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Republic of South Africa
In the Western Cape High Court of South Africa

In the matter between:	Case No: 4850/2012
AUCTION ALLIANCE (PTY) LTD	Applicant
And	
ESTATE AGENCY AFFAIRS BOARD	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
MINISTER OF FINANCE	Third Respondent

Judgment delivered Friday, 28 June 2013

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[1] This second judgment in this matter also concerns the Estate Agency Affairs Board 's (the Board) attempt to conduct warrantless inspections in terms of s 32A of the Estate Agency Affairs Act 112 of 1976 (the EAAA) and s 45B of the Financial Intelligence Centre Act 38 of 2001 (FICA), of the applicant's business premises to ascertain whether there is evidence that the applicant has contravened the provisions of the EAAA and FICA and the applicant's constitutional challenges to the aforementioned sections (the impugned sections).

[2] The respondents oppose the application and contend that the impugned sections are not unconstitutional. There is a conditional counter

application by the Board for the issue of a warrant to inspect the applicant's premises, in the event that it is held that the impugned sections are constitutionally invalid.

[3] An inspector who is authorised by the Board may carry out an investigation under s 32A of the EAAA and, because the applicant is an accountable institution under FICA, an inspector of the Board may also carry out inspections under s 45B of FICA. The Board is a supervisory body under FICA and s 45 of FICA requires the Board to supervise and enforce compliance with FICA.

[4] The impugned sections spell out the purposes for which the investigations and inspections may be conducted. Under s 32 A (1) the inspector may carry out an investigation and enter premises to search and seize for the purpose of determining whether the provisions of the EAAA are being or have been complied with. Inspections under s 45 B(1) of FICA are authorised for the purposes of determining compliance with FICA or any order, determination or directive made under FICA.

[5] The background to the applications is set out in the first judgment delivered on 21 June 2012. The Board regularly carries out inspections in order to effectively regulate the estate agent industry by ensuring regulatory compliance by estate agents, to identify the agents whose conduct requires the Board to take action to enforce compliance and to verify alleged wrong-doing by estate agents. Every year the Board conducts about 2000 random

routine regulatory inspections of estate agents. It also conducts specific targeted non-routine inspections on the basis of specific complaints or a reasonable suspicion of wrongdoing or that statutory violations were taking place.

[6] The applicant has specifically limited its constitutional challenge to non-routine targeted inspections. The applicant's case is that the Board requires prior judicial authority in the form of a warrant to search premises and to seize anything found there where the search and seizure is a targeted inspection and investigation which is carried out for the purpose of criminal investigations and envisaged criminal or quasi-criminal proceedings against the estate agent and its employees who are the subject of the investigation.

[7] It is doubted whether an investigation under s 32 A of EAAA or 45B of FICA may legitimately be conducted for the purpose of the investigation and prosecution of crime. The Board has filed an affidavit by Mr. Baloyi, its Acting Executive Manager of its Enforcement and Compliance Department, who denies that it is the Board's intent in conducting the inspection is to secure evidence to be used in criminal investigation and possible prosecution. He states that the purpose of the inspection is to determine whether there have been any breaches of the EAAA or FICA. (P244 and 312).

[8] The dispute between the applicant and the Board is whether the Board is entitled to proceed with the warrantless targeted inspection at the applicant's premises from which it conducts its business as an auction house.

These premises are the applicant's head office in Cape Town and two of its branches situated in Durban and Cape Town.

[9] I first consider the constitutionality of the provisions of s 32A of the EAAA.

[10] The applicant relies on its constitutional right to privacy under s 14 of the Constitution, of the Republic of South Africa Act, 1996 (the Constitution), which section explicitly provides protection against searches of everyone's person, home and property, the seizure of their possessions and the infringement of the privacy of their communications. It is common cause that both natural and juristic persons have this right to privacy.

[11] In Magajane v Chairperson, North West Gambling Board, 2006 (5) SA 250 (CC), the Constitutional Court held at 273 A – D para [59] that all regulatory inspections constitute searches in terms of s 14 of the Constitution and the respondents concede that the inspections the Board is empowered to carry out under the impugned sections, limit the applicant's constitutional right to privacy.

[12] The first stage of the constitutional analysis is therefore answered in favour of the applicant and the analysis must proceed to the second stage namely to whether the respondents who rely on the impugned sections have provided sufficient evidence to justify the limitation under s 36 (1) of the Constitution, which reads as follows:

36 (1) The right in the Bill of Rights may be limited only in terms of law of general application to the extent the limitation is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom, taking into account all relevant factors, including:

(a) The nature of the right;

(b) The importance and 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.

[13] In regard to the first two of these considerations, namely the nature of the right and the importance and purpose of the limitation, the Board first correctly concedes that the right to privacy is an important freedom and that the need for its protection against search and seizure is weighty. The Board contends, however, that the power afforded to the Board by the impugned sections to conduct not only routine but also targeted searches without first obtaining a warrant, is both important and necessary to enable the Board to fulfil its statutory obligation to effectively regulate the estate agent industry. A well regulated industry is clearly in the public interest. Large amounts of money are involved and the immovable property dealt with, often represent the most valuable asset of an individual. As regards the fourth consideration, there is a significant relation between the need for measures to regulate the industry and the limitation of the privacy right of those involved in the industry. The public interest requires these measures to be effective. Routine searches are important but targeted searches are necessary since they enable the

Board to respond effectively to suspected contraventions of the EAAA and to allegations of wrongdoing made against estate agents and to timeously detect such wrongdoing.

[14] In this case, the nature and extent of the limitation and the question whether there are less restrictive means to achieve the purpose of the legislation, are the more controversial considerations. In Magajane para [66] at 275 GH, the court held that in considering the nature and extent of the limitation in the circumstances of that case (an inspection of commercial private property not licenced for gambling), there are at least three issues that will have a bearing, namely

(1) the level of reasonable expectation of privacy,

(2) The degree to which the statutory provision resembles criminal law and

(3) The breath of the provision.

[15] The Board contends that the extent of the limitation of the right to privacy, in the context of the estate agent industry is not excessive. The entities affected are juristic persons or private individuals that are engaged in a business which requires the disclosure of relevant information to the public and the authorities. The estate agent industry is a highly regulated industry. This is necessary because of the potential to harm posed to the public by the activities of estate agents. Participants in the industry and those who choose to enter the industry know that they will be subjected to both routine and targeted regulatory investigations and inspections in the public interest. This

knowledge constitutes an important deterrent to prevent wrongdoing and the participants in the industry have a concomitantly reduced expectation of privacy when it comes to inspections aimed at the regulation of the industry.

