

# Search and seizure of learners in schools in a constitutional democracy: A comparative analysis between South Africa and the United States

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## OPSOMMING

### **Deursoeking en Beslaglegging van Leerders in Skole in 'n Grondwetlike Demokrasie: 'n Vergelykende Ontleding van Suid-Afrika en die Verenigde State**

In hierdie artikel word die regsraamwerk wat die effektiewe bestuur van deursoeking en beslagleggingsaksies rig, gebruik om die reg van leerders op privaatheid in gevalle van onredelike deursoeking en beslaglegging van leerders se besittings in Suid-Afrika te vergelyk met die Verenigde State.

In Suid-Afrika mag 'n skoolhoof of die persoon aan wie hierdie gesag gedelegeer is, 'n groep leerders of die besittings van 'n groep leerders lukraak deursoek vir enige gevaarlike voorwerp of onwettige dwelmmiddel, mits daar 'n billike en redelike vermoede bestaan.

In die Suid-Afrikaanse reg word die begrippe deursoeking en beslaglegging nie duidelik gedefinieer nie. Hoewel daar riglyne gepubliseer is wat die bestuur en voorkoming van dwelmmisbruik in skole rig, word deursoeking van leerders tans oorgelaat aan eie oordeel wat van een geval tot die volgende gebruik word. Deursoeking noodsaak 'n mate van skending van die reg op privaatheid van leerders of hulle besittings.

Daar is 'n belangrike verskil tussen Suid-Afrika en die Verenigde State wat betref die vryheid om 'n individu te mag deursoek. In die Verenigde State mag 'n skoolhoof nie 'n groep leerders deursoek as daar 'n redelike vermoede bestaan dat een van hulle 'n moontlike oortreding begaan het nie. Indien daar 'n redelike vermoede bestaan dat 'n individuele leerder 'n moontlike oortreding begaan het, mag slegs daardie leerder deursoek word.

In die artikel word onderwysers gemaan dat elke situasie waartydens deursoeking of beslaglegging betrokke is van mekaar verskil en dat 'n presedent moeilik gevolg kan word. Nuwe hofuitspake en verskillende

omstandighede noodsaak verskillende optredes. Die doel met deursoeking en inbeslaglegging van leerders se besittings moet verband hou met die handhawing van goeie orde en dissipline by 'n skool en nie met die toepassing van strafreg nie.

## 1 Introduction

Law enforcement and education authorities as well as substance abuse researchers are in agreement that the nature and extent of illicit drug trafficking, consumption and associated problems have all increased dramatically since the 1990s. During this period South Africa has experienced major political and social transformation and the forging of trade and other links with some African countries and the rest of the world. The current increase in drug abuse is a disturbing phenomenon which causes a reprehensible escalation of insecurity at some schools.<sup>1</sup>

The issue of substance abuse in South African schools is far more urgent than is generally realised. Society in general ignores the accompanying dangers of addiction, aggression, and violence which threaten the very existence of the secure school environment. The South African Government, in recognition of the serious threat posed by substance abuse in schools, amended the South African Schools Act to include provision for random search and seizure exercises and drug testing in schools.<sup>2</sup>

The aim of this article is to investigate the right to privacy of the learners against unreasonable search and seizure exercises by exploring the legal framework that guides effective management of both search and seizure and of substance abuse in public schools in South Africa in comparison with the United States.

This article consists of two sections. The first section examines recent legislative action that focuses specifically on deterring substance abuse in schools in South Africa. It commences with a discussion of the National Policy on Drug Abuse in schools that was published in 2002, followed by the legislative actions resulting from this first attempt of the National Department of Education to manage the problem in South African schools. It also attempts to strike a legal balance between the learner's right to privacy and the security of the greater school community. The second section deals with the practical implementation of the legal provisions on search and seizure exercises and drug testing in schools in the United States. It briefly addresses perspectives from the United States on search and seizure exercises to provide guidance on their management in South African schools.

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1 National Department of Education *The National policy on the management of drug abuse by learners in public and independent schools and further education and training institutions* (2002) par 1.

2 S 8A South African Schools Act 84 of 1996 (SASA) provides for random search and seizure and drug testing in schools.

## 2 Search and Seizure Exercises in South African Schools

### 2.1 Introduction

The Ministry of Education in South Africa considers a safe and disciplined learning environment one of the critical elements to the successful delivery of quality education and recognises the role played by substance abuse in undermining this.<sup>3</sup> Evidence indicates that school communities are particularly vulnerable and substance abuse among learners is on the increase in both rural and urban, primary and secondary schools.<sup>4</sup>

### 2.2 The Learners' Right to Privacy

The Constitution of the Republic of South Africa,<sup>5</sup> 1996 provides for the right to privacy for everyone which includes the right not to have:

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communication infringed.

