CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/13

In the matter between:

ESTATE AGENCY AFFAIRS BOARD	Applicant
and	
AUCTION ALLIANCE (PTY) LTD	First Respondent
MINISTER OF HUMAN SETTLEMENTS	Second Respondent
MINISTER OF FINANCE	Third Respondent

Neutral citation:	*Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J and Zondo J
Heard on:	18 November 2013
Decided on:	27 February 2014
Summary:	Estate Agency Affairs Act 112 of 1976 – constitutionality of section 32A – right to privacy – warrantless searches – section 32A unconstitutional Financial Intelligence Centre Act 38 of 2001 – constitutionality of section 45B – right to privacy – warrantless searches – section 45B unconstitutional

Retrospectivity of orders of invalidity – courts' power to limit retrospective effect generally exercised

Counter-application for a warrant – inherent jurisdiction – section 172(1)(b) of the Constitution – courts' power to issue a warrant limited

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ORDER

Application for confirmation of two declarations of constitutional invalidity of the Western Cape High Court, Cape Town (Louw J). The declarations are confirmed, but the terms of the High Court order are varied. The full order is at [73].

JUDGMENT

CAMERON J (Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J and Zondo J concurring):

[1] These are confirmation proceedings in respect of an order the Western Cape High Court, Cape Town (High Court) granted declaring section 32A of the Estate Agency Affairs Act[1] (Act) and section 45B of the Financial Intelligence Centre Act[2] (FICA) constitutionally invalid.[3] Both provisions confer wide powers of search and

[1] 112 of 1976. Section 32A is set out below at n 13.

[2] 38 of 2001. Section 45B is set out below at n 14.

[3] *Auction Alliance (Pty) Ltd v Estate Agency Affairs Board and Others* [2013] ZAWCHC 105 (High Court judgment).

seizure on regulatory bodies. The applicant, the Estate Agency Affairs Board (Board), tried to use those powers to search the business premises of the first respondent, Auction Alliance (Pty) Ltd. Auction Alliance resisted. It obtained an order that the provisions under which the Board acted were constitutionally invalid. The parties meanwhile agreed that the evidence the Board sought to seize under the impugned powers should be preserved, pending the outcome of these proceedings.

[2] In this Court, there was no dispute on the primary question: all parties agreed that the provisions cannot be defended, and that this Court should confirm the High Court's declaration of invalidity. So the main debate was about defining the contours, and managing the consequences, of invalidity. Should the declarations of invalidity be retrospective, so as to invalidate action previously taken under the provisions? Should the orders be suspended? And, if so, should the Court as an interim measure order that words be read into the provisions?

[3] Beyond these questions lay an even more contested issue. This was whether the Court, if it strikes down the authorising provisions, may, in the exercise of its inherent jurisdiction, grant a search warrant to the Board in respect of the preserved items.

Parties

[4] Under the Act, the Board regulates the estate-agency industry. It must "maintain and promote the standard of conduct of estate agents" and "regulate" their

activities.[4] The Board is also a "supervisory body" under FICA.[5] In that role, it is required to combat money laundering and financing of terrorism and related activities.[6]

[5] The first respondent in this Court – the applicant in the High Court – is Auction Alliance (Pty) Ltd, a company doing business as an auctioneer. Its main offices are in Cape Town, with smaller offices in Johannesburg and Durban. Because the definition of "estate agent"[7] in the Act covers almost any person dealing in property, Auction Alliance is an estate agent under the statute. Further, all estate agents are "accountable institutions" under FICA.[8] The two statutes impose a range of record-keeping, reporting and other obligations on it.[9] To violate many of these is a crime.[10]

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[4] Section 7 of the Act.

[5] Schedule 2 of FICA provides a list of seven supervisory bodies.

[6] See, for example, section 36(1) of FICA.

[7] Section 1 of the Act defines an "estate agent", for the purposes of section 32A, as—

> "any person who for the acquisition of gain on his account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person—
>
> (i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser therefor; or
>
> (ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or
>
> (iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or
>
> (iv) renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the *Gazette*".

[8] Schedule 1 of FICA sets out the categories of persons and institutions that are "accountable institutions". Item 3 specifies estate agents as defined in the Act.

[9] See, for example, section 29 of the Act and Chapter 3 of FICA.

[10] Section 34 of the Act and Chapter 4 of FICA.

[6] Because of the statutory designations of the Board and Auction Alliance, both section 32A of the Act and section 45B of FICA at present authorise the Board to conduct searches of Auction Alliance's premises without first obtaining a warrant.[11]

[7] The second and third respondents are the Ministers responsible for the administration of the Act and FICA respectively.[12]

Factual background

[8] Mr Rael Levitt, the founder and former chief executive of Auction Alliance, was in early 2012 the subject of a television exposé that, if accurate, would implicate Auction Alliance in activities constituting gross and wide-ranging violations of the Act and FICA. The producers sent the information they gathered to the Board, which commenced an investigation. While the Board was devising a strategy with the Financial Intelligence Centre (Centre), the main authority responsible for FICA's enforcement, to which supervisory bodies like the Board report, it learned that Auction Alliance was destroying documents and information. The Board sprang into action. It set out on an urgent search of Auction Alliance's business premises in Cape Town, Johannesburg and Durban. Its inspectors arrived unannounced and

[11] See the text of these provisions below at n 13 and n 14.

[12] The Minister of Human Settlements is responsible for administering the Act. Before the hearing in this Court, the Court substituted her as second respondent in place of the Minister of Trade and Industry.

warrantless. Relying on the powers conferred by section 32A of the Act[13] and section 45B of FICA,[14] they demanded entry.