[16] Not all breaches under the EAAA are criminal offences and the available responses by the Board to breaches are wide and are not limited to laying of criminal charges or quasi-criminal measures. Both routine and targeted inspections may result in a range of possible steps once a failure to comply with provisions of the Act is revealed. These steps include, inter alia; the following under the EAAA:

1. The appointment of a committee of enquiry (s 8 B);
2. The withdrawal of the fidelity fund certificate of any estate agents found to have behaved improperly (s 28);
3. An application to court to withdraw the fidelity fund certificate of any estate agents found to have behaved improperly (ss 28 93));
4. The bringing and investigation of a charge of misconduct against any estate agent reasonable suspected of behaving improperly (ss 30 (2));
5. The imposition of a fine on an estate agent found guilty of misconduct (ss 30 (3) (b));
6. Ordering any estate agent to submit an audited statement of its accounting records (ss 32 (5)).

[17] In Magajane at paras [69] – [70] at 276 E – 277 F, a distinction is drawn between 'inspections aimed at compliance' and 'searches aimed at enforcement' as follows:

> [69] Whether the inspection involves a search for criminal evidence is an important measure of the extent of the limitation. A warrantless search aimed at criminal prosecution will constitute a greater intrusion and an owner has a greater expectation of privacy regarding the risk of criminal prosecution, even in the context of commercial private property.
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> [70] Provisions that more closely resemble traditional criminal law require closer scrutiny. Factors in assessing each case include the nature of the conduct addressed by the provision, the purpose for which it was designed and the civil or criminal nature of the sanctions for violating the provision. The more the purpose of the provision and the intent of the inspectors is to obtain evidence for criminal prosecution, the greater the limitation of the right to privacy. The distinction often will be between compliance and enforcement. Inspections aimed at compliance - characterised as 'the random, overarching supervision of an industry at large, with particular actors within that industry "targeted" without particular regard to any pre-existing objective save the integrity of the scheme of regulation in general' - are less like criminal searches and impose lesser

limitations on the right to privacy. Searches aimed at enforcement - characterised as 'a focused investigation of a particular actor under that regime, often with a view to quasi-penal consequences are more like criminal searches, especially if the sanctions under the regulatory provision are essentially criminal or if the target can be charged under a criminal statute'. Not every case will be amenable to such a clear distinction between compliance and enforcement and some cases involving enforcement might not be characterised as those in which the inspectors intend to obtain evidence for criminal prosecution. The fact that an inspector responded to a complaint, or found evidence of a criminal violation during the inspection, might not be conclusive of an inspection aimed at criminal prosecution. The assessment must be made on the facts of each case.

[18] The search the Board wishes to conduct in this case is in my view in the nature of an enforcement search in the sense described in Magajane. The Board in effect acknowledges this to be the case in its answering papers where the deponent states that the investigation by the Board is not aimed at any particular outcome or has the purpose of imposing a criminal or quasi-criminal sanction because it does not know what will be discovered, but continues to state that

'If the reasonable suspicions of the Board are realized it may be that criminal prosecutions or quasi-criminal sanctions must follow. However, at this stage it is impossible to say what the proper outcome of the investigation will be. This position has been stated repeatedly by the Board as is evidenced by the quotes in paragraphs 20 and 24 of Auction Alliance's founding affidavit. I accept that the inspectors sought entry with a view to find evidence of the contraventions that have been laid out above and accept that it follows that the inspections were not conducted for the purpose of determining compliance. The inspections were, nonetheless, a reasonable and statutorily required response to the very serious allegations contained in the information placed in the hands of the Board.'

[19] In addition, the third respondent (the Minister of Finance), in an affidavit deposed to by the acting director general of the National Treasury on behalf of the third respondent, gives an account of the involvement of the Financial Intelligence Centre in the envisaged inspection of the applicant's premises and the decision by the Centre to assist the Board in carrying out the inspections. It is clear from the information given to the Centre by the Board that it had information not only that the applicant had made 'large payments' into the account of another entity, Merobex (Pty) Ltd, but also that it had received information that the applicant was destroying information valuable to the proposed inspection.

[20] It was argued on behalf of the Board that because, so it is contended, of the clear uncontroverted evidence that the applicant has conducted its affairs in flagrant disregard of the provision of the EAAA, this is a clear case where the Board was fully justified in going ahead without a warrant. A court, when considering the constitutionally of a law, must embark on an objective enquiry. The enquiry is not restricted to the subjective positions of the parties to a dispute before it. Regard must be had to the effect of the law on anyone to which it may apply. (Ferreira v Levin and Others, 1996 (1) SA 984 (CC).

[21] The provisions of s 32 A of the EAAA are in my view overly broad in that the section does not sufficiently circumscribe the discretion of an inspector performing the inspection in regard to the place where the inspection may take place and the scope of the inspection. S 32 A is overbroad in the following respects:

1. Ss (1) (b) empowers the inspector without prior judicial sanction and without prior notice (albeit at a reasonable time), to enter any place where he has reason to believe, 'any person is performing an act as an estate agent' or he has reason to believe that the place 'is connected with an act performed by an estate agent' or he has reason to believe that it is a place where there are books, records or document to which the provisions of the EAAA applies. 'Any place' will include the private home, not only of an estate agent who conducts business from home or keeps some documents relating to his work at home, but the home of a person who is believed to be

performing an act as an estate agent at his home, and also through the use of the words 'connected with an act performed', the home even of an erstwhile client where a show house had previously been held or the home of an erstwhile a client who has a copy of an offer to sell or purchase his or her property, at home.

2. ss (1) (b) (ii) is not limited to documents which concern the business of an estate agent and allows for the production (but not the seizure) on the demand of an inspector of 'any ... document in the possession or under the control of that estate agent.'
3. Apart from stipulating that inspectors on request, must produce their written inspection authority and issue a receipt of anything seized or retained, s 32 A is lacking in material indications of the manner in which the inspectors should execute the searches and seizures.

[22] In Magajane, para [88], at 282 GH, the following is said in regard to the wide powers afforded by the enactment in that matter

> [88] In the context of warrantless searches aimed at obtaining evidence for criminal prosecution, the overbreadth creates an impermissible threat to the right to privacy. Section 65 does not narrowly target only those premises whose owners possess a low reasonable expectation of privacy; the statute permits inspectors to reach into a person's inner sanctum. The section fails to guide inspectors as to how to conduct searches within legal limits, and it leaves property owners unaware of the proper limits to the invasion of their privacy. The boundaries of a

permissible search of unlicensed premises could be delineated and protected by a warrant, but s 65 permits warrantless searches of unlicensed premises.

[23] I turn to the question of less restrictive means to achieve the purpose envisaged by the search. While it is undoubtedly so that targeted searches under the EAAA would advance the purposes of that act, it has in my view not been shown by the Board that requiring the Board to obtain a warrant for targeted searches would not equally well serve to advance the purposes of the EAAA. Requiring a warrant for such targeted searches under the EAAA will constitute a less restrictive means to advance the purposes of the EAAA. The need for surprise in a targeted search could be served by obtaining a warrant on an ex parte basis and, in addition, provision can be made in the statute for prescribed circumstances under which warrantless searches may be done, for instance, where the object of the search will be defeated by the delay in obtaining a warrant.

[24] I agree with the contentions on behalf of the applicant that despite the reduced expectation of privacy of participants in the estate agent industry, the limitation posed by targeted warrantless searches, made with a view to the enforcement of statutory provisions which could and possibly will eventually include the laying of criminal charges or quasi-criminal procedures, is not justified under s 36 (1) of the constitution.