The right to privacy affords a greater intensity of protection to personal activities within the sanctum of the home. Where individuals engage in communal activities, such as education, the intensity of this protection diminishes. In *Mistry v Interim Medical Council of South Africa*<sup>6</sup> the Constitutional Court stressed that the more public an undertaking, the more attenuated would any corresponding claim to privacy be in respect of an activity.

Furthermore, the right to privacy, like all rights, is not absolute. In some instances, it is reasonable and justifiable for society to intrude into the personal and private realm of the individual.<sup>7</sup> If the school, therefore, wishes to search learners periodically in order to prevent dangerous weapons or contraband being brought onto the school premises, it must do so in terms of legislation.

### 2.3 Searches in South African Schools

The South African Schools Act,<sup>8</sup> (SASA) declares<sup>9</sup> all schools as drug free zones.<sup>10</sup> SASA clearly states that no person may bring a dangerous object

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3 Department of Education par 1.

4 Medical Research Council of South Africa *The Second South African National Youth Risk Behaviour Survey* (2008) 14.

5 S 14 Constitution.

6 *Mistry v Interim Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC).

7 S 36 Constitution.

8 84 of 1996 s 8A.

9 S 8A SASA.

10 S 8A SASA.

or illegal drug onto school premises or have such object or drug in his or her possession on school premises or during any school activity.<sup>11</sup> The principal or his or her delegate may, at random, search any group of learners, or the property of a group of learners, for any dangerous object or illegal drug, if a fair and “reasonable suspicion” has been established.<sup>12</sup> By its very nature, searches and drug testing are an invasion of privacy and may infringe the constitutional and personal rights of learners.

It should therefore not be the first point of intervention. In South Africa, there is no empirical evidence or justification yet for routine random testing of learners, to reduce drug usage.<sup>13</sup> In terms of SASA, drug testing may only be done where there is “reasonable suspicion” that a learner is using drugs.<sup>14</sup> Testing must be implemented as part of a structured intervention or relapse prevention programme in an environment that is committed to safeguarding personal rights relating to privacy, dignity, and bodily integrity according to school policy, medical/treatment procedures, and ethical guidelines.

Although, at first glance, it seems to be a fact that search and seizure exercises and drug testing of learners would entail an unlawful infringement of their right to privacy, section 7(3) of the Constitution reminds us that this right is subject to the limitations referred to in section 36, generally known as the limitation clause.

Section 36(1) stipulates that the rights in Chapter 2 of the Constitution are not absolute, but may be limited in certain circumstances. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including:

- (a) The nature of the right,
- (b) The importance of the purpose of the limitation,
- (c) The nature and extent of the limitation under consideration,
- (d) The relationship between the limitation considered and its purpose, and
- (e) The consideration of less restrictive means for achieving the purpose.

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11 S 8A (1) SASA.

12 S 8A (2) SASA.

13 Alexander & Sughrue (Paper delivered at the SAELA conference in 2009 in Mpumalanga) argue that in the US “[t]here is considerable debate as to whether random drug testing has any meaningful impact on discouraging learners from initiating use or from continuing use of illicit drugs”. There is concern by professional organisations that drug testing learners should be discouraged until “its safety and efficacy can be established and adequate substance abuse assessment and treatment services are available”. While there are a number of case studies and a few that are more comprehensive, there is little in the way of controlled studies that would offer the data and analysis that are needed to better inform the public and policymakers about the effectiveness of random search and drug testing.

14 S 8A(3)(iii) SASA.

Section 8A of SASA is a law of general application, in that it applies to all schools and is aimed at safeguarding the interests of learners with regard to their right to education, which must take place in an environment free of drugs and dangerous objects. Given that section 8A limits certain rights conferred in the Bill of Rights, it must be implemented with due regard to human dignity, privacy, and the right to property of the learners concerned.