[13] Section 32A of the Act provides:

> "(1) Any inspector furnished with inspection authority in writing by the board may conduct an investigation to determine whether the provisions of the Act are being or have been complied with and may, subject to subsection (5), for that purpose, without giving prior notice, at all reasonable times—
>
> (a) enter any place in respect of which he has reason to believe that—
>
> (i) any person there is performing an act as an estate agent;
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> (ii) it is connected with an act performed by an estate agent;
>
> (iii) there are books, records or documents to which the provisions of this Act are applicable;
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> (b) order any estate agent or the manager, employee or agent of any estate agent—
>
> (i) to produce to him the fidelity fund certificate of that estate agent;
>
> (ii) to produce to him any book, record or other document in the possession or under the control of that estate agent, manager, employee or agent;
>
> (iii) to furnish him, at such place and in such manner as he may reasonably specify, with such information in respect of that fidelity fund certificate, book, record or other document as he may desire;
>
> (c) examine or make extracts from or copies of such fidelity fund certificate, book, record or other document;
>
> (d) seize and retain any such fidelity fund certificate, book, record or other document to which any prosecution or charge of conduct deserving sanction under this Act may relate: Provided that the person from whose possession or custody any fidelity fund certificate, book, record or other document was taken, shall at his request be allowed to make, at his own expense and under the supervision of the inspector concerned, copies thereof or extracts therefrom.
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> (2) No person shall—
>
> (a) fail on demand to place at the disposal of any inspector anything in his possession or under his control or on his premises which may relate to any inspection;
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> (b) hinder or obstruct any inspector in the exercise of his powers under this section;
>
> (c) falsely hold himself out to be an inspector.
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> (3) Any inspector shall issue a receipt to the owner or person in control of anything seized and retained under this section.
>
> (4) Any inspector who exercises any power in terms of this section shall, at the request of any person affected by the exercise of that power, produce the inspection authority in writing furnished to him in accordance with subsection (1).
>
> (5) Notwithstanding anything contained in this section, the provisions thereof, excluding subsection (2)(c), shall not apply in respect of—

(a) any attorney, member of a professional company or articled clerk, as defined in section 1 of the Attorneys Act, 1979 (Act No 53 of 1979), or any employee of any such attorney, member or company;

(b) any premises from which such attorney or company conducts his or its practice; and

(c) any book, record or document on such premises or in the possession or under the control of any person referred to in paragraph (a)."

[14] Section 45B of FICA provides:

"(1) For the purposes of determining compliance with this Act or any order, determination or directive made in terms of this Act, an inspector may at any reasonable time and on reasonable notice, where appropriate, enter and inspect any premises 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.

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

(a) in writing direct a person to appear for questioning before the inspector at a 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—

(i) to produce that document; or

(ii) to furnish the inspector at the place and in the manner 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 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 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.

(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, 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.

[9] Auction Alliance refused. Instead, it launched an application for both interim relief, to prevent the Board from conducting the warrantless search and seizure operation, and for final relief through its constitutional challenge to the two provisions. The Board opposed the main application. It also brought a counter-application asking the High Court to grant it a warrant permitting it to search Auction Alliance's premises.

[10] The interim relief became redundant when the parties agreed to allow KPMG, an independent auditing and accounting firm, to copy and preserve all the data on Auction Alliance's computer servers. It did so "pending the judicial determination" of Auction Alliance's legal challenge to the validity of the contested inspection.

(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) 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."

[11] The Board's affidavits set out in detail the evidence against Mr Levitt and Auction Alliance. The High Court found that this evidence strongly suggested that Auction Alliance had, as part of its operations, committed serious breaches of both the Act and of FICA. In response, Auction Alliance chose to adopt a tactical position. It tendered no explanation or rebuttal. Instead, it focused on the constitutional validity of the provisions. That was its choice. But it means, as the High Court found, that the Board's allegations must for present purposes be accepted as true. The litigation must be determined on the basis that Auction Alliance committed grave infractions of the laws regulating its business.

In the High Court

[12] The High Court (Louw J) gave two judgments. In the first, the Court decided the narrow question whether its inherent jurisdiction, independent of statutory authority, empowered it to grant the Board's counter-application for a warrant to search Auction Alliance's premises.[15] Despite the prima facie evidence of serious breaches of the two statutes by Auction Alliance, which it found established a reasonable suspicion of wrongdoing, the High Court held that it did not have inherent jurisdiction to grant a warrant. That jurisdiction, it held, is limited to regulating the Court's own processes in pending or intended litigation. This would allow the Court to grant a warrant to preserve evidence pertinent to pending or intended litigation. But where, as here, the desired warrant is directed at an objective unrelated to the High

[15] *Auction Alliance (Pty) Ltd v Estate Agency Affairs Board and Others* [2013] ZAWCHC 92.

Court's own processes and evidence-preservation, there had to be statutory authority for a warrant.

[13] The Court's second judgment – the one at issue in these proceedings – decided the constitutional validity of the two impugned provisions.[16] The Court noted that Auction Alliance did not challenge "routine" inspections of its premises. It limited its challenge to warrantless "non-routine" (or "targeted") inspections – in other words, those based on a particularised suspicion of wrongdoing, as in the instance it sought to resist.

[14] On section 32A of the Act, the Court noted that, in terms of this Court's judgment in *Magajane*,[17] all statutorily authorised inspections limit the constitutional right to privacy.[18] The Court considered whether the inspections were reasonable and justifiable limitations under the Constitution.[19] The Court concluded that those

[16] High Court judgment above n 3.

[17] *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC).

[18] Section 14 of the Bill of Rights provides:

> "Everyone has the right to privacy, which includes the right not to have—
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> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[19] Section 36(1) of the Constitution permits the limitation of rights only—

> "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;

engaged in the estate-agency industry have a reduced expectation of privacy. It found further that the search the Board tried to conduct was, under *Magajane*,[20] a search aimed at enforcement. And it concluded that section 32A is overbroad. This was because it authorises a warrantless search of "any place" an inspector has reason to believe "is connected with an act performed by an estate agent".[21] So wide is the wording here that this could include even the private homes of estate agents' former clients. In addition, the provision poses no requirement of prior notice, nor any guidance about how a search should be conducted. The provision was also overbroad because it requires an estate agent to produce "any . . . document" demanded by an inspector, without limitation as to relevance.[22]

[15] In part due to this overbreadth, the Court found that the provision did not survive scrutiny under the "less restrictive means" rubric of the limitations clause.[23] There was little evidence that requiring a warrant for targeted searches would hinder the Board's work. Hence, despite industry participants' reduced expectation of privacy, non-routine warrantless searches[24] could not be justified when undertaken

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(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

[20] See *Magajane* above n 17 at para 70, which explains the distinction between searches intended to ensure, at the industry level, general compliance with the regulatory scheme and searches aimed at enforcement of a regulatory provision against a particular actor.