[25] S 32 A of EAAA cannot in my view be saved by an interpretation of its provisions (reading down) that would render them constitutionally permissible or by reading in provisions requiring a warrant for targeted enforcement searches. The requirements that the statute must be reasonably capable of bearing the ascribed meaning and that the interpretation may not be unduly strained, cannot be met. S 32 A is in my view not capable of an interpretation that not only draws a distinction between compliance searches and enforcement searches and then also requires a warrant for enforcement but not compliance searches. The EAAA firstly does not recognise the distinction between the two kinds of searches and also, and in any event, does not contain any of the elements that are required to authorise the issue of a warrant. Provisions regulating the circumstances under which a warrant is required, the conditions for the grant of a warrant and provisions regulating how a warrant should be executed are absent and cannot in my view, by interpretation or reading down, be found in the EAAA.

[26] Reading in is also not a viable option. First, the EAAA does not distinguish between compliance and enforcement searches. Secondly, a reading in to provide for a warrant to authorise enforcement searches, will require a detailed and intricate change of the words used in s 32 A. Apart from creating a distinction between the two categories of searches, it will be necessary to set out which authority is empowered to issue the warrants, what the jurisdictional requirements are for the issue of the warrants, when the Board may proceed without a warrant and what the parameters within which the warrants may be executed, are. This is important because the validity of a

warrant depends, inter alia, on whether the warrant complies with its authorising statute and whether the scope of the actions authorised by the warrant is capable of being determined with certainty. (NDPP and Others v Zuma and Anor 2008 (1) SACR 258 (SCA) para [76] at 284 h – i). It is clear that a detailed re-writing of s 32 A would be required if the reading in option is adopted. These are matter that should, in my view, be left to the legislature and it will, in my view not be appropriate for the court to undertake such a task.

[27] In my view the provision of s 32 A of the EAAA are inconsistent with the Constitution to the extent that it authorises warrantless targeted enforcement searches and seizures under all circumstances.

[28] In making a declaration of unconstitutionality in respect of s 32 A of the EAAA, it will, in my view be appropriate to use the device of notional severance to render only part of its provisions inoperative and to preserve its operation and to permit warrantless routine and random inspections under s 32 A to ensure compliance with the EAAA. In addition, the declaration of invalidity should not be retrospective.

[29] It follows that s 32 A must be declared invalid to the extent set out in the order made hereunder. It also follows that the Board's conditional counter application for the issue of a warrant by this court under s 32 A cannot succeed. There simply is no legal authority for the warrant sought by the Board under the provision of the EAAA.

[30] I turn to consider the applicant's constitutional challenge to the provisions of FICA. The basis of this attack is that it is a constitutional requirement that the kind of targeted inspection which the Board wishes to carry out in this case in terms of FICA, can only be done with a warrant.

[31] The primary purpose of FICA is recorded in its long title namely, to establish a Financial Intelligence Centre (the Centre) and a Counter-Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist related activities. The objective of the Centre is to provide financial intelligence to law enforcement agencies, intelligence agencies and the South African Revenue Service. In order to achieve this objective, FICA requires that designated categories of businesses register with the Centre.

[32] The framework of FICA provides for a range of obligations which apply to financial institutions such as banks, insurers and investment intermediaries and also non-financial institutions such as attorneys, accountants, estate agents and gambling institutions. These *'accountable institutions'* are obliged to identify their clients, to keep records of information relating to the identities of their clients and detailed records of transactions performed by and with their clients. In addition the institutions are required to report information on suspicious transactions and various other types of transactions exceeding a prescribed threshold. These institutions are also required to introduce internal policies and procedures to facilitate compliance with the duties under FICA.

The Centre makes information that it collects available to the aforesaid investigating authorities.

[33] The Centre is also required to supervise and enforce compliance with FICA and to facilitate effective supervision and enforcement by supervisory bodies. Section 26 (1) provides that an authorised representative of the Centre is entitled to have access to any records kept by or on behalf of accountable institutions and to make extracts from or to make copies of any such records for the purpose of obtaining further information. Section 26 (2) provides that the powers of access to records may, except in the case of records which the public is entitled to have access to, only be exercised pursuant to a warrant issued in chambers by a judge or magistrate if it appears to the judge or magistrate from information on oath or affirmation that there are reasonable grounds to believe that the records referred to may assist the Centre to identify the proceeds of unlawful activities or to combat money laundering activities. In terms of sec 32 the Centre is authorised to request the accountable institutions to furnish additional information about reports the accountable institution is required to make to the Centre in terms of sections 28 and 29.

[34] Section 45 (1) of FICA requires every supervisory body to supervise and to enforce compliance with FICA by all accountable institutions regulated or supervised by such supervisory body.

[35] Pursuant to recommendations by the Financial Action Task Force in 2009, FICA was amended in 2010 by the introduction of measures to provide for an administrative enforcement framework within which the Centre and the supervisory bodies were empowered to undertake inspections, to issue directives, to request information, to impose administrative sanctions and to apply to the courts for an interdict or a mandamus where appropriate. Sec 45 B is one of these measures that were introduced in 2010.

[36] FICA provides for enforcement of compliance with the obligations under FICA. Sec 45 C provides for an whole host of administrative sanctions which the Centre or a supervisory body may impose which range from a caution to a financial penalty not exceeded R10 m in respect of a natural person and R50m in respect of any legal person. In addition to administrative sanctions, FICA in sec 46 to 68 creates a large number of criminal offences for non-compliance with the provisions of the Act. These offences are divided into two groups and carry penalties of imprisonment not exceeding five years or a fine not exceeding R10m on the one hand and in respect of the more serious contraventions, imprisonment for up to fifteen years and a fine not exceeding R100 m.

[37] Since the applicant is an accountable institution and the Board is a supervisory body under FICA, the Board is required to supervise and enforce compliance with FICA in respect of the applicant. The Board became aware of allegations of financial misconduct by the applicant and pursuant thereto had a meeting and consulted with the officials of the Centre on 20 February 2012.

At the meeting it transpired that the Board as a supervisory body contemplated conducting an inspection of the applicant in terms of both the EAAA and FICA. It was agreed at the meeting that a company, Merobex (Pty) Ltd with whom the applicant had certain business dealings and the applicant would be inspected for compliance with the EAAA and FICA and the Centre agreed to assist the Board to conduct such inspections. What happened thereafter is described as follows by the deponent on behalf of the third respondent.

> 14. On 8 March 2012 an inspector of the EAAB notified a representative of the Centre that the EAAB had information that Auction Alliance was destroying information that may be valuable to the inspection and that the EAAB will be conducting an inspection on Friday, 9 March 2012. The EAAB telephonically invited the Centre to accompany their inspectors on the inspections to the Auction Alliance head office in Cape Town and two branches situated in Durban and Johannesburg. Given the short notice the Centre was able to provide two inspectors for the Johannesburg branch but was unable to assist with inspections in Cape Town and Durban.