Section 14<sup>15</sup> of the Constitution may be incorrectly interpreted, in the school situation, as meaning that educators are not permitted to search learners' possessions (eg for a dangerous weapon) and that possessions or people may not be searched (eg schoolbags for drugs). We do not support such an interpretation. Educators will, however, have to have a "reasonable suspicion" that an individual is in possession of a dangerous substance or weapon in order to carry out searches. The protection against searches and seizures is triggered only when the right to privacy is invaded. A two-step analysis must be done to draw a conclusion on the constitutionality of an invasion of privacy. Both the potential danger of the item being sought (dangerous weapons or drugs) and the validity of the information or the credibility of the informant that leads the searcher to believe a search is necessary, must be analysed.

In other words, the scope of the right to privacy must be assessed to determine whether law or conduct has infringed on the right. If there has been an infringement, the question remains as to whether it was justifiable under the limitation clause of the Constitution.

Section 36(1) of the Constitution imported a requirement of objective reasonableness into the limitation of learners' rights, such as would be the case with conducting searches and seizures at schools. This implies that, at school level, principals may seize an item only if, on reasonable grounds, they appear to have evidence of a contravention of any provision of the SASA.

A search will be permissible in scope when the measures adopted are reasonable in relation to the objectives of the search and not excessively intrusive in view of the age and sex of the learner and the nature of the infraction. Searches should be made in the privacy of an office by a person of the same sex in the presence of another person of the same sex.<sup>16</sup> The right to human dignity of the person being searched must always be protected. In all such cases the general rule should apply, namely that any limitation of the right to privacy should be justified by a rational educational purpose.

Parents may expect a school to take special care of their children, not only in terms of their education, but also in protecting them from harm during those hours when they are under the authority and care of the school. Therefore, educators have a duty to uphold, protect and promote

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<sup>15</sup> S 14 Constitution guarantees that everyone has the right to privacy.

<sup>16</sup> S 8A(4) SASA.

the rights of learners to effective education, equal educational opportunities, human dignity, freedom of security of the person, a safe school environment, privacy and just administrative action to ensure a safe school environment.<sup>17</sup> Educators in a school furthermore have a legal duty in terms of the common law principle, *in loco parentis*, to ensure the safety of the learners in their care. There are two coextensive pillars to the *in loco parentis* role that educators play: the duty of care and the duty to maintain order at a school.

In the South African legal context, the terms search and seizure are not clearly defined.<sup>18</sup> The question of what constitutes a search is left to common sense and is determined on a case by case basis. It is maintained that an element of physical intrusion concerning a person or property is necessary to establish a search. "Search" where it relates to a person must be given its ordinary meaning in its context. "Search" may also be regarded as:

[a]ny act whereby a person, container or premises is visually or physically examined with the object of establishing whether an article is in, on or upon such person, container or premises.<sup>19</sup>

The latter approach to search is questionable. What is meant by "visually" is not defined. The meaning of search, when viewed from a constitutional perspective, should entail an element of physical intrusion, related to the level of privacy provided for in the Constitution.<sup>20</sup> If there is no reasonable expectation of privacy then no search has occurred.

Since a search may also infringe upon the rights to dignity<sup>21</sup> and to bodily security, including the right against cruel, inhuman or degrading treatment,<sup>22</sup> it must be conducted consonant with those rights.

In *Ntoyakhe v Minister of Safety and Security*<sup>23</sup> the court held that the word "seize" encompasses not only the act of taking possession of an article, but also the subsequent detention thereof. Otherwise the authority to seize would be rendered worthless. The power to seize is limited to articles which are either involved in, used during, or may provide proof of the commission of an offence in the Republic or

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17 Ch 2 Constitution.

18 *Minister of Safety and Security v Xaba* 2003 1 All SA 596 (D). The second edition of the *Oxford English Dictionary* gives the following meaning to "search" where the verb relates to a person: "3(a) To examine (a person) by handling, removal of garments and the like, to ascertain whether any article (usually something stolen or contraband) is concealed in his clothing".

19 Basdeo "The Constitutional validity of search and seizure powers in South African criminal procedure" 2009 *Potchefstroom Electronic LJ* 4.

20 *Ibid.*

21 S 10 Constitution guarantees that everyone has inherent dignity and the right to have their dignity respected and protected.

22 S 12 Constitution guarantees the freedom and security of the person, including the right to be free from any forms of violence.

23 *Ntoyakhe v Minister of Safety and Security* 2000 1 SA 257 (ECD).

elsewhere, or provide proof of the fact that the commission of the offence was planned.