[21] Section 32A(1)(a)(ii) of the Act.

[22] Id section 32A(1)(b)(ii).

[23] Section 36(1)(e) of the Constitution.

[24] The High Court, relying on the High Court judgment in *Gaertner and Others v Minister of Finance and Others* [2013] ZAWCHC 54; 2013 (4) SA 87 (WCC); 2013 (6) BCLR 672 (WCC), defined a "non-routine inspection" as "an inspection which an inspector has decided to conduct because a suspicion exists that a failure to comply with this Act or any order, determination or directive made in terms of this Act or that a contravention of the Act has occurred and because the inspector suspects that information pertaining to such failure or contravention may be discovered if the premises in question are subjected to an inspection".

with a view to enforcing statutory provisions that could eventually include criminal or quasi-criminal sanctions.

[16] The Court further held that neither a reading down nor a reading in could salvage section 32A. Neither option was viable, because it would require detailed rewriting of the provision. Not only would the reading in have to distinguish between compliance and enforcement searches, but it would also have to set out the authority for issuing warrants, the requirements for issuing warrants, and the parameters within which the warrants may be executed. This was best left to the Legislature. The Court therefore held section 32A unconstitutional and invalid. Employing notional severance, it declared the provision invalid to the extent that it "permits any inspections other than routine or random inspections aimed at ensuring compliance" with the Act.

[17] The Court also found section 45B of FICA wanting, though less so. It noted the Act's primary objective, which is to ensure transparency and regulatory compliance in the financial system for the purpose of combating money laundering and preventing the financing of terrorist activities. This meant that corporate entities like Auction Alliance, operating in a closely regulated industry, would have a reduced expectation of privacy. Even though the inspection the Board sought to undertake was targeted and non-routine, aimed at criminal investigation, and could possibly result in penal sanction and prosecution, the FICA provisions were not overbroad.

[18] Here, the Court noted that the section requires that the inspection, whether routine or targeted, be for the purpose of determining compliance with FICA. It also requires reasonable notice, and demands that searches be at reasonable times. Inspections are also limited to determinable business premises, and guidance is provided to inspectors. Documents subject to inspection are limited to those relating to the institution's affairs. Though the Court noted that an inspection may be conducted at a private home where there is a reasonable belief that a business of the kind contemplated is being conducted, and that the provisions cover a large number of industries, the Court nevertheless concluded that the purpose of FICA requires this breadth.

[19] The Court considered the section well-tailored to the ends it sought to achieve, but it nevertheless held that there were less restrictive means available. The state respondents had not shown that requiring a warrant for targeted non-routine inspections would defeat the purpose of inspections. Section 45B of FICA, like section 32A of the Act, was therefore unconstitutional. But, because of the substantial public interest considerations at issue, the declaration of unconstitutionality had to be suspended for 18 months to afford the Legislature an opportunity to amend section 45B.

[20] In the interim, the Court provided an extensive reading in of section 45B.[25] This drew heavily on the High Court judgment in *Gaertner*.[26] After the High Court

[25] In terms of this reading in, section 45B(1) of FICA was deemed to read (the underlined portions being the reading in):

"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, conduct a routine inspection in terms of this section and the inspector may further, subject, however, to the provisions of paragraphs 7(b) to (e) of this section, conduct a non-routine inspection in terms of this section, and the inspector may for purposes of both such inspections 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."

The existing section 45B(7) was substituted with the following:

"(a) No warrant is required for the purposes of a routine inspection in terms of this section.

(b) If an inspector wishes to enter premises to conduct a non-routine inspection in terms of this section, the inspector shall not do so except on the authority of a warrant issued in terms of paragraph (c) of this subsection.

(c) An inspector may apply to a magistrate or judge in chambers for the issue of a warrant contemplated in paragraph (b) of this subsection, and the magistrate or judge may issue such warrant if it appears from information on oath:

(i) That there are reasonable grounds for suspecting that a failure to comply with this Act or any order, determination or directive made in terms of this Act or that a contravention of the Act has occurred; and

(ii) That an inspection and search of the premises is likely to yield information pertaining to such failure to comply or contravention; and

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

(d) An inspector may enter and inspect premises without the warrant contemplated in paragraph (b) of this subsection if:

(i) The person in charge of the premises consents to the entry and inspection after being informed that he is not obliged to admit the inspector in the absence of a warrant; or

(ii) The inspector on reasonable grounds believes:

(aa) That a warrant would be issued in terms of paragraph (c) of this subsection if the inspector applied for a warrant; and

(bb) that the delay in obtaining a warrant is likely to defeat the object of the inspection and search.

(e) For purposes of this sub-section the following expressions have the meaning indicated:

(i) 'non-routine inspection' means an inspection which an inspector has decided to conduct because a suspicion exists that a failure to comply with this Act or any order, determination or directive made in terms of this Act or that a contravention of the Act has occurred and because the inspector suspects that information pertaining to such failure or contravention may be discovered if the premises in question are subjected to an inspection.

(ii) 'routine inspection' means any inspection or examination other than a non-routine inspection."

[26] Above n 24.

judgment in this matter, though, this Court issued judgment in the confirmation proceedings in *Gaertner*.[27] There, it declined to adopt the reading in set out by the High Court in that matter.

[21] In addition, the High Court here extended the consensual interim arrangement embracing KPMG's preservation of Auction Alliance's computer data, to afford the Board an opportunity to apply for a warrant in terms of the reading in. Neither declaration of invalidity was to apply retrospectively.

In this Court

[22] The Board accepted for the first time that section 32A is unconstitutional because of its overbreadth. It shifted its stance to argue that the High Court went too far in holding that warrantless, suspicion-based searches in regulated industries are inevitably unconstitutional. It attacks this finding as a departure from South African precedent, which regards the expectation of privacy of actors in regulated industries as sharply attenuated.[28] It contends that endorsing the High Court's conclusion would require a new development of constitutional law and a drawing of sharp lines where previously there have been none.

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

[28] The Board relied on the authorities cited in *Gaertner* above n 27 at paras 36 and 44.

