*law recognises that there will be limited circumstances in which the need for the state to protect the public interest compels an exception to the warrant requirement*" and cited section 22 of the CPA as an example.[34]

25.11.3 In *Ngqukumba*, the Court made clear that police officers are generally required to comply with the warrant requirement but then held that "*where there is a need for swift action, the police can always invoke section 22*" of the CPA.[35]

25.11.4 Most recently, in *Kunjana* the Court held that section 22 of the CPA "provides for a constitutionally sound warrantless search procedure".[36]

25.12 It is thus quite clear that, on the existing jurisprudence, a warrant requirement may be dispensed with in urgent situations. As the cases cited make clear, this is so even in respect of searches of private homes and even where criminal offences are involved.

25.13 Yet this is precisely what the proposed section 45B(1C) seeks to do.

26 **Third, the option of ex parte applications does not create a less restrictive means.**

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[34] *Gaertner* at para 70, see also para 73

[35] *Ngqukumba v Minister of Safety and Security and* Others [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) at para 19

[36] *Kunjana* at para 30

26.1 In his referral, the President suggests that the element of surprise can be met by allowing warrants to be issued without notice to other parties – that is ex parte applications.[37] He cites paragraph 39 of *Estate Agency Affairs Board* in this regard.

26.2 However, in our view that contention is misplaced. Ex parte applications are indeed an effective way of maintaining the element of surprise. That is why – as a default position – warrants are generally required. That is the point made by paragraph 39 of the *Estate Agency Affairs Board* decision.

26.3 But the question of a default position is quite different from the question how urgent searches are to be dealt with.

26.4 The suggestion of using ex parte applications does not resolve the difficulty of urgency that is sought to be addressed by the proposed section 45B(1C) and, indeed, by section 22 of the CPA and the Court's reading-in orders. Those provisions seek to address the situation where the person conducting the search fears, on reasonable grounds, that by the time the application for a warrant has been prepared and granted, the evidence concerned will have been concealed or destroyed – in other words, the purpose of the search will be undermined. Using ex parte applications cannot assist at all in this regard.

[37] President's referral, para 7(e)(iii)

26.5 In the circumstances, we do not believe that the President's contention is well-founded.

27 **Fourth, if there is any concern about the breadth of the search, this is resolved by a process of interpretation, including reading-down.**

27.1 The President raises a concern that the proposed section 45B(1C) does not require that the FIC 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*". The President seeks to contrast this with section 22 of the CPA, which specifies that the search concerned must be for the purposes of seizing any article referred to in section 20 of the CPA.[38]

27.2 We agree with the President that it is important that those conducting a search of this type only search for documents relevant to the purpose of the search.

27.3 But we do not agree that the mere fact that the proposed section 45B(1C) does not say so expressly creates a constitutional difficulty.

27.4 This is because the proposed section 45B(1C) must be interpreted both in a manner that adheres to the context provided by other provisions and in a manner that conforms to the Constitution.

[38] President's referral, para 7(e)(i)

27.5 In relation to contextual interpretation:

27.5.1 it is now well-established that all statutory provisions must be interpreted in a contextual manner. This means taking account of both "*the context in which the provision appears*" and "*the apparent purpose to which it is directed*".[39] In the present case, this means that the proposed section 45B(1C) must be interpreted in the context of its surrounding provisions.

27.5.2 In this regard, the proposed section 45B(1A) makes clear that the entry into the premises concerned may only be "*for purposes of determining compliance with*" FICA or relevant directives. The proposed section 45B(1B) then similarly makes clear that a warrant may only be granted where the judicial officer concerns is satisfied that *"entry to the residence or premises is likely to yield information pertaining to the non-compliance"* with FICA and that *"entry to the residence or premises is reasonably necessary for the purposes of"* FICA.

27.5.3 In our view, these provisions make clear that in a warrant-based search in terms of proposed section 45B(1A), the person conducting the search may only search for information pertaining to non-compliance with FICA and the relevant directives thereunder.

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[39] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18

27.5.4 Though not stated expressly, that same principle must apply to the proposed section 45B(1C). It is plain that the search envisaged by the section has precisely the same purpose and ambit as the search envisaged in section 45B(1A) – the only difference is that the former takes place without a warrant due to urgency.

27.5.5 On a proper contextual interpretation, therefore, the proposed section 45B(1C) already requires that the person conducting the search may only search for information pertaining to non-compliance with FICA or the directives thereunder.