The safeguards against an unjustified interference in the right to privacy and other fundamental rights include an objective standard, which is whether there are “reasonable grounds” to believe that an offence has been or is likely to be committed and that the articles sought or seized may provide evidence of an offence. It is insufficient merely to ask if the articles are possibly connected with an offence. The question arising is what criteria should be employed to determine the basis of such grounds. One may infer that for seizure of property on reasonable grounds to be justifiable, there should exist an objective set of facts which causes the principal or his/her delegate to have the required belief. In the absence of such facts, the reliance on reasonable grounds will be vague.

Legislation, allowing for schools to search for drugs when there is “fair and reasonable suspicion” that illegal substances are being used on the school premises,<sup>24</sup> came into effect in 2007. As an extension of the National Drug Master Plan,<sup>25</sup> the Department of Education has developed a Policy Framework on the Management of Drug Abuse in all Public Schools and Further Education and Training Institutions.<sup>26</sup> The policy framework encapsulates recommendations made in the National Drug Master Plan and has been distributed to schools throughout South Africa. The policy framework focuses on prevention and early intervention based on a restorative justice approach.

## **2 4 Guidelines for Search and Seizure Practices in SA Schools**

The Guidelines for the Management and Prevention of Drug Use/Abuse by Learners in all Public Schools and Further Education and Training Institutions<sup>27</sup> (hereafter Guidelines) provided by the Department of Education spells out that searches must be conducted in a manner that is reasonable and proportional to the suspected illegal activity. For example, where there is a suspicion that learners have illegal drugs in their school bags or lockers, the search may not be extended to their bodies. Where there is a suspicion that the learners are carrying illegal substances in their pockets or elsewhere in their clothing, only their clothing may be searched, and not their bags or lockers.

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24 Education Laws Amendment Act 31 of 2007.

25 Department of Social Development *The National Drug Master Plan (NDMP)* (2006) was drafted in accordance with the stipulations of the Prevention and Treatment of Drug Dependency Act 20 of 1992. It reflects the country's responses to the substance abuse problem as set out by UN Conventions and other international bodies. The revised *National Drug Master Plan 2006-2011* is South Africa's answer to this challenge. It has been designed to serve as the basis for holistic and cost-effective strategies to reduce the supply and consumption of drugs and limit the harm they cause.

26 Department of Education 2002.

27 Department of Education 2008-09-19.

If a learner refuses to cooperate in a lawful search procedure, the parents must be informed that the learner is unwilling to cooperate and that the learner will be handed over to the police. If either the learner or the parent refuses to cooperate, the police may conduct a search in terms of the Criminal Procedure Act.<sup>28</sup> However, in terms of the Department of Education's drug policy, the focus is on identifying the drug abuse problem, and learners who are victims of a dependency must be assisted, as provided for in the system.

The Guidelines emphasise the sensitivity of drug testing and provides guidance on the practical approach to search and seizure. The general approach should be to search groups of learners only after a "fair and reasonable suspicion" has been established. All drug testing should be confidential, information must be clearly and correctly recorded, all objects and urine samples must be clearly labelled and all confiscated objects must be handed to the police.

It is important to note that, in accordance with SASA, random search and seizure procedures are only undertaken when a fair and reasonable suspicion has been established that substances are being used on the school premises. In this regard, searches are conducted after taking into account all relevant factors, including:

- (a) the best interest of the learner in question or of any learner at the school;
- (b) the safety and health of the learner/s in question or of any learner at the school;
- (c) reasonable evidence of illegal activity; and all relevant evidence received.

The Guidelines<sup>29</sup> have been designed to balance the privacy and psychological integrity of the child against the need to respond both reasonably and proportionally to suspected illegal activity. If a drug test is considered necessary, it should form part of a structured intervention or relapse prevention programme, and be carried out according to school policy, the prescribed test procedures and ethical guidelines.

In terms of Section 8A(ii) of SASA, the Minister of Education must identify the device with which the drug test is to be done and the procedure to be followed and publish the name of this device, and any other relevant information about it, in the Government Gazette. The Minister has, accordingly, identified ten devices and a school may use any one of these.<sup>30</sup>

South Africa is in search of strategies, both educational and managerial, to confront the problem of substance abuse, whether it is real or perceived, in their schools. Educational strategies include health

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28 *Idem* par 4.6.3.

29 Department of Education 2008 2.

30 Department of Education *Devices to be used for drug testing and the procedure to be followed*. Notice 1140 (2008-09-19).



education curricula that discuss the effects of various illicit drugs and alcohol on humans of all ages and that specify resources that are available to learners faced with drug use at home or in schools. Managerial tactics to thwart drug possession and drug use include various forms of search and seizure, such as random locker and school bag searches, canine searches, and even strip searches in rare instances.