[23] This development, the Board argues, would also be inconsistent with the United States and Canadian approaches.[29] Further, it would unduly constrain Parliament when it seeks to remedy the constitutional defect while remaining in step with international best practices. In particular, the Board urges this Court not to foreclose the possibility of future legislation that may authorise warrantless searches when regulators employ a risk-based approach to industry-level administrative oversight.

[24] The Board accordingly requests an order declaring section 32A unconstitutional and invalid, without retrospective effect, suspended for two years. It suggests that, during the suspension, the Board be required to comply with the warrant requirements of the Criminal Procedure Act[30] (CPA) and that the Board's inspectors be permitted to make use of the powers conferred by its provisions.[31]

[25] Finally, the Board urges this Court to reverse the High Court's refusal to grant its counter-application for a warrant to conduct a search of Auction Alliance's premises. It argues that the Court should do this drawing either on its inherent powers or those conferred by section 172(1)(b) of the Constitution.[32]

[26] Like the Board, the Ministers do not dispute that the sections are invalid. But they also argue that the High Court went too far. Relying on the fact that *Magajane*

[29] See *New York v Burger* 482 US 691 (1987) and *R v Jarvis* 2002 SCC 73; [2002] 3 SCR 757.

[30] 51 of 1977.

[31] Sections 20-2 and 25 of the CPA.

[32] This section empowers a court to "make any order that is just and equitable".

related to unlicensed premises, they urge the Court to hold warrantless inspections permissible depending on whether an institution is licensed to conduct business within a field that falls within the scope of industries regulated by FICA. They point out that FICA is not intended to be used as a basis for conducting an inspection as part of a criminal investigation. For the purpose of possible prosecutions for non-compliance with FICA, an investigating authority must use the provisions of the CPA.

[27] The High Court's judgment, the Ministers contend, means that the Board is able to conduct routine compliance searches, but is powerless to do anything when there is a reasonable suspicion that something questionable or unlawful is occurring at an accountable institution. Hence they support the Board's approach.

[28] Auction Alliance takes issue with how the Board characterises its constitutional challenge. Its only attack on the Act and FICA is that they permit warrantless targeted searches. It adds that the conception of the challenge will impact the nature of the remedy. It urges that the distinction between licensed and unlicensed premises makes no sense in the context of estate agents, because they are not required to register a place of business or conduct the business of an estate agent from that place. In fact, many estate agents conduct business from home.

[29] Hence, Auction Alliance opposes the bald declaration of invalidity that the Board seeks. Instead, it asks the Court to declare both provisions invalid to the extent that they permit any inspections "other than routine or random inspections aimed at

ensuring compliance" with the Act. That, it suggests, would represent less interference with the separation of powers. Auction Alliance further asks this Court to make the High Court's order in respect of section 32A retrospective, so that the invalidity applies with effect from the start of the constitutional era. It submits that the only exception should be cases that have already been finalised. This, it argues, is consistent with the Court's past practice.

[30] Auction Alliance also rejects the High Court's proposed reading in of section 45B of FICA. Its argument here parallels that of the Board. It urges that to confirm the reading in would unduly trespass on the terrain of the Legislature. Instead, it argues, the Court should simply invalidate the section, as the High Court ordered in respect of section 32A of the Act.

[31] Auction Alliance strongly opposes the Board's appeal against the dismissal of its counter-application for a search warrant. It contends that for the Court to grant the Board a warrant, without direct statutory authorisation, would amount to a "judicial bill of attainder" unjustly targeting it.

Issues

[32] These issues must be decided:

(a) Are the impugned provisions constitutionally invalid?

If so:

(b) Should the declarations of invalidity be retrospective?

(c) Should the declarations of invalidity be suspended, and, if so—

(i) for how long?

(ii) should there be a reading in?

(d) Is the Board entitled to a court-issued search warrant?

Constitutional validity of section 32A and section 45B

[33] This case requires no reinvention. The terrain has recently and closely been traversed in *Gaertner*.[33] There, this Court invalidated provisions of the Customs and Excise Act.[34] These authorised warrantless searches of any premises at any time; allowed inspectors to demand books, documents or things from any person believed to have them or control over them, and to do so at any time and at any place; permitted them to break open doors, windows, walls or flooring of any premises at any time in order to search; and authorised them to open, in any manner, any room or safe if it is locked and the keys were not produced on demand. The only qualification on the exercise of these powers, the Court noted, "if a qualification at all",[35] was that premises could be entered only "for the purposes of" the statute.[36] Beyond this, the provisions gave officials far-reaching powers that could "be exercised anywhere, at whatever time and in relation to whomsoever, with no need for the existence of a reasonable suspicion, irrespective of the type of search."[37]

[33] Above n 27.

[34] 91 of 1964. The provisions invalidated were section 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6).

[35] *Gaertner* above n 27 at para 38.

[36] Section 4(4)(a) of the Customs and Excise Act.

[37] *Gaertner* above n 27 at para 66.

[34] The provisions' enormous sweep (which extended not only to the homes and places of business of those operating in the customs and excise industry, but also the homes of their clients, associates, employees and relatives), the absence of any requirement, as a precondition to a search, that there be suspicion (let alone a reasonable suspicion), and the unbounded manner in which searches were licensed, led the Court to conclude that the provisions unjustifiably limited the right to privacy. Hence, even though customs and excise controls were important,[38] and even though there was a rational connection between tight regulation and the searches authorised,[39] the blanket authorisation of warrantless searches was not justified.[40]

[35] The provisions here are less conspicuously at odds with constitutional rights than those in *Gaertner*. They do not license destruction of property in their execution. The authorisations they afford are also more bounded. Section 32A of the Act limits when searches may be conducted to "all reasonable times".[41] In addition, before premises are entered, the Board's inspector must have "reason to believe" that any person there is performing an act as an estate agent, that the place searched is connected with an act performed by an estate agent, and (if one were to read sub-clauses (i) to (iii) of section 32A(1)(a) conjunctively) that there are books, records or documents to which the Act is applicable.[42]

[38] Id at para 55.

[39] Id at para 67.

[40] Id at paras 68-70 and74.

[41] Section 32A(1).

[42] Section 32A(1)(a).