27.6 In relation to constitutional interpretation:

27.6.1 It is trite that, where reasonably possible, all provisions must be interpreted in a manner that conforms with the Constitution. This is required by section 39(2) of the Constitution and has been repeatedly made clear by our highest courts.[40]

27.6.2 Importantly, it has also been made clear in precisely this context by the Constitutional Court in *Estate Agency Affairs Board*. In that case, the provisions of both the Estate Agents Affairs Act and FICA did not specify which articles could be examined or seized. For example, FICA allowed inspectors access to "*any data*" while

[40] Eg: *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28(c); *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) at para 10.

the Estate Agency Affairs Act allowed for "*any*" document to be demanded.

27.6.3 However, the Court did not consider that these broad definitions rendered the sections unconstitutional. (Rather, it was only the complete absence of a warrant requirement that did so *read down*.) Instead the Court made clear that both of these provisions – "any" document and "any data" – should probably be "read down" to require a link to the purpose of the statute concerned.[41]

27.6.4 In other words, the Court considered that this difficulty could be resolved at the level of statutory interpretation,[42] rather than by holding that the provisions were constitutionally invalid. Precisely the same applies here.

27.6.5 On a proper constitutional interpretation, therefore, the proposed section 45B(1C) already requires that the person conducting the search may only search for information pertaining to non-compliance with FICA or the directives thereunder.

27.7 We also emphasise that the mere fact that section 22 of the CPA cross-refers to section 20 of the CPA should not be overemphasised.

27.7.1 Section 20 is extraordinarily broad and allows for seizure of:

---

[41] *Estate Agency Affairs Board* at para 37.

[42] "Reading down" is an technique of statutory interpretation. This is different to the "reading in" remedy discussed earlier, which only applies after a provision is declared unconstitutional.

(a) Any item which is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence;

(b) Any item which may afford evidence of the commission or suspected commission of an offence;

(c) Any item which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

27.7.2 It is thus hardly a material constraint on those conducting warrantless searches under section 22 of the CPA. Yet, as we have explained in detail above, the Constitutional Court has repeatedly indicated its approval of section 22 of the CPA.

27.8 Lastly, we note that the sections read-in by the Constitutional Court in both *Gaertner* and *Estate Agents Affairs Board* did not contain the restriction that the President now contends is necessary to meet the requirements of section 14.

27.8.1 In *Estate Agency Affairs Board*, for example, the provision read-in provided simply that:

> *"(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."*

27.8.2 There was thus not attempt to expressly constrain the ambit of the search.

27.8.3 If this had been necessary to comply with section 14 of the Constitution, as the President suggests, the Constitutional Court would no doubt have said so and adopted this approach. It did not do so.

28 **Finally, the proposed section 45B(1C) must be read with the constraints imposed by the proposed section 45B(1D).**

28.1 As we have explained, the proposed section 45B(1D)constrains the manner of the warrantless search.

28.2 It stipulates that the search must take place:

28.2.1 at a reasonable time;

28.2.2 on reasonable notice, where appropriate; and

28.2.3 with strict regard to decency and good order, including to a person's right to respect for and the protection of dignity; freedom and security; and personal privacy.

28.3 This is a further safeguard of the right to privacy. Indeed, it is a safeguard which goes beyond the safeguards contained in section 22 of the CPA and the reading-in orders granted by the Constitutional Court in *Gaertner* and *Estate Agency Affairs Board.*

THE OPTIONS AVAILABLE TO THE NATIONAL ASSEMBLY

29 We have concluded that the proposed section 45B(1C) is consistent with the Constitution. In view of this, the National Assembly would be perfectly entitled to simply re-affirm the Bill in its existing form.

30 In the event, however, that the National Assembly wanted to, it could also amend the Bill to make expressly clear the limits of the searches under section 45B(1C).

30.1 It could do so most easily by adding an additional subsection to the proposed section 45B(1D), as follows:

> *"(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.*
>
> *(d) only for the purpose of determining compliance with this Act or any order, determination or directive made under this Act."*

30.2 We reiterate that we do not consider that the Constitution requires this addition to be made. This is because it is already inherent in the section, on a proper interpretation.

30.3 However, the National Assembly may perhaps take the view that this addition could alleviate the President's concerns, resulting in the Bill being more swiftly enacted than if the President were to refer it to the Constitutional Court.

CONCLUSION

31 We therefore conclude that the proposed section 45B(1C) is consistent with the Constitution.

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23 January 2017