Teachers and principals in South Africa are frequently finding it necessary to search learners and remove from their possession items which may be harmful to them or others. Search and seizure and drug testing in schools are relatively new procedures in South Africa and have not yet been tested in the courts. School principals and education officials are thus interpreting and implementing the legal provisions in SASA as they see fit.

### **3 Search and Seizure in United States' Schools**

#### **3 1 Introduction**

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>31</sup>

Based on experiences of British soldiers invading and seizing the homes and goods of colonists while searching for contraband, the Founders were adamant that citizens must be protected from such government action. The Fourth Amendment requires government (law enforcement officers and officials) to first establish probable cause and to obtain a warrant prior to searching or seizing a person, his papers, or his home. In other words, government has to respect the privacy of an individual, a right that protects an individual against “unreasonable searches and seizures.”

#### **3 2 Learners' Right to Privacy**

While the right to privacy is extended to learners in public schools, the US Supreme Court, in *New Jersey v TLO*,<sup>32</sup> tempered it by balancing it against the government's interest in securing a safe learning environment. A lesser standard of “reasonable suspicion” was issued by the High Court for application by school officials who could not be expected to go to court to obtain a warrant in order to search for weapons, drugs, or other paraphernalia that might present a danger to the individual or to others.

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<sup>31</sup> US Const amend IV.

<sup>32</sup> 1985 469 US 325.

TLO was a 14-year-old student who was caught smoking in the bathroom with another student. The second girl admitted to smoking, but TLO denied it. She was escorted to the assistant principal who then searched her purse and found cigarettes and much more. There were rolling papers, a pipe, empty plastic bags, a small amount of marijuana, a substantial amount of money, index cards with names of learners who owed TLO money, and two letters implicating her in the selling of marijuana.

The assistant principal contacted the learner's parents and the police concerning her drug dealing. When they arrived at the police station, she confessed to dealing in marijuana at school. Based on her confession and the evidence found by the assistant principal, she was charged as a juvenile delinquent. However, once in the Juvenile and Domestic Relations Court, TLO moved to have her confession and the contents of her purse suppressed under the "exclusionary rule" arguing that the contraband and confession were illegally obtained. The trial court ruled that:

A school official may properly conduct a search of a student's person if the official has 'reasonable suspicion' that a criminal act has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.<sup>33</sup>

TLO appealed this decision to the New Jersey Appellate Division, which affirmed the lower court's decision. She then appealed to the New Jersey Supreme Court, which overturned the previous rulings, declaring that the Fourth Amendment applies to school searches. It suppressed the evidence collected by the assistant principal, stating that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings."<sup>34</sup>

The US Supreme Court accepted this case as an opportunity to evaluate whether the exclusionary rule should apply in Juvenile Delinquency proceedings that involved school searches. However, it had "doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities,"<sup>35</sup> so it ordered re-arguments on that question.

### 3 3 Searches in US Schools

In evaluating the context of school searches, the Supreme Court noted that some lower courts had held that school personnel were not subject to the restrictions placed on law enforcement by the Fourth Amendment because they acted *in loco parentis*. However, the Court disagreed with this reasoning:

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33 *Idem* 736.

34 *Idem* 737.

35 *Idem* 739.

Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.<sup>36</sup>

The Court followed this determination by weighing a learner's legitimate expectation of privacy against the State's interest in maintaining discipline in the school. On one hand, it disagreed with New Jersey's claim that students had no expectation of privacy at school:

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. Students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extra-curricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, non-contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto the school grounds.<sup>37</sup>

On the other hand, it was cognisant of the difficulty faced by school personnel to maintain order:

Against the child's interest in privacy, must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.<sup>38</sup>

The Court's answer to the dilemma of balancing these competing interests was to modify the requirement of probable cause for law enforcement to one of "reasonable suspicion" for school officials. It articulated a two-pronged test of reasonableness. It required that the school official must have reasonable individualised suspicion prior to initiating the search and that the search had to be reasonably related in nature and scope to the suspected school violation and in the light of the gender and age of the child:

[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception;' second, one

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36 *Idem* 739-740.

37 *Idem* 741.