[38] It is necessary to set out the provision of s 45B of FICA. It reads:

> 45 B **Inspections**
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> (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.

(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.

[39] Save for the provisions of ss 45 B (6) (b) of FICA, the impugned sections do not draw a distinction between routine and non-routine inspections. The concepts are not defined in FICA but I will adopt herein an adaptation of the formulation proposed by Rogers, J in the recent unreported judgment in Patrick Lorenz Martin Gaertner & two Others v Minister of Finance and The Commissioner: SARS & Nine Others delivered in this court

on 8 April 2013, namely that (i) 'non-routine inspection' means an inspection which an inspector has decided to conduct because a suspicion exists that a failure to comply with the Act or 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 and that (ii) 'routine inspection' means any inspection or examination other than a non-routine inspection.

[40] It is common cause that s 45 B of FICA (and in particular ss (7) which permits an inspection to be conducted without the need to first obtain a warrant), limits the right to privacy and the question is therefore whether this limitation is justified under s 36 of the Constitution.

[41] The right to privacy is an important right in our constitutional dispensation. The scope and ambit of the right is dependent on the context in which protection is claimed. The deponents on behalf of the second and third respondents have explained the rationale for the limitation posed by the warrantless inspection which is permitted under s 45 B (7) as follows:

> 57. The rationale for the permissive provision is the very nature of inspections conducted in terms of the FIC Act which are directly aimed at ascertaining the level of compliance of supervised institutions or persons, and therefore indirectly combating money laundering activities and the financing of terrorist and related activities through increasing the levels of compliance

with the control measures in the FIC Act to prevent abuse of supervised institutions or persons by criminal or terrorist elements.

58. The conduct of money laundering is criminalised in the Prevention of Organised Crime Act, 1998 and that of terror financing in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004. The FIC Act is complementary to these two Acts in that it provides for a framework of regulatory control measures with the aim to improve the ability of law enforcement and prosecuting authorities to detect, investigate and prosecute money laundering and terror financing activities.

59. This framework enhances transparency in the financial system by introducing the premise that financial and other institutions must know who they are doing business with and that possible money laundering or terror financing related transactions must be brought to the attention of investigating authorities through appropriate reporting mechanisms. This increases the probability that investigators would be able to reconstruct transactions with financial and other institutions successfully. Ultimately a system that ensures that abuses of these institutions are detected, investigated and prosecuted enhances

the integrity of the institutions that conducts business within such a system.

60. In the event that the Centre and/or the supervisory bodies are not empowered to adequately, timeously and effectively conduct compliance inspections it places the whole South African anti-money laundering regulatory framework in jeopardy with dire consequences locally and internationally. An inability for the Centre and supervisory bodies to effectively perform their oversight functions in terms of the FIC Act will quickly lead to deterioration in the adherence levels by accountable institutions to preventative compliance control measures contained in the FIC Act.

61. Of relevance to an assessment of the importance of the limitations is South Africa's role as a player in the global fight against terrorism. On the international stage, countries are required to implement measures to combat money laundering, including a framework such as the one introduced by the FIC Act. The measures adopted are assessed against an international standard which is contained in the 40 Recommendations of the Financial Action Task Force ("FATF").

62. On the issue of professions such as estate agents the Recommendations require that they be subject to effective

systems for monitoring and ensuring compliance with measures such as those contained in the FIC Act. In this regard a supervisor should have adequate powers to supervise or monitor, and ensure compliance including the authority to conduct inspections. This includes the power to compel production of any information from financial institutions that is relevant to monitoring such compliance.

63. Essential criteria 29.3.1 of the methodology by which compliance with the Recommendations is assessed states that "The supervisor's power to compel production of or to obtain access for supervisory purposes should not be predicated on the need to require a court order."

[42] The uncontroverted evidence in this case contains allegations that the applicant and some of its employees have committed serious breaches not only of the EAAA, but crucially, also of FICA. FICA requires an accountable institution to keep an accurate record of its business relationships and transactions and a failure to keep such record as well as to destroy or wilfully tamper with a record are all offences under FICA. The undisputed evidence on the papers in this application, strongly suggest that these offences have been committed by the applicant as part of its operations.

[43] In Ministry v Interim Medical and Dental Council of South Africa and Others, 1998 94) SA 1127 (CC) at para [27] at 1144 C – 1145.

> The more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion. In Bernstein Ackermann J posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated. In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation. The greater the potential hazards to the public, the less invasive the inspection. People involved in such undertakings must be taken to know from the outset that their activities will be monitored. If they are licensed to function in a competitive environment, they accept as a condition of their licence that they will adhere to the same reasonable controls as are applicable to their competitors. Members of professional bodies, for example, share an interest in seeing to it that the standards, reputation and integrity of their professions are maintained.

[44] I referred earlier to the passage in Magajane where the Constitutional Court in dealing with the extent of the limitation as a factor in the limitations exercise, mentioned three issues that will have a bearing, namely (1) the level of the reasonable expectation of privacy, (2) the degree to which the statutory

provision resembles criminal law and (3) the breadth of the provision (at para [66] at 275 G-H)

[45] I have already dealt with the applicant's level of reasonable expectation of privacy and have pointed out that the applicant has an attenuated expectation of privacy. In addition, the applicant is a corporate entity which does not bear human dignity.

[46] The second enquiry envisaged by Magajane in regard to the nature and extent of the limitation is the degree to which s 45 B resembles criminal law. S 45 B contemplates two types of inspections, namely, routine inspections and, in terms of ss 45 B (6) (b) an inspection other than a routine inspection, but then only after consultation with the FIC Centre. The inspection envisaged in this case is a targeted non-routine inspection. This is the only kind of warrantless inspection to which the applicant objects in this case and the constitutional declaration is sought only in respect of such an inspection. In Magajane, at para [69] – [70] at 276 E – 277 E, warrantless inspections aimed at a criminal prosecution are considered and it is stated that a person has a greater expectation of privacy regarding the risk of criminal prosecution and that provisions that more closely resemble traditional criminal law require closer scrutiny.

[47] The third consideration referred to in Magajane is the breath of the provision. The applicant contends that the provisions of s 45 B are overbroad.