[36] But these boundaries, though more perceptible, are barely more adequate. The definition of estate agent[43] is so broad that almost any property-related business is vulnerable to search.[44] And beyond the specification as to reasonable times and reason to believe, the search powers are almost as unlimited in scope, performance and execution as in *Gaertner*. As the High Court pointed out,[45] section 32A does not sufficiently circumscribe the discretion of an inspector regarding the place and scope of the search. "Any place" can include the private home, not only of an estate agent, but of the owner of a show house who keeps a copy of an offer to purchase there.[46]

[37] The documents that inspectors may demand are not limited to those linked to the business of estate agency. Though the provision should probably be read down to require that link, in its terms it requires production of "any" document in the possession or under the control of an estate agent.[47] Apart from requiring that inspectors produce written inspection authority at the request of the person searched,[48] the statute gives no limiting guidelines as to how searches and seizures may be carried out. FICA likewise licenses access to "any data".[49] That provision should probably also be read down.

[43] The definition is quoted in n 7 above.

[44] Section 32A(5) expressly exempts attorneys, articled clerks and members of professional companies as defined in the Attorneys Act 53 of 1979.

[45] High Court judgment above n 3 at para 21.

[46] Id at para 21.1.

[47] Section 32A(1)(b)(ii) of the Act.

[48] Id section 32A(4).

[49] Section 45B(2)(d)(i) of FICA.

[38] Section 45B of FICA, a post-constitutional enactment,[50] is more carefully circumscribed, and thus further from the pre-constitutional provisions at issue in *Gaertner*. Like section 32A, it limits searches to reasonable times.[51] In addition, it requires "where appropriate" that reasonable notice of the search be given.[52] As the High Court pointed out, section 45B defines the premises that may be targeted and sets out, in some detail, the powers and obligations of inspectors during inspections.[53] While, again, the powers extend to "any premises",[54] they may be exercised only when the Centre, or a supervisory body like the Board,[55] reasonably believes that the business of an accountable institution, reporting institution[56] or other person to whom FICA applies is being conducted there. In addition, the provision requires that non-routine inspections by a supervisory body, like the Board, may be conducted only after consultation on that inspection with the Centre.[57]

[39] These features led the High Court to conclude that, given the pressingly important objectives of FICA in combating money laundering and the financing of

[50] FICA was enacted in 2001, and section 45B was inserted by section 16(b) of the Financial Intelligence Centre Amendment Act 11 of 2008.

[51] Section 45B(1) of FICA.

[52] Id.

[53] High Court judgment above n 3 at para 50.

[54] Section 45B(1) of FICA.

[55] Section 45(1) of FICA provides:

> "Every supervisory body is responsible for supervising and enforcing compliance with this Act or any order, determination or directive made in terms of this Act by all accountable institutions regulated or supervised by it."

As already indicated, the Board is a "supervisory body".

[56] Section 1 of FICA defines a "reporting institution" as "a person referred to in Schedule 3". Schedule 3 has two items: persons who carry on the business of dealing in motor vehicles, and persons who carry on the business of dealing in Kruger rands.

[57] Section 45B(6)(b) provides that an inspector of a supervisory body may conduct an inspection, other than a routine inspection in terms of section 45B, only after consultation with the Centre on that inspection.

terrorism, section 45B is not overbroad.[58] It nevertheless concluded that its provisions failed the "less restrictive means" component of the limitations analysis. In its view, a warrant was necessary for non-routine inspections. While surprise was often crucial, that could be attained by allowing warrants to be issued without notice to other parties (ex parte) and by providing limited exceptions.[59]

[40] Given the unpalatable aspects of both provisions, it is not surprising that the Ministers and the Board, after trying unavailingly in the High Court to defend them, abandoned that stance in this Court, and conceded their invalidity.[60] 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.

[41] Section 32A of the Act suffers, in addition, from many of the specific vices this Court set out in detail in *Gaertner*. It is overbroad in the premises to which it applies and the purposes for which it licenses searches, and it is deficient in failing to guide the manner in which searches should be conducted.

[58] High Court judgment above n 3 at paras 48-9.

[59] Id at para 52.

[60] In addition, this Court's judgment in *Gaertner* above n 27 was delivered on 14 November 2013, days before argument in this case.

[42] In relation to the purpose and importance of the limitation, the major policy factors at issue in *Gaertner* were that customs duties are collected at the national perimeter, where some greater measure of rigorous scrutiny may be required, plus the country's interest in the revenue that customs controls are designed to secure.[61] Those factors are wholly absent in the case of section 32A. Nevertheless, tight regulation of the estate-agency business is important, especially since very large sums of money pass through estate agencies' accounts. Indeed, it is because of this potential for the industry to become a conduit for illicit funds that under FICA the Board is a supervisory body and estate agents are accountable institutions. FICA was enacted to secure vital national objectives. These are stated in its long title: to combat money laundering activities and the financing of terrorist and related activities.

[43] Even so, in starting from the premise that no searches need warrants, section 45B goes too far. Without modulation, that premise cannot be constitutionally acceptable. The possibility of less restrictive means should be considered. It follows that the High Court's conclusion that the provisions must be declared incompatible with the Constitution and therefore invalid was correct.

[44] More difficult are the questions that now arise.

[61] *Gaertner* above n 27 at paras 51-6 emphasises the importance to a developmental state like South Africa of rigorous and efficient collection of customs duties.

Should the declarations of invalidity be prospective only?

[45] An order of full retrospective force would render unlawful all section 32A searches the Board undertook after the Constitution came into effect, and all section 45B searches undertaken under FICA from December 2010, when Chapter Four (sections 45A-45F) came into effect.[62] The High Court did not grant a fully retrospective order. Instead, it ordered that both declarations of invalidity would operate prospectively only. In striking down section 32A, it spelled out that its order would "not affect the validity of any criminal, civil and administrative proceedings that have relied on documents obtained through inspections, searches and seizures" conducted under the provision. It did not specify that the exemption from invalidity would apply only to finalised cases.

[46] Auction Alliance challenged this. It urged this Court to narrow the section 32A order of non-retrospectivity. It argued that unfinalised civil, administrative and criminal matters based on searches conducted under the impugned provisions should not be protected. There was no reason, it submitted, not to allow the declaration of invalidity to hit matters still pending before courts or tribunals. In advancing this argument, Auction Alliance submitted that "the default rule" is that orders of invalidity are retrospective to the date the Constitution came into effect, or the legislation was enacted, whichever is the later. Subject to this rule, it contended, the Court can limit the effect of retrospectivity if it is just and equitable to do so.