38 *Ibid.*

must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.' Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in the light of the age and sex of the student and the nature of the infraction.<sup>39</sup>

In applying this "reasonableness" standard to the *TLO* case, the Court concluded that the assistant principal had "reasonable suspicion" prior to searching TLO's purse that she would find cigarettes. TLO was suspected of smoking and her friend confessed to it. The other contraband was in plain view once the cigarettes were taken out of the purse. The Court also determined that the nature and scope of the search was reasonable inasmuch as a search of a purse was not intrusive given the circumstances of the suspected violation.

### 3 4 Guidelines for Search and Seizure Practices in US Schools

Beckham<sup>40</sup> suggested that a learner's demeanour and conduct may contribute to an individualised suspicion. However, the suspicion should be based on first hand observation or from a reliable source, such as a teacher. If a learner reports a concern about a school infraction that may require a search, the school official would be wise to investigate the matter further, particularly in the light of an intrusive search.

Courts do not look favourably upon generalised non-random searches. If a school violation is suspected, the teacher or administrator should first establish an "individualised" suspicion. School staff may not search a classroom of learners to find evidence of someone breaking a rule.

The courts have allowed school officials to search lockers and cars based on reasonable suspicion. Lockers are school property, so learners should be notified that random searches as well as those based on individualised reasonable suspicion are permitted. Driving to school and parking in a school lot is considered a privilege not a right, so learners' cars may be searched if reasonable suspicion is established. This may occur with canine searches in school parking lots.

Many schools have established the practice of searching all the luggage and hotel rooms of learners who are participating in school tours or outings. A Federal District Court in New York ruled that searching the hotel rooms of learners was justified and based the judgment on the

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<sup>39</sup> *Idem* 742-743.

<sup>40</sup> Joseph Beckman *The Principal's Legal Handbook* (ed Lane, Gooden, Mead, Pauken, & Eckes) (2008) 32.

legitimate interest of the school to prevent learners from taking illegal substances on these trips.<sup>41</sup>

In this case, the learners were notified prior to the trip that their rooms would be checked on a daily basis. On one particular evening, a teacher passed a group of learners in the hallway and detected a strong smell of marijuana. A search of the learners' rooms thereafter uncovered marijuana and alcohol. The learners were immediately sent home and subsequently suspended from school. In its ruling, the court referred to the facts that the learners were aware of the school's code of conduct, they were given prior notice that there would be room checks, that the teachers acted *in loco parentis*, and that when the teacher smelled marijuana he had strong reason to believe that the learners were engaged in illegal activity. The court ruled that the search was constitutional.

Schools may utilise surveillance cameras in classrooms, hallways, and school grounds without encroaching on the right to privacy of learners. The US Court of Appeals, Sixth Circuit, has ruled that rooms where learners undress and shower are of "elevated personal privacy", and has clearly established that the personal privacy of learners may not be infringed when they are changing their clothes.<sup>42</sup>

If a search has the probability of being intrusive, the school official should assess whether it could be justified based on the danger presented by the suspected violation, as well as the age, gender, disciplinary history, and background of the learner. In other words, if a search of a learner's person is indicated, then the school official must have a strong safety concern, usually one that involves a weapon or drugs.

The most intrusive search is a strip search. Over the years, the courts have had difficulty in deciding if reasonable suspicion allowed students to be strip-searched. The Supreme Court took up the challenge two years ago in *Stafford United School District #1 v Redding*.<sup>43</sup> This case involved a 13-year-old girl, Savana, who was strip-searched because the assistant principal suspected she was hiding prescription strength ibuprofen as well as other pills that could be purchased over the counter. The administrator, Wilson, had been told by another girl, who was in possession of Savana's day planner and who was caught with the drugs, that Savana had given the drugs to her. Wilson interviewed Savana who denied the accusations, after which the administrator searched her backpack but found nothing. He then instructed the school nurse and a female administrative assistant to take Savana to another room and to search her clothing. They instructed her to undress to her underwear, at which point they asked her to hold out her bra and panties.

The Court ruled that the search of the backpack was reasonable, but that the strip search was not:

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41 *Rhodes v Guarricino* 1999 54 FSupp 2d 186.

42 *Brannum v Overton County School Board* 2008 516 F3d 489.

43 2009 129 Sct 2633.