[48] The envisaged inspection in this case may disclose evidence which may result in penal sanctions under FICA and criminal prosecutions. However, the provisions are in my view not overbroad and the limitation of the applicant's attenuated right to privacy posed by the inspection, can, save for the question of less restrictive means to achieve the purpose which is discussed hereunder, otherwise be justified. S 45B (1) circumscribes the purpose of the inspection. The section requires that the inspection, whether routine or targeted, must be for the purpose of determining compliance with FICA, any order, determination or directive made in terms of FICA. An inspection which seeks to go beyond such purpose is unlawful. In this case the Board seeks to act within the required purpose namely, to determine whether the applicant, has or has not kept proper records of its business relationships and transactions and whether or not the applicant through some of its employees has destroyed or wilfully tampered with its said records. The fact is, however, that if a contravention of this nature should be found, administrative penalties may be imposed and criminal charges may follow. S 45 B (1) stipulates that the inspector may, where appropriate carry out the inspection on reasonable notice and at any reasonable time. The inspection itself is limited to determinable business premises, that is, any premises at which the Centre or the Board (as supervisory body) reasonable believes the business of an accountable institution (such as the applicant, an estate agent), reporting institution or other person to whom the provisions of the act applies, is being conducted. S 45 B (2) sets out what an inspector may do when conducting an inspection. Ss (2) limits the documents (and information in respect of such document), which may be the subject of the inspection, to

documents relating to the affairs of the accountable institution (or other relevant entity) and the inspector may open any strongroom, safe or other container (clearly on the premises in question) in which the inspector suspects any document relevant to the inspection is kept. The inspector may use any computer on the premises to access data on the system and may reproduce a document from such data. The inspector may make extracts from or copy any document in the possession of the accountable institution. Having done all of this, the inspector may only, against the issue of a receipt, seize any document obtained in conducting the inspection, which in the inspector's opinion may constitute evidence of non-compliance with FICA or any order, determination or directive made in terms of that act.

[49] An inspection may be conducted at a private home where there is a reasonable belief that a business of the kind contemplated by s 45 B (1) is being conducted there. In addition, a large number of industries are covered by the provisions of FICA and are thus liable to be inspected. This is required by the purpose of FICA itself, namely to combat money laundering and terror financing and therefore to further important and beneficial public purposes. In Magajane the impugned provision provided for warrantless searches of unlicensed premises. This indicated that the statutory purpose was to facilitate raids aimed at collected evidence for criminal prosecution and allowed such searches on the basis of a suspicion (not as, in this case, a reasonable belief) that gambling was taking place at such premises. The catalyst for the inspection is suspicion of illegality. (Magajane, para [84] at 281 E). The

Constitutional Court consequently dealt with this issue at paragraph [88] of the judgement which is quoted earlier at par [22] in this judgement.

[50] In contrast to the impugned provision in Magajane, s 45 B defines the premises that may be targeted and sets out in some detail what the powers and obligations of the inspectors are during inspections. In addition, s 45 B (6) requires that non-routine inspections by an inspector of a supervisory body (the Board, in this case) may only be conducted after consultation with the FIC Centre, on that inspection.

[51] I turn to the final consideration mentioned in s 36(1) of the Constitution which in my view is decisive for this case namely, the issue of less restrictive means to achieve the purpose of the measures. In Magajane it was held that the respondent authorities could not show why the purpose of the impugned provision could not have been achieved by first requiring the inspectors to obtain a warrant before searching unlicensed premises. The deponents on behalf of the second and third respondents have stated that it is crucial that warrantless inspections should be allowed, given the obvious threat that accountable institutions (of which there are at least 14 000 registered with the Centre) may in certain circumstances destroy crucial information and records that they are obliged to hold and that are highly relevant to the fight against money laundering and the financing of terrorist activity. It was argued in this case on behalf of the applicant that the respondents who bear the onus of advancing a factual basis for the conclusion that requiring a warrant for targeted searches would defeat the purpose of the inspection. There is no

reason to believe, it was submitted, that requiring a warrant, with limited exceptions, would allow the subject of the search to destroy vital records.

[52] I agree with these contentions. The respondents have not, in my view shown that requiring a warrant for targeted non-routine inspections would defeat the purpose of a targeted inspection. The need for surprise which will often be crucial, can be preserved by allowing warrants to be obtained on an *ex parte* basis and to provide for limited circumstances under which a targeted search may proceed without a warrant.

[53] It follows that the applicant has been successful in its challenge to the constitutionality of both the impugned sections. I am of the view that the declaration of unconstitutionality of s 32A of the EAAA should not be suspended. In the light of the order I intend making in regard to s 45B of FICA, there will be interim measures which the Board may use to conduct targeted inspections. In regard to s 45B of FICA there are immense public interest considerations involved and it would in my view be just and equitable to make an order suspending the declaration of unconstitutionality for a period and to provide for an interim measure to enable a warrant to be obtained for targeted non-routine inspections. Finally, it is recorded that in completing this judgment and in formulating the orders I make hereunder I have had the considerable benefit of the unreported judgment of Rogers, J in Patrick Lorenz Martin Gaertner & two Others v Minister of Finance and The Commissioner: SARS & Nine Others referred to earlier.

[54] In view of the fact that in terms of the interim provision made now made for the issue of a warrant under s 45B of FICA, the interim arrangement agreed between the parties should be extended for a period of ten days from the date of this judgement to allow the Board an opportunity to apply if so advised for a warrant in terms of the interim provision made in paragraph 5 of the order below.

[55] The following orders are made:

1. Section 32A of the Estate Agency Affairs Act 12 of 1976 (the EAAA) is inconsistent with the Constitution and invalid to the extent that it permits any inspections other than routine or random inspections aimed at ensuring compliance with the EAAA.
2. The declarations of invalidity in paragraph 1 above 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 conducted under s 32A of the EAAA.
3. Section 45B of the Financial Intelligence Centre Act 39 of 2001 (FICA) is inconsistent with the Constitution and invalid to the extent that it permits any inspections without a warrant other than routine or random inspections aimed at ensuring compliance with FICA.
4. The declaration in paragraph 3 shall not be retrospective and its effect shall be suspended for 18 months to afford the legislature an opportunity to amend the offending provisions so as to make them constitutionally valid.

5. During the period of suspension referred to in paragraph 4 or until such sooner date as any amendments as contemplated in paragraph 4 come into force, ss 45B (1) and (7) will be deemed to read as follows (the words inserted into the existing text by this order are underlined for convenience).

45B Inspections

(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, 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.

(7)(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.

6. The first respondent's counter application is dismissed.

7. The interim arrangement agreed between the parties in terms whereof the accountants KPMG would retain a mirror image of the data on the applicant's computer is ordered to endure for a period of ten court days from the date of this order.
8. The respondents, jointly and severally are ordered to pay the applicant's costs, including, where employed, the cost of two counsel.

