

South African Institute of Professional Accountants

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South African Institute of Professional Accountants (SAIPA) questions Constitutionality of FICA Bill

The Financial Intelligence Centre Amendment (FICA) bill has been in limbo since Parliament assented to it in May 2016. For months, it awaited approval from President Jacob Zuma. But in December last year, the President returned the bill to Parliament, citing concerns over the constitutionality of a single clause that would allow inspectors to carry out searches without a warrant. Since then, President Zuma has been harshly criticised for its delay.

SAIPA itself deliberated the constitutional integrity of the clause and has submitted a letter to Parliament's Standing Committee on Finance outlining its reservations.

Ayanda Mabida, Company Secretary at the South African Institute of Professional Accountants (SAIPA) says SAIPA acknowledges that FICA is essential to South Africa meeting its obligations as a member of the Financial Action Task Force, an intergovernmental body that sets standards for combating money laundering, terrorist financing and other abuses of the international financial system.

Lack of specificity

"SAIPA has reservations on the warrantless searches," says Mabida. "There are definite circumstances where offenders may leverage delays in obtaining a search warrant to tamper with or destroy crucial evidence. Rather, our concerns relate to the lack of specificity about the conditions under which warrantless searches can be executed."

In its current form, the amended clause threatens to violate Section 14 of the Bill of Rights, which states that everyone has the right to privacy, and not to have their person, home or property searched, their possessions seized or the privacy of their communications infringed.

To paraphrase the FICA amendment, an inspector may enter premises without a warrant, either with consent from the person in charge (provided they're informed of their right to refusal), or if the inspector on reasonable grounds believes that a) a warrant would be issued anyway, and b) the delay in obtaining one would defeat the end (refer to FICA 32(b)).

According to Mabida, the term “reasonable grounds” doesn’t adequately describe the extent of the limitation of the right as required by Section 36 of the Constitution. “It could be abused and therefore infringe on the constitutional rights of those under investigation or anyone else.”

Although a court may rectify such infringement after the fact, Mabida is adamant. “It remains that a person’s constitutional rights would already have been violated. On principle, no law should be passed that would permit this eventuality.”

How should it be done?

Mabida highlights the Anton Piller order as a model of a well-defined legislation. One can be obtained promptly and allows authorities to carry out a search without prior notice, provided that an extremely strong prima facie case exists; the damage to the applicant would be drastic; and the offenders clearly possess relevant documents or items and could certainly destroy these before a warrant can be obtained.

Mabida concludes that South Africa must satisfy its responsibility to harden its financial systems, but not at the expense of its founding principles. “In developing new legislation, we must ensure that even the most minor clause honours the Constitution as our nation’s highest legal standard, and affords its people the protection described under the Bill of Rights.”

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