[62] Parliament enacted Chapter Four in 2008, but the Minister brought it into operation only in December 2010.

[47] It is as well to clarify that it is misleading to speak of a "default rule" that declarations of invalidity operate retrospectively. In the case of pre-constitutional legislation, an order of invalidity takes effect, if not otherwise specified, with retrospective effect to the date the Constitution came into operation. That is the default position simply because if a court does not make an order limiting the retrospective effect of a declaration of invalidity, its effect reaches back to its constitutional roots. This flows from the objective theory of constitutional invalidity this Court adopted in *Ferreira v Levin*[63] and which it has endorsed many times. It means that all pre-existing laws inconsistent with the Constitution are invalid from the date of the Constitution and that post-constitutional enactments are invalid from the date they came into effect. But this is subject to the Court's remedial power, afforded by the Constitution, when declaring law or conduct inconsistent with the Constitution invalid, to make any order that is just and equitable, including an order limiting the retrospective effect of a declaration of invalidity.[64]

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[63] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 25-30.

[64] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

For a fuller explanation of objective invalidity and its effect on retrospectivity see *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC).

[48] In fact, this Court almost invariably exercises the power to limit the effect of retrospective invalidity.[65] Where good grounds exist to limit retrospectivity, the Court will exercise its power to do so.

[49] Here, the High Court's order is purely prospective. In striking down section 32A, it specified, for clarity, that not only past criminal and civil proceedings, but also administrative proceedings, are exempt from retrospective effect. Sound reasons underlay the breadth of this exemption. As the Board pointed out, there is no suggestion that it has not carried out its functions in good faith in accordance with the powers existing legislation afforded it. What it has done should be protected from retrospective invalidity, even if any proceedings in relation to it are not yet finalised.

[50] That was the approach this Court adopted in *Mistry*,[66] a case decided under the interim Constitution, but after the final Constitution came into effect. Unlike the Constitution, which gives this Court a general just and equitable jurisdiction to limit the retrospective effect of an order of invalidity, the interim Constitution provided that an order declaring invalid a legislative provision that existed when the Constitution

[65] In *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 43 the Court said its power to allow an invalidation to take retrospective effect should be used "circumspectly", so as to avoid unnecessary dislocation and uncertainty in the administration of justice. To the same effect is *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32, where it was held that, as a general principle, an order of invalidity should have no effect on criminal cases that have been finalised before the date of the order. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 96-7 this Court struck down the common-law offence of sodomy, retroactive to the adoption of the interim Constitution in 1994, but nevertheless declined to grant an order of unqualified retrospectivity: those unjustly convicted after 1994 still had to lodge appeals, if necessary by applying for condonation. See too *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 45.

[66] *Mistry v Interim Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC).

came into force did not invalidate anything done or permitted in terms of that provision unless the Court, in the interests of justice and good government, ordered otherwise.[67] Even though the constitutional provisions are different, this Court's general approach in *Mistry* seems apposite. It found that any general declaration of invalidity with retrospective effect—

> "would impact negatively on good government by rendering unlawful all such searches conducted after the retrospective date specified. This could create considerable uncertainty with regard to the validity of proceedings which were conducted on the basis of evidence obtained as a result of such searches. It could also give rise to delictual claims by persons subjected to searches and seizures after that date, and add further burdens to a health budget already under considerable strain."[68]

[51] The Court there refused an order with retrospective effect and granted one prospectively only. It found that there was a "general rule favouring prospectivity".[69] Though this observation was based on the wording of the interim Constitution, the general considerations that underlay it apply with equal force in this case. The proper exercise of this Court's just and equitable jurisdiction requires that the retrospective effect of the order of invalidity be limited to protect all searches the Board has already

[67] Section 98(6) of the Constitution of the Republic of South Africa Act 200 of 1993 provided:

> "Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof—
>
> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
>
> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof."

[68] *Mistry* above n 66 at para 41.

[69] Id.

undertaken. In my view, the express specification the High Court added[70] was overly cautious and unnecessary. A stipulation that the orders operate prospectively only will suffice.

Suspension and reading in

[52] The High Court did not suspend the declaration of invalidity of section 32A. This was presumably because in striking the provision down it used the device of notional severance. This left the provision intact, except, in the terms of the High Court's order, insofar as it "permits any inspections other than routine or random inspections aimed at ensuring compliance" with the Act.

[53] On the other hand, the Court suspended its declaration of invalidity of section 45B for 18 months, to give Parliament a chance to fix the provision. It coupled this with an extensive reading in during the suspension period. This was based on the distinction between routine and non-routine inspections. Routine inspections could proceed. But for non-routine inspections, the Board has to apply for and obtain a warrant from a judge or magistrate.

[54] These are the questions: should the invalidity of both provisions be suspended, and, if so, for how long? And what regime should apply in the interim?

[70] The High Court specified that its declaration of invalidity "shall not be retrospective and shall not affect the validity of any criminal, civil and administrative proceedings that have relied on documents obtained through inspections, searches and seizures" under section 32A.

[55] It seems to me that, rather than using the device of notional severance, the order of invalidity in respect of section 32A should be wholly suspended. Suspension is not an exceptional remedy. It is an obvious use of this Court's remedial power under the Constitution to ensure that just and equitable constitutional relief is afforded to litigants, while ensuring that there is no disruption of the regulatory aspects of the statutory provision that is invalidated. This was well explained in *J*:

> "The suspension of an order is appropriate in cases where the striking down of a statute would, in the absence of a suspension order, leave a lacuna. In such cases, the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna. If the Court is persuaded upon a consideration of these conflicting concerns that it is appropriate to suspend the order made, it will do so in order to afford the Legislature an opportunity 'to correct the defect'. It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants."[71] (Footnote omitted.)