W J LOUW

Judge of the Western Cape High Court

"ABSA"

ESTATE AGENCY AFFAIRS BOARD
OF SOUTH AFRICA

17 February 2012

TO WHOM IT MAY CONCERN:

CERTIFICATE OF APPOINTMENT BOTH IN TERMS OF SECTION 32 A OF THE ESTATE AGENCY AFFAIRS ACT 112OF 1976, AS AMENDED AND IN TERMS OF SECTION 45A (3) OF THE FINANCIAL INTELLIGENCE CENTRE ACT, NO 38 OF 2001, AS AMENDED

This serves to certify that the following persons:

SHARON VAN ROOYEN, identity number [redacted] and/or JAMES DE VILLIERS, identity number [redacted] and/or LAWRENCE VAN DER WESTHUIZEN, identity number [redacted] and/or JOHANNES VAN DER WALT, identity number [redacted] and/or ELIZABETH MULLER, identity number [redacted] and/or NAREEN MOODLEY, identity number [redacted] and/or ETIENNE BADENHORST, identity number [redacted] and/or JOSIAS ALBERTUS SPANGENBERG, Identity number [redacted] and/or NATASHA RAMNARAIN, Identity number [redacted] and/or WYNAND BASIL LODEWIKUS PRETORIUS, Identity number [redacted] MARK NIEMANN Identity number [redacted] SIOBHAN SARAH DAWSON Identity number [redacted], MORROW SEAN MICHALE Identity Number [redacted] RIAAN DELPORT Identity Number [redacted], MARGARETE PRETORIUS Identity Number

CNR JAN SMUTS AVENUE AND ALBURY ROAD, HYDE PARK, PRIVATE BAG X10, BENMORE 2010, TEL: (011) 781 6600 FAX: (011) 880 983
Website: www.eaab.org.za E-mail: sello@eaab.org.za Docex 41 Nelson Mandela Square

[redacted], NADIA SPITTAL Identity Number [redacted], KARISH RAMNARAYAN Identity Number [redacted], ZAAHID KHAN Identity Number [redacted],

(Hereinafter referred to jointly and severally as "The inspectors") are hereby appointed as inspectors both in terms of the Estate Agency Affairs Act, 112 of 1976 ("the Act") and the Financial Intelligence Centre Act, 38 of 2001, as amended ("the FIC Act").

A. The inspectors are hereby furnished with the requisite inspection authority by the Estate Agency Affairs Board, pursuant to section 32(A) of the Act, to conduct all such investigations as may be necessary to determine whether the provisions of the Act are being, have been or were, complied with by **AUCTION ALLIANCE (PTY) LTD** Registration No. 980277607 and /or **AUCTION ALLIANCE (PTY) LTD** Registration No. 2000/031303/07 and/or any estate agency firm practicing under the name and style of **"AUCTION ALLIANCE"**.

The inspectors are hereby granted full authority to do all acts and undertake and perform all functions as are allowed by the provisions of section 32A of the Act for this purpose.

It is, in this respect, specifically recorded that section 32A of the Act provides as follows:

Powers of inspectors

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;*
   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 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.

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;*

b. *hinder or obstruct any inspector in the exercise of his powers under this section;*

c. *falsely hold himself out to be an inspector.*

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 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).

B. The inspectors are additionally appointed to conduct inspections and to exercise the powers, in terms of section 45B of the FIC Act into the affairs of : **AUCTION ALLIANCE (PTY) LTD** Registration No. **980277607**, an accountable institution as listed in item 9 of Schedule 1 to the FIC Act and/or any estate agency carrying on business under the name and style of "**AUCTION ALLIANCE**", with the objective to ascertain compliance or Non-compliance with the FIC Act or any order, determination or directive made in terms of the FIC Act.

The inspectors are required to report on the inspections done by them.

The inspectors have signed this certificate and their photographs are attached hereto.

Yours faithfully,

Mr. B CHAPLOG

ACTING CHIEF EXECUTIVE OFFICER
ESTATE AGENCY AFFAIRS BOARD

Signed by the inspectors as follows:

Svan Rooyen

SHARON VAN ROOYEN, identity number _____

Date: _____

JAMES DE VILLIERS, identity number _____

Date: _____

LAWRENCE VAN DER WESTHUIZEN identity number _____

Date: _____

JOHANNES VAN DER WALT, identity number _____

Date: _____

ELIZABETH MULLER, identity number _____

Date: _____

NAREEN MOODLEY, identity number _____

Date: _____

ETIENNE BADENHORST, identity number _____

Date: _____

MARK NIEMANN Identity number _____

Date: _____

SIOBHAN SARAH DAWSON Identity number _____

Date: _____

MORROW SEAN MICHALE Identity Number _____

Date: _____

RIAAN DELPORT Identity Number _____

Date: _____

MARGARETE PRETORIUS Identity Number(_____

Date:_____

NADIA SPITTAL Identity Number' _____

Date:_____

KARISH RAMNARAYAN Identity Number _____

Date:_____

ZAAHID KHAN Identity Number _____

Date:_____

JOSIAS ALBERTUS SPANGENNBERG Identity Number _____

Date:_____

NATASHA RAMNARAIN Identity Number' _____

Date:_____

WYNAND BASIL LODEWIKUS PRETORIUS Identity Number

Date:_____

"ABS3"

Republic of South Africa
In the Western Cape High Court of South Africa

In the consolidated matters between: Case No: 4850/2012

AUCTION ALLIANCE (PTY) LTD Applicant

And

ESTATE AGENCY AFFAIRS BOARD First Respondent
MINISTER OF TRADE AND INDUSTRY Second Respondent
MINISTER OF FINANCE Third Respondent

Judgment delivered 21 June 2012

LOUW J:-

[1] The applicant company conducts business as an auctioneer at premises in Cape Town (where its head office is situated), Johannesburg and Durban. By reason of its activities, the applicant falls under the definition of an 'estate agent' in the Estate Agency Affairs Act, 112 of 1976 (the EAAA) and is also an 'accountable institution' as defined in the Financial Intelligence Centre Act, 38 of 2001 (the FICA).

[2] The first respondent is the Estate Agency Affairs Board (the Board). The second respondent is the Minister of Trade and Industry and is the minister responsible for the administration of the EAAA. The third respondent

is the Minister of Finance and is the minister responsible for the administration of the FICA. (I shall refer herein to the second and third respondents as the Ministers).

[3] The applicant has since January 2012 received a large amount of negative publicity in the South African press regarding the manner in which the applicant is alleged to have conducted its business. After receiving documents from the producers of the current affairs television show Carte Blanche, the Board instituted a targeted investigation into the affairs of the applicant. As part of the investigation inspectors of the Board, armed only with a certificate signed by the acting chief executive officer of the Board, authorising them to conduct searches of the applicant's premises in terms of the provisions of S 32A of the EAAA and S 45B of the FICA, arrived without a warrant and unannounced at the applicant's premises in Cape Town, Johannesburg and Durban. When the inspectors sought entry to the premises to search and seize, the applicant refused them entry and launched an application for both interim relief to prevent the Board from conducting the warrantless search and seizure operation (the interim application) and for final relief in the form of a constitutional challenge to s 32A of the EAAA and s 45 B of the FICA (the impugned provisions).

[4] The Board and the second and third respondents oppose the application and in response to the main application, the Board brought a counter application for a warrant to search the applicant's premises. The basis for the counter application is that there is a reasonable belief that the

applicant and/or some of its employees may have committed serious violations of the EAAA and the FICA.

[5] Before the launch of the main application, the parties agreed that KPMG, an independent firm of accountants, would make a mirror image of the data on the applicant's computer servers for safekeeping pending the outcome of these proceedings. The Board has undertaken that it will not proceed to search the applicant's premises pending the outcome of the application. This has rendered the interim relief unnecessary.