We do mean ... to make it clear that the T L O concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resorting to hiding evidence of wrongdoing in underwear before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.<sup>44</sup>

The Court recounted Savana's description of her ordeal as embarrassing, frightening, and humiliating and referred to professional mental health journals and *amicus* briefs as to the devastating effects of strip searches on adolescents. Nonetheless, the Court realised there may be situations in which strip searches may be required, but that a high level of justification was needed, something that was not present in this case:

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in TLO, that 'the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place.' The scope will be permissible, that is, when it is 'not excessively intrusive in the light of the age and sex of the student and the nature of the infraction.' Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.<sup>45</sup>

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.<sup>46</sup>

Although searches of individual students must adhere to the standards of reasonableness described above, there is a category of searches that prevails under the "special needs" doctrine although they are not based on reasonable and individualised suspicion. The special needs doctrine recognises that there are general safety concerns that require more latitude in supervising learners. This is the justification that is given in support of random drug testing, or a search without specific suspicions that school officials may require of learners who participate in extra-

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44 *Idem* 2643.

45 *Idem* 2642.

46 *Idem* 2643.

curricular activities.<sup>47</sup> However, the Court did caution that school districts should not assume that random drug testing would be constitutional in all contexts. Compulsory education laws require students to attend school and, therefore, they cannot be expected to give up their right to privacy and be subjected to suspicionless drug testing. Participating in extra-curricular activities is voluntary; a learner who objects to random drug testing has the choice to abstain from those activities in which testing would be a requirement. No such option would exist in the general population of learners who are required to attend school.

In summary, the protection against unreasonable searches and seizures implies that a search cannot be instituted without a school official having reasonable suspicion that a search is necessary. The search must be specific to an individual learner, and the nature and scope of the search must be reasonably related to the suspected infraction and take into consideration the age and gender of the learner.<sup>48</sup>

A learner's freedom from search and seizure must be balanced against the needs of the school to maintain order and discipline and to protect the health and safety of all learners. It is clear learners and teachers have constitutional rights, but those rights may be tempered by the unique circumstances that exist in public schools. The US Supreme Court resolved that learners have a lesser expectation of privacy when in school.<sup>49</sup>

The Court approved suspicionless drug testing of athletes in *Vernonia School District 47J v Acton*<sup>50</sup> and later for all participants in extra-curricular activities in *Board of Education of Independent School District No 92 of Pottawatomie v Earls*.<sup>51</sup> The Supreme Court held that special needs exist in schools that underpin the schools' obligation to deter drug use and, therefore, can require participants in extra-curricular activities to submit to drug testing. However, this kind of search has not been determined to be applicable in all contexts, such as where all learners are required to participate.

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47 *Vernonia School District 47J v Acton* 515 US 646 (declaring that requiring student athletes to submit to random drug testing is not constitutionally infirm); *Board of Education of Indiana School District No 92 of Pottawatomie County v Earls* 536 US 822 (opining that requiring students in any competitive extra-curricular activity to participate in random drug tests is not a violation of the Fourth Amendment).

48 Alexander & Alexander *The Law of Schools, Students and Teachers* (2009) 271.

49 *New Jersey*.

50 *Vernonia School Dist 47J*.

51 *Board of Education of Indiana School District 92*.

## 4 Possible Inferences for South African School Principals

School principals should be primarily concerned with removing illegal substances from the school environment for the betterment of other learners and not for use in the criminal prosecution of learners. The question that arises is: can these illegal substances seized by teachers be used in criminal prosecutions or must they be excluded as evidence? The majority of the courts in the US have ruled that materials seized by school officials may be used as evidence in a criminal prosecution,<sup>52</sup> as long as the evidence was obtained by a legal search. With this lesson from the US courts in mind, inexperienced South African school principals and education officers need more clarification on the requirements for confiscating and safe-keeping of illegal substances until they can be handed over to the police.

School principals in South Africa often involve the police to assist them with search and seizure in their schools. Many US schools, particularly high schools, now employ law enforcement personnel to remain on school campuses to assist in school discipline and to combat criminal activity in schools. In the US a stronger “probable cause” standard applies when outside police search learners *unless* they are conducting the search at the request of a teacher or administrator. Law enforcement officers may need to meet only the reasonable suspicion standard if they are functioning in their capacity as a school official at the time.

School principals do not need the consent of the learner in order to conduct a search, although they often seek it. Consent, though, must be given freely and willingly without coercion. The learner’s parents should be contacted and can be asked to explain to the learner the importance of cooperation with the school.

There is an important distinction between the freedom to search an individual in South Africa and the United States. The principal in the US does not have to first establish where the contraband is hidden. If a US school administrator has a reasonable suspicion that a learner is in possession of drugs or a weapon, the principal can search the learner, his belongings, or his locker. The test of a reasonable search is in the nature and scope of the search. The more intrusive the search, the more severe the suspected violation must be. In other words, it is reasonable to search a learner's locker for stolen property, but it is not reasonable to strip search a learner if the suspected violation does not involve dangerous drugs or weapons.

