



CONSTITUTIONAL COURT OF SOUTH AFRICA

Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others

CCT 94/13

Date of hearing: 18 November 2013

Date of judgment: 27 February 2014

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court confirmed an order of the Western Cape High Court, Cape Town, which declared section 32A of the Estate Agency Affairs Act (EAAA) and section 45B of the Financial Intelligence Centre Act (FICA) unconstitutional and invalid.

The Estate Agency Affairs Board is the primary regulator under the EAAA and is also a “supervisory body” responsible for enforcing FICA compliance. The Board suspected that Auction Alliance had not complied with both statutes. Relying on the search powers under the two statutes, inspectors tried to conduct a search of Auction Alliance’s business premises without a warrant. Auction Alliance refused them entry, and instead launched the current constitutional challenge.

The High Court held both provisions unconstitutional because they unjustifiably limit the right to privacy by allowing “targeted” searches (i.e., searches based on specific suspicion of wrongdoing) without a warrant. The High Court declared the provisions invalid to that extent. The declaration of invalidity has immediate effect in relation to section 32A of the EAAA, but has been suspended for 18 months with respect to section 45B of the FICA. The High Court ordered that, during that interim period, section 45B be read as modified to allow a magistrate or judge to grant a warrant. The High Court also rejected a counter-application by the Board, in which it sought a warrant to inspect documents previously stored at Auction Alliance’s offices, and which, by agreement, were being held in trust by KPMG pending the outcome of this litigation.

Before the Constitutional Court, the parties agreed that section 32A of the EAAA and section 45B of the FICA are unconstitutional and have to be declared invalid. The main issue was about defining the contours and managing the consequences of the invalidity. In a unanimous judgment by Cameron J, the Constitutional Court held that the provisions unjustifiably infringe the right to privacy. Both provisions lack meaningful limits as to the locations and scope of warrantless searches as well as the manner in which they may be conducted. The state failed to show that less restrictive means are not adequate to achieve the purposes of the statutes.

Accordingly, the Constitutional Court has confirmed the declaration of invalidity in respect of both provisions. It stipulated that, consistent with past practice, the declarations of invalidity would operate only prospectively. The declarations have been suspended for 24 months, to allow the Legislature an opportunity to cure their defects. In the interim, the Court has read a warrant requirement into each provision and empowered magistrates and judges to issue a warrant upon application by an inspector.

Lastly, the Constitutional Court, like the High Court, has declined to authorize a warrant in favour of the Board to search and access the material being held in trust by KPMG. Instead, the Court has given the Board an opportunity to apply to the High Court for a warrant to access that material under the newly read-in provisions.