



ESTATE AGENCY AFFAIRS BOARD
OF SOUTH AFRICA

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AUCTION ALLIANCE

On 27 February 2014 the Constitutional Court of South Africa handed down judgement in the dispute between the Estate Agency Affairs Board (EAAB) on the one side and Auction Alliance and Rael Levitt on the other. The Constitutional Court has confirmed that the provisions of S32A of the Estate Agency Affairs Act and S45B of the Financial Intelligence Centre Act, which provide for search powers, are unconstitutional. This had been conceded by the EAAB as it was appropriate to do so. These statutory provisions have been declared to be invalid but that declaration is suspended for a period of 24 months (to allow a redrafting of the provisions). The declaration of invalidity does not apply retrospectively and will not impact on any actions taken previously by the EAAB in terms of those sections.

Additionally the Constitutional Court has confirmed that during this 24 month period, the wording of these statutory sections will now be deemed to be read as including provisions providing the EAAB with a mechanism to make application for a warrant to conduct searches that would otherwise have been affected by the decision of the Court. A link to the full judgement appears on this web page.

The EAAB welcomes the judgement which not only creates certainty for regulatory bodies on the question of how inspections and searches in circumstances like these are to proceed, but also puts an end to two years of litigation which Auction Alliance and Levitt have directed at preventing the EAAB from inspecting them.

The matter before the Constitutional Court initially arose out of an attempt by the EAAB to conduct a search of Auction Alliance's premises following receipt of information by the EAAB which suggested serious wrongdoing within Auction Alliance and disturbing breaches of both the Estate Agency Affairs Act and the Financial Intelligence Centre Act. Auction Alliance and Levitt sought to prevent the EAAB inspection by challenging the constitutionality of the statutory provisions under which the EAAB sought to inspect them. The Constitutional Court, whilst confirming the lack of constitutionality of the impugned provisions, also recognised the need of the EAAB to be able to conduct inspections in appropriate cases and has crafted as part of its order the aforementioned mechanism to allow the EAAB to apply for search warrants where justified.

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The EAAB has issued instructions to A.B.Scarrott Attorneys, its attorneys of record, to assist with the process of preparing an application in accordance with the decision of the Constitutional Court, for a search warrant in respect of Auction Alliance and Levitt.

The EAAB has repeatedly stated that it is committed to completing the investigation of Auction Alliance and Levitt and, if the evidence obtained by the EAAB and which caused the decision to investigate Auction Alliance and Levitt is confirmed, to ensuring that any persons found to have done wrong are held accountable therefor. The EAAB is the Regulator of the estate agents industry and will not be deterred from fulfilling its duty in this matter by any attempts to impede the process. The EAAB remains concerned at the uncontroverted evidence which suggests serious wrongdoing by Auction Alliance and by certain of its staff. The High Court has previously made certain factual findings. These include:

“The uncontroverted evidence in this case contains allegations that the applicant [Auction Alliance] 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 records 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 suggests that these offences have been committed by the applicant [Auction Alliance] as part of its operations”

And :

“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.”

The Constitutional Court has confirmed that for purposes of the proceedings thus far, the failure of Auction Alliance and Levitt to offer any explanation or rebuttal of the evidence in the possession of the EAAB means that the position contended for by the EAAB must be accepted as true and that :

“The litigation must be determined on the basis that Auction Alliance committed grave infractions of the laws regulating its business.”

The EAAB has lodged a criminal complaint with the South African Police Services against Auction Alliance and certain of its directors and will provide the South African Police Services and the National Prosecuting Authority, in so far as it is appropriate, with such support as it may require.

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The EAAB wishes it known that no estate agent will be allowed to avoid the provisions of the regulatory legislation. The EAAB is absolutely committed to fulfilling its statutory duties and functions and will not be deterred therefrom by dilatory tactics aimed at delaying the EAAB in executing its duty. The EAAB will ensure that in any matter, where evidence of wrongdoing is confirmed, that those concerned are held accountable to the fullest extent of the law.

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For further information:

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