[6] When the applications were called on 28 May 2012, Mr Hellens on behalf of the Board drew attention to the fact that the applicant had not complied with Rule 16A (1) by giving due notice to the registrar that it was raising a constitutional issue in the main application. After some debate on whether there had not been substantial compliance, I ruled that in the absence of proper compliance with Rule 16 A (1) the main application cannot proceed and it was postponed sine die. Both Mr Hellens on behalf of the Board and Mr Gauntlett on behalf of the Ministers urged that I should nevertheless hear and decide the Board's counter application for a warrant to be issued. After hearing Mr Katz on behalf of the applicant who opposed the hearing of the counter application at that stage, I ruled that the Board may proceed with the counter application.

[7] The issue to decide is therefore whether this court may and should issue a warrant to the Board to search the applicant's premises.

[8] The applicant's principal contention is that there is no legal authority for the warrant sought by the Board: sections 32 A of the EAAA and 45 B of the FICA do not provide in express terms for the issue of a warrant and cannot be interpreted and 'read in' or 'read down' to enable the court to issue a warrant to the Board.

[9] Under the EAAA, the Board is the Industry Regulator responsible for the estate agency industry and is required to maintain and promote the standards of conduct of estate agents and to regulate their activities. Under the FICA the Board as a 'supervisory body' is required to supervise and enforce compliance with the FICA and to combat money laundering and the financing of terrorist and related activities. As an 'estate agent' and 'accountable institution, the applicant is subject to a large number of obligations under the EAAA and the FICA. It is required, inter alia, to keep an accurate record of its business relationships and activities and a failure to do so is an offence. Under the code of conduct published under s 8 (b) of the EAAA, the applicant is required at all times to protect the interests of its clients to the best of its ability with due regard to the interests of other parties concerned and not to make any false statement knowing it to be false and not to prepare or maintain any false books of account or any other records.

[10] To enable the Board to fulfil its regulatory function the EAAA and the FICA confer on the Board the power to conduct inspections and searches. The empowering provisions are:

1. Section 32 A of the EAAA provides in general terms and without reference to a warrant requirement that an inspector furnished with inspection authority by the Board may conduct an investigation to determine whether the provisions of the EAAA are being or have been complied with and the inspector may for that purpose, without giving prior notice, at all reasonable times enter any place at which he has reason to believe any person is performing an act as an estate agent, is connected with the performance of such an act or there are books, records or documents to which the provisions of the act are applicable.
2. Section 45 B of the FICA provides that an inspector appointed in terms of s 45 (1) may at any time and on reasonable notice enter and inspect any premises at which the Centre or the supervisory institution reasonably believes that the business of an accountable institution is being conducted. While section 45 B (7) of the FICA provides that no warrant is required for the purposes of an inspection in terms of that section, section 45 B (7) does not expressly preclude the obtaining of a warrant before the Board conducts such an inspection.
3. Both s 32 A of the EAAA and 45 B of the FICA grant inspectors various powers of search and seizure over estate agents and accountable institutions respectively.

[11] Save that in terms of section 45 B (6) of the FICA non-routine inspections by the inspector of a supervisory body may only be conducted after consultation with the Financial Intelligence Centre (the Centre), the empowering provisions do not draw a distinction between random regulatory

inspections of which the Board carries out approximately 2000 every year and specific targeted inspections the Board carries out on the basis of specific complaints or a reasonable suspicion of wrongdoing or statutory violations.

[12] The information underlying the Board's application for a warrant is set out in the answering affidavit filed on behalf of the Board. The allegations are for purposes of the main and counter applications not answered by the applicant and must for present purposes be accepted as accurate. The material consists of email exchanges between employees of the applicant and between persons in senior management positions within the applicant and extracts from the applicant's books of account and constitute prima facie evidence of serious breaches of the EAAA and the FICA on the part of the applicant and some of its employees, including its former CEO, Rael Levitt. The evidence is sufficient to justify a reasonable suspicion of wrong-doing on the part of the applicant.

[13] The Board contends that the court has the power and competence to grant a warrant on two alternative bases:

1. The provisions of the EAAA and the FICA, interpreted in the light of the Constitution are reasonably capable of bearing the meaning that random compliance inspections may be carried out without a warrant (something to which the applicant does not raise an objection) but that a warrant is required for targeted inspections.

2. The court has the inherent power to create remedies governing the preservation of and access to evidence even where there is no express statutory authority to do so.

[14] Having reconsidered the matter, I am of the view that the issue of whether the empowering provisions of the two acts are open to the interpretation that it affords the court a power to issue the Board with a warrant to enter the applicant's premises and there to search for and seize documents and records, is in itself a constitutional issue which should not be determined separately from the main constitutional challenge brought by the applicant. The hearing of the latter issue was postponed sine die to allow for proper compliance on the Rule 16 A. I do not think that the issue of the constitutional interpretation of the sections in question should be decided separately and on a piece meal basis. In my view, that issue should also stand over for determination together with the principal constitutional challenge to the impugned provisions.

[15] That leaves the second basis upon which the Board contends this court has the power to issue a warrant namely that the court has the inherent power to create a procedural remedy to preserve and grant access to evidence.

[16] In Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Anor; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others 1995 (4) SA 1 (AD) at 15 G, the Appellate Division held that the absence of express statutory

authority was no bar to the acceptance of Anton Piller orders as part of the court's judicial practice and that the court has the discretion whether to grant an Anton Piller order or not, and if so, on what terms (at 16 B). Corbett, CJ (at 8 G – 9 D) dealing with the proposition that South African Courts do not have the jurisdiction to grant an order for the attachment of documents and other things to which no right is claimed except that they should be preserved for and produced as evidence in an intending court case between the parties, cited and referred with approval to the following obiter passages from his judgment in the Appellate Division in Universal City Studios Inc v Network Video 1986 (2) SA 734 (AD) at 754 EF and 755 A – E.

> 'Now, I am by no means convinced that in appropriate circumstances the Court does not have the power to grant ex parte and without notice to the other party, i.e. the respondent (and even, if necessary, in camera) an order designed pendente lite to preserve evidence in the possession of the respondent. It is probably correct, as so cogently reasoned by the Court in the Cerebos Food case supra, that there is no authority for such a procedure in our common law. But, of course, the remedies devised in the Anton Piller case supra and other subsequent cases for the preservation of evidence are essentially modern legal remedies devised to cater for modern problems in the prosecution of commercial suits.'
>
> There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the

proper administration of justice. [citations omitted]. It is probably true that, as remarked in the Cerebos Food case (at 173 E), the court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw (some citations omitted). Salmond Jurisprudence, 11th Ed at 504 states that 'Substantive Law is concerned with the ends which the administration of justice seeks: procedural law deals with the means and instruments by which those ends are to be obtained'.

...

In a case where the applicant can establish prima facie that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the Court to make an order designed to preserve the evidence in some way, is the Court obliged to adopt a non possumus attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the Court were powerless to act. Fortunately I am not persuaded that it would be. An order whereby the evidence was in some way recorded, eg by copying documents or

photographing things or even by placing them temporarily, i.e. pendente lite, in the custody of a third party would not, in my view, be beyond the inherent powers of the Court. Nor do I perceive any difficulty in permitting such an order to be applied for ex parte and without notice and in camera, provided that the applicant can show the real possibility that the evidence will be lost to him if the respondent gets wind of the application.' (emphasis supplied)

[17] These dicta which relate to the court's inherent power to develop procedural remedies have been cited with approval by the Constitutional Court. In National Director of Public Prosecutions and Another v Mohamed NO and Others 2003 (4) SA 1 (CC) at paras 30-32 with reference to section 173 of the Constitution which provides that

'The Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice'.