[56] The Board rightly contended that it is important for it to be able to conduct inspections to determine whether statutory breaches have occurred in the period before Parliament enacts remedial legislation. Here, not to suspend the declaration of invalidity would hamstring the Board in carrying out its functions of implementing the regulatory regimes the Act and FICA impose. Auction Alliance complained that the Board's assertions here were unsupported by evidence; but it seems self-evident that deletion from the Board's arsenal of all powers of inspection would seriously hamper it in carrying out its oversight functions.

[71] *J and Another v Director General, Department of Home Affairs and Others* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) at para 21.

[57] Auction Alliance also pointed to *Magajane*,[72] where this Court declined to suspend the order invalidating statutory search and seizure provisions. There, the Court found that inspectors and police were still able to enforce the statute without the provisions at issue: they could investigate violations and police could use their powers to conduct searches without warrants. Compliance inspections would be able to continue. As appears from this reasoning, the unaffected statutory provisions afforded the regulatory authorities sufficient powers to continue their work. Here, inspections are the Board's primary means of enforcing the Act. To invalidate section 32A without suspension would extract the Board's means of enforcing compliance, and leave it toothless.

[58] Auction Alliance suggests that in the interim the Board must cast itself upon the National Prosecuting Authority and the South African Police Service to ensure compliance with the Act and with FICA. This is unrealistic. Police services are already thinly stretched. The Board's evidence gave vivid instances where investigation was compellingly urgent, but the police were unable to respond with sufficient urgency. And the Board is also responsible for inhibiting breaches of the Act and FICA that are non-criminal. The Board needs to do its own supervisory work. To do so, it needs extant legislation.

[59] A further consideration is that estate agents' accounts can be used for criminal activities, as the evidence before us suggests, and for money laundering. Though the

[72] Above n 17 at para 99.

proceeds of illegal gambling, which were at issue in *Magajane*, can obviously be used to fund criminal activities, the supervision of accounts was not present in that case. In addition, the remedial measure in *Magajane*, SAPS warrants, provided an adequate means of policing illegal gambling, while requiring a warrant to search all registered estate agents' activities would hinder the compliance objective. These considerations indicate that, as in the case of section 45B of FICA, the invalidity of section 32A of the Act must be suspended.

[60] It seems advisable to grant the Legislature a 24-month period of suspension. This is longer than the 18 months the High Court afforded. And it is much longer than the six months in *Gaertner*. There, projected new legislation was at an advanced stage of preparation. It had already passed through Cabinet and through some Parliamentary Committees. By contrast, we were informed during argument that, while amendments to the Act have passed through Cabinet, those to FICA have not yet progressed to that stage.

[61] This suggests a longer period of suspension. In my view, the most realistic period would be 24 months. But this longer period means there must be fuller interim arrangements than in *Gaertner*. As pointed out in *J*,[73] the interim relief must be carefully tailored to afford those subject to the invalid statutory regime temporary constitutional relief. The High Court did this in relation to section 45B of FICA

[73] Above n 71.

through an extensive reading in. This does not seem to me to provide the best practical course.

[62] The main reason is that the High Court's reading in relies on the distinction between "routine" and "non-routine" searches. All non-routine searches, without qualification, are proscribed unless a warrant is obtained. That rests on the premise that, apart from urgent cases, warrantless suspicion-based searches – even where the suspicion is based on generalised risk factors, rather than an individualised suspicion – in a regulated field like estate agency are necessarily unconstitutional. I do not think this Court should, at this stage, endorse this assumption. It is one that 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.

[63] In *Gaertner*, this Court held that it was "problematic" to draw the routine versus non-routine distinction in those proceedings.[74] The judgment did not need to distinguish at all between the types of searches or the types of premises to be searched. Madlanga J explained:

> "I am particularly loath to do so as the lawmaker is – at this very moment – in the process of crafting a legislative measure that aims to address the unconstitutionality. The Legislature, guided by this judgment to the extent certain pronouncements have been made, should be given latitude to formulate the inner and outer reaches of the search power."[75]

[74] *Gaertner* above n 27 at para 75.

[75] Id.

[64] The same applies here. But I would go further. The distinction the High Court drew between routine and non-routine searches seems to me to be inapposite and possibly misleading. This is because it does not fully cohere with the distinction *Magajane* drew between searches undertaken for enforcement, as opposed to those undertaken to supervise compliance. Under the *Magajane* dichotomy, a warrant may well not be necessary for compliance searches motivated by an assessment of general risk factors. That is the very point *Gaertner* avoided deciding, and which it is not necessary for us to decide in these proceedings.

[65] For all these reasons, we should refrain from endorsing the routine versus non-routine distinction now. Instead of the notional severance the High Court applied to section 32A, and the reading in it applied to section 45B, it seems to me that the simplest and fairest solution is an order like that in *Gaertner*: one that minimally intrudes on the statute, while ensuring that during the suspension unconstitutional searches cannot for the most part take place.

[66] The Board in its written argument proposed a more extensive reading in, which itself was premised on a distinction between suspicion-based investigations and others. At the hearing, counsel for the Board disclaimed this proposal as "messy". Instead, the reading in ordered below follows that in *Gaertner*, but with the addition that, where the Board considers that a criminal offence has been committed by the target of the search, it must apply on reasonable grounds for a search warrant before

conducting a search. Though drawing this line at suspicion of a criminal offence, while leaving alone targeted suspicion concerning other forms of serious civil but non-criminal infractions, may reflect only an approximation of the constitutional standard, this ensures the Board will be able to perform its important functions during the period of suspension.

Is the Board entitled to a court-issued search warrant?

[67] The most hotly contested issue was the fate of the documents and information KPMG is holding in trust. The Board invited the High Court, in the exercise of its inherent jurisdiction, to issue a warrant enabling it to access the materials. The High Court turned the invitation down.[76] The Board now asks this Court the same, relying also on the Court's powers under section 172(1)(b) of the Constitution,[77] but it must likewise be declined. In doing so, it is not necessary to consider the Board's contentions that the circumstances in which it asks for a warrant are analogous to those in which the courts have granted ex parte orders to ensure that evidence is preserved pending the initiation of litigation in which the evidence will be used.[78] Nor is it necessary to decide whether an order to that effect will be just and equitable under the Court's remedial powers. It should however be said that the Board struggled to explain persuasively what the basis of the power is for granting such access.

[76] This was in the first judgment the High Court delivered, on 21 June 2013. See above n 15.