Likewise, a US principal may NOT search a group of students, even if reasonable suspicion has been established that perhaps one among them

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52 Alexander & Alexander 206.



has committed a school violation. *Individualised* reasonable suspicion must be established before a search of a learner can proceed.

Random non-intrusive searches can be conducted in such instances as for example, when learners arrive at school and are required to pass through a metal detector or to be scanned by a wand. Schools can require all students to submit to such a search or they may institute a system in which learners are truly selected randomly for the screening.

A school may require a learner to be drug tested only upon establishing individualised reasonable suspicion and measures must be taken to ensure the privacy of the learner during the urine collection process. Random drug testing is only authorised for learners participating in extra-curricular activities. Schools may use positive results from random tests to deny learners the opportunity to participate in extra-curricular sports or clubs and to refer them to drug counselling, but they may neither share the results with law enforcement nor deny the students access to schooling.

The important lesson is that school officials have the responsibility to maintain a safe and secure learning environment for staff and learners. When they determine a search is necessary, they must conduct a search that is justified at the inception and the nature and scope of the search must be reasonably related to the nature of the suspected infraction and in the light of the age and gender of the student. The general rule of thumb is, the more intrusive the search, the stronger the justification must be to conduct it.

## 5 Conclusion

A substantial percentage of learners have access to and use illegal drugs and alcohol on school property.<sup>53</sup> It is imperative that schools be active to regain their role and function as institutions of learning and that a forceful drive to establish a culture of learning and appropriate discipline is instituted. Teachers and principals have frequently found it necessary to search learners and to remove from their possession, items which may be harmful to them or to others.

In each circumstance of a search, the court may determine whether the search was reasonable. The South African Schools Act makes it clear that the principal needs reasonable suspicion before conducting a search or drug test. In the case of drug testing, the learners' right to privacy is not violated if the testing procedures to collect samples do not intrude on the learners' privacy. Likewise, the test results must be kept confidential and must not be used to invoke school academic or disciplinary measures, or to provide evidence in a criminal procedure.

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53 Medical Research Council of South Africa *The Second South African National Youth Risk Behaviour Survey* (2008) 14.

What guidance do the United States cases provide for South African school principals? Most obviously, if it is believed that there has been a breach of school rules, the suspected learner may be searched, and any contraband that is found, may be seized. However, it is important to remember the following caveats:

- (1) Any detention, search, or seizure must be done with the intent of maintaining proper order and discipline in the school. Any such action cannot be done for the purpose of enforcing the criminal law.
- (2) Any detention, search, and seizure must meet the 'reasonableness' test. That is, it must be based on credible information and carried out in a sensitive and reasonable manner. Strip searching an entire class of learners when money is missing from a locker or school bag, for example, would hardly meet this test.
- (3) Whenever principals can, they should determine, in advance, whether a particular detention, search, or seizure is going to become a police matter and whether they want the learner to face criminal charges and potential conviction.
- (4) Courts have noted that school principals can practice discretion. In the US, schools are required to report criminal activity, but they may not have the capacity to properly handle evidence. There is no general duty to report to police, for example, every time a learner commits assault in a fist fight. The seriousness of every situation must be weighed, and it is wise to be very familiar with Departmental policy on these matters.
- (5) School lockers and desks are obviously the property of the school. Common sense would dictate that if teachers, under the authority of principals, may search learners in given circumstances, this would also extend to school property. In fact, schools may publish a policy advising learners that school lockers may be searched periodically, even in the absence of reasonable suspicion. The reason is to maintain control over school property at all times. Ideally, searches of learners and school lockers should be done with two or more persons present so that observations and the findings of evidence may be corroborated.

Educators must also be cautious of the following aspects. Interpretations of the law and what constitutes "reasonableness" can be subjective and might change over time. Furthermore, situations involving search and seizure are all different and might not conform exactly to precedent. New cases and new circumstances continually emerge. Drug use, for example, has been on the rise over the past few years, and decriminalisation of marijuana is a possibility. One example of a response by school principals to a perceived increase in drug use is the recent employment of dogs in several South African schools to assist in the search for drugs. Does this meet the test of reasonableness? Will this become necessary for the maintenance of proper order and discipline in school?