[18] Mr Hellens on behalf of the Board submitted that these cases show that our courts have inherent jurisdiction to create procedures which govern access to evidence in a way that balances the privacy interests of those being searched with the public necessity of effective law enforcement and legislation.

[19] During the course of argument the issue arose whether the provisions of section 45 F (3) could be invoked by the Board to bolster its argument in support of its application for a warrant. Section 45 F reads as follows:

'45F Application to court

(1) (a) The Centre, in respect of any accountable institution regulated or supervised by a supervisory body in terms of this Act or any other law, may institute proceedings in accordance with this section only if a supervisory body failed to institute proceedings despite any recommendation of the Centre made in terms of section 44 (b) or failed to institute proceedings within the period recommended by the Centre.

(b) A supervisory body may institute proceedings in accordance with this section only after consultation with the Centre on that application to court.

(2) Subject to subsection (1), the Centre or any supervisory body may institute proceedings in the High Court having jurisdiction against any accountable institution, reporting institution or person to whom this Act applies, to-

(a) discharge any obligation imposed on the Centre or supervisory body in terms of this Act;

(b) compel that institution or person to comply with any provision of this Act or to cease contravening a provision of this Act;

(c) compel that institution or person to comply with a directive issued by the Centre or supervisory body under this Act; or

(d) obtain a declaratory order against that institution or person on any point of law relating to any provision of this Act or any order, determination or directive made in terms of this Act

(3) Subject to subsection (1), if the Centre or a supervisory body has reason to believe that an institution or person is not complying with this Act or any order, determination or directive made in terms of this Act, it may, if it appears that prejudice has occurred or might occur as a result of such non-compliance, apply to a court having jurisdiction for-

(a) an order restraining that institution or person from continuing business pending an application to court by the Centre or supervisory body as contemplated in subsection (2); or

(b) any other legal remedy available to the Centre or supervisory body.

[20] At the end of the oral argument the parties were permitted to file written submissions on the applicability of section 45 F (3) of the FICA and whether it empowers the Board and/or the Centre to apply to court for the issue of a warrant. Counsel on both sides of the case filed written submission for which I thank them.

[21] In their joint submissions on behalf of the Board and the Ministers counsel contended that the effect of section 45 F (3)(b) is to empower the Centre or the Board (as supervisory body), once the jurisdictional requirements set by 45 F (3) are met, to make application to a court for any

legal remedy that is available to them and that the section implicitly empowers a court to grant a legal remedy so applied for. The section in effect provides the 'statutory lift off' for the application for a warrant by the Centre or the Board, it is contended.

[22] The applicant's counsel in their written submissions submitted that there are a number of reasons why the Board's reliance on section 45 F (3) should not be entertained. First, it is pointed out that since section 45 F is not mentioned in the proposed warrant and in the Board's 'founding' and replying affidavits, the Board is not entitled to rely on the section and that, in any event, the Board has not explicitly brought the application for relief in terms of section 45 F (3). Further it is contended that there is no evidence of compliance with the jurisdictional facts required in section 45 F (1) (b) for granting relief under section 45 F (3) (b), namely that the Board had first consulted with the Centre on the application. Further that section 45 F (3) is limited to interim relief pending the outcome of an application for the relief set out in section 45 F (2). In view of the conclusion to which I have come in regard to a further point raised by the applicant's counsel, it is not necessary to deal with these contentions and the answers to the points raised by counsel for the Board and the Ministers in their joint written submissions.

[23] In my view section 45 F (3) (b) does not take the matter any further because the section only permits the court to grant a remedy (assuming the issue of a warrant to be such a remedy) if it has the power to do so. The applicant contends that the court has no inherent jurisdiction to issue a

warrant and that the court can only issue a warrant if it has the necessary statutory authority to do so (Min of Safety and Security v Mohamed 2012 (1) SACR 321 (SCA) at 329 par [20]; 331 par [24]). Whether the impugned provisions do sanction the issue of a warrant by the court depends on whether words to that effect may be read into the statutes and can only happen once the sections as they stand are declared to be constitutionally invalid. The application regarding those issues has been postponed for decision after compliance with Rule 16 A. The Board and the Ministers contend however that the court does indeed have the inherent jurisdiction to consider and grant the application for a warrant and that this constitutes an existing legal remedy for which the Board is entitled to apply under section 45 F (3) (b) and which the court may grant.

[24] The issue therefore remains whether the order being sought by the Board may be made by the High Court in the absence of direct statutory authority for such an order. The respondents contend that the Appellate Division has held that an order pertaining to the preservation of and access to evidence, being procedural in nature, falls within the inherent jurisdiction of the High Court. In addition, section 173 of the Constitution entrenches the inherent power of the High Courts to regulate its own process.

[25] As I understand the judgments of the Appellate Division relied upon by the Board and the Ministers, the inherent power described therein is limited to the regulation of High Court's own process in regard to pending or intended litigation before that court. In Universal Studios it was made clear that orders

that went beyond orders designed merely to preserve specific evidence for trial but that are designed to give authority for a search for and attachment of, evidence in order to found a cause or causes of action, was not a procedure to which the Appellate Division could or should give its approval and that if such a remedy should be necessary, it should be sought in appropriate legislation and/or the amendment to the Rules of Court (at 754 CD; 755 H – J). In my view the relief sought by the Board is not concerned with the inherent power of the High Court to regulate its own process. There is no pending or intended litigation in the High Court in respect of which it is necessary to preserve evidence in the possession of the applicant. The Board is not seeking to enforce a cause of action through intended litigation in the High Court. The Acting Executive Manager of Enforcement and Compliance Department of the Board states that the sole purpose of the intended inspection of the applicant's premises was to determine whether there was information which demonstrated a failure by the applicant to comply with the provisions of the EAAA and the FICA. The exact manner in which the Board would seek to enforce compliance with the Acts would depend on what was discovered in the course of the investigation.

[26] In my view the Board has not made out a case for the issue of a warrant on the basis that the High Court has the inherent jurisdiction to do so in a case like the present. The relief sought by the Board can therefore not be granted by this court on the basis of this court's inherent jurisdiction.

[27] Whether the Board is entitled to proceed with its targeted search and seize operations without a warrant or whether this court is empowered by the impugned provisions to issue the Board with a warrant are matter which in my judgment should be heard together and stand over for determination when the main constitutional challenge is heard by this court. It follows that the following order is made:

1. The counter application by the Board for a warrant is postponed sine die to be heard together with the applicant's application challenging the constitutional validity of the impugned provisions.
2. The costs of this application are to stand over for determination at the postponed hearing.

W.J. LOUW

Judge of the High Court