[77] Section 172(1)(b) of the Constitution provides that, in deciding a constitutional matter within its power, a court "may make any order that is just and equitable".

[78] Here the Board relied upon *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* [1995] ZASCA 49; 1995 (4) SA 1 (A) and *Universal City Studios Inc and Others v Network Video (Pty) Ltd* [1986] ZASCA 3; 1986 (2) SA 734 (A).

[68] It is not necessary to decide these points. The reason is that the Board should be enabled to apply for the warrant it seeks under the provisions of the statutes as they appear after the reading in ordered below. For its part, Auction Alliance resisted affording the Board this opportunity. It strongly urged that this would be unfair. It pointed out that it had resisted the Board's exercise of statutory powers, and its challenge had shown those powers to be unconstitutional and invalid. There must, it said, be some consequence. And the consequence is that the evidence to which the Board seeks to gain access should be lost to it. That, counsel for Auction Alliance urged, was the price we pay for living in a constitutional democracy.

[69] But this is surely wrong. Constitutional litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the Constitution by establishing its meaning through contested cases. In practical terms, it was unrealistic to expect of the Board that it should understand perfectly in advance that the powers it sought to exercise against Auction Alliance were or would be declared unconstitutional. It is not liable to a penalty because it tried to use statutory provisions this litigation has now determined are constitutionally invalid.[79] Likewise, Auction Alliance has not earned a prize or bonus by showing the provisions it contested fall short of the Constitution. What Auction Alliance is entitled to is

[79] Compare *Illinois v Krull* 480 US 340 (1987) at 349-50, where it was deemed unnecessary to exclude evidence obtained under a statute authorising warrantless administrative searches where the search was performed in objectively reasonable reliance on the statute and the statute was only later declared unconstitutional.

effective relief.[80] It secures that relief when the Board's proposed search of its premises is adjudicated in accordance with the Constitution, as the Court will order here.

[70] Hence the Board should be able to try to establish before a judge or magistrate that it is entitled to a warrant against Auction Alliance under the provisions as they now will read during the suspension period. If the Board can establish that it is entitled to a warrant under constitutionally compliant conditions, it should then be able to apply that warrant to the documents and information it sought to obtain at the time it acted against Auction Alliance.

[71] The Board, for its part, complained strenuously that requiring it to apply anew for a warrant would enable Auction Alliance to raise myriad legal points, ensnaring it in complex and protracted litigation. That may be. Auction Alliance is entitled to contest the action taken against it on legally sound grounds. In doing so, it will be alert to the fact that courts are not amenable to facile and obstructive preliminary point-taking.[81] The evidence is not fully before this Court, and it is inadvisable to say more.

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[80] In terms of section 38 of the Constitution, a court may grant "appropriate relief" to a person who establishes an infringement of a constitutional right. The relief that is granted should be effective. See, for example, *Mvumvu and Others v Minister for Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at paras 46 and 48 and *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[81] In *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656 (SCA) at para 5, the Supreme Court of Appeal said:

> "There is no such thing as perfect justice. . . . Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and

Costs

[72] Auction Alliance sought its costs, including the costs of three counsel. The Board conceded that Auction Alliance was entitled to costs, but said that those should be limited to two counsel. In my view, only two counsel are justifiable.

Order

[73] The following order is made:

1. The declaration of constitutional invalidity of section 32A of the Estate Agency Affairs Act 112 of 1976, and of section 45B of the Financial Intelligence Centre Act 38 of 2001, made by the Western Cape High Court, Cape Town is confirmed.
2. The declaration of invalidity is not retrospective.
3. The declaration of invalidity is suspended for 24 months to afford the Legislature an opportunity to cure the invalidity.
4. The order the High Court granted under which KPMG retains a mirror image of the data on the first respondent's computers is extended for 30 days beyond the date of this order to enable the Board to apply for a

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suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution." (Footnotes omitted.)

warrant in respect of the data under the statutory provisions as they will apply during the period of suspension.

5. During the period of suspension, section 32A(1) of the Estate Agency Affairs Act is deemed to read as follows, what is underlined being the reading in:

"(1) Any inspector furnished with inspection authority in writing by the board may conduct an investigation to determine whether the provisions of the Act are being or have been complied with and may, subject to subsection (5), for that purpose, without giving prior notice, at all reasonable times—

(a) enter any place <u>except a private residence</u> in respect of which he has reason to believe that—

(i) any person there is performing an act as an estate agent;

(ii) it is connected with an act performed by an estate agent;

(iii) there are books, records or documents to which the provisions of this Act are applicable;

(b) order any estate agent or the manager, employee or agent of any estate agent—

(i) to produce to him the fidelity fund certificate of that estate agent;

(ii) to produce to him any book, record or other document in the possession or under the control of that estate agent, manager, employee or agent;

(iii) to furnish him, at such place and in such manner as he may reasonably specify, with such information in respect of that fidelity fund certificate, book, record or other document as he may desire;

(c) examine or make extracts from or copies of any such fidelity fund certificate, book, record or other document;

(d) seize and retain any such fidelity fund certificate, book, record or other document to which any prosecution or charge of conduct deserving sanction under this Act may relate: Provided that the person from whose possession or custody any fidelity fund certificate, book, record or other document was taken, shall at his request be allowed to make, at his own expense and under the supervision of the inspector concerned, copies thereof or extracts therefrom.

(1A)

(a) Where the board suspects that a criminal offence has been or is being committed by the person who is the subject of the search, or where it seeks to search premises that are a private residence, an inspector in terms of subsection (1)

may conduct a search only on the authority of a warrant issued by a magistrate or judge.

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

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

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

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

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

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

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

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

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

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

(1A)

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

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

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

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

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

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

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

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

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

7. The applicant and second and third respondents are ordered, jointly and severally, to pay the first respondent's costs, including the costs of two counsel.

For the Applicant:	Advocate S Budlender, Advocate B Manentsa and Advocate N Ferreira instructed by A B Scarrott Attorneys.
For the First Respondent:	Advocate A Katz SC, Advocate J de Waal and Advocate M Bishop instructed by Smiedt & Associates.
For the Second and Third Respondents:	Advocate J Gauntlett SC and Advocate N Pakade instructed by the State Attorney.