

A CONSTITUTIONAL PERSPECTIVE OF POLICE POWERS OF SEARCH AND SEIZURE IN THE CRIMINAL JUSTICE SYSTEM

by

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KEY TERMS

Privacy

Search

Seizure

Constitution

Criminal Procedure Act

South African Police Service Act

Police

Warrants

South Africa

Canada

United States

SUMMARY

Before 1994 criminal procedure was subject to the sovereignty of Parliament and the untrammelled law enforcement powers of the executive which resulted in the authoritarian and oppressive criminal justice system of the apartheid era. The Constitution, Act 108 of 1996 has since created a democratic state based on the values of the supremacy of the Constitution and the rule of law. The basic principles of criminal procedure are now constitutionalised in the Bill of Rights. The Bill of Rights protects the fundamental rights of individuals when they come into contact with organs of the state which includes the police. The Criminal Procedure Act 51 of 1977 authorises the police to search for and to seize articles, and has long provided the only legal basis for obtaining warrants to search for and to seize articles and for performing such actions without a warrant in certain circumstances. Generally the standard for these measures and actions taken under their purview has been one of reasonableness. Since the birth of the Constitution there has been additional constraints on search and seizure powers. Not only are there now constitutionalised standards by which such legal powers are to be measured, but there is also the possibility of excluding evidence obtained in course of a violation of a constitutional right. The provisions of the Criminal Procedure Act are now qualified by the Constitution. Where feasible a system of prior judicial authorisation in the form of a valid search warrant obtained on sworn information establishing reasonable grounds is a precondition for a valid search or seizure. Search and seizure without a warrant is permitted only in exceptional circumstances such as an immediate threat to person or property. By prohibiting unreasonable searches and seizures the Constitution places important limits on police efforts to detect and investigate crime. The Constitution appreciates the need for legitimate law enforcement activity.

CHAPTER ONE

INTRODUCTION AND CONTEXTUAL CONSTITUTIONAL ISSUES

1. Introduction

The subject matter of this study is “A Constitutional Perspective of Police Powers of Search and Seizure in the Criminal Justice System”. It examines search and seizure from a constitutional perspective in the South African criminal justice system. Starting with the interim Constitution¹ of 1993 and the culmination of the 1996 Constitution², the fundamental principles of criminal procedure are now constitutionalised. The courts, with the Constitutional Court reigning supreme, as guardians of the Constitution, now has the final say as to the values and rules, which determines how society deals with crime. This replaces the central tenet of the criminal justice system in pre-1994 period which gave Parliament and the executive a free hand, which resulted in the oppressive and illegitimate criminal justice system of the apartheid years.³

An important part of crime investigation is the obtaining of evidence through the search of persons and places, and the seizure of things. At the same time our Constitution recognises that state authorities should not be permitted untrammelled access to search for and seize items belonging to individuals. It is a necessary incident of democracy that individuals must be protected from unjustified intrusions on privacy and property by agents of the state. Otherwise, arbitrary state actions could

¹ Constitution of the Republic of South Africa Act 200 of 1993 (hereafter referred to as the “Interim Constitution”).

² Constitution of the Republic of South Africa, 1996 (unless otherwise mentioned all references to “Constitution” in this thesis refers to the said Act, hereafter referred to as either the 1996 Constitution or Constitution”).

³ Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* 1998 v.

severely affect privacy and affected fundamental rights that are intended to be a predominant feature of democratic society, which our Constitution guarantees. Historically, the police and other state agents have required legal authority for undertaking such measures.

The Criminal Procedure Act⁴ has long provided the main legal basis for obtaining warrants to search for and seize property or for performing such actions without a warrant in certain circumstances. Generally, the standard for these measures and the actions taken under their purview has been one of “reasonableness”. Many statutory and common law search and seizure powers are, and have been for many years, predicated on ‘reasonable grounds’ for believing that evidence will be located at the place to be searched. Even where the grounds have been set at a lower threshold, reasonableness has usually been included as a constraint against arbitrary or capricious conduct by the police or other authorities.

Since the advent of the Constitution there have been additional constraints on search and seizure powers. This has come through the guarantee to be secure against unreasonable search or seizure. There are now constitutional standards by which such legal powers are to be measured. The Constitution is now the guiding light for the criminal justice system. The idea that individuals can enjoy privacy from governmental intrusions with regard to themselves, their possessions, and their homes, is what we have come to expect, rather than what we desire. The right to privacy includes the right, not to have one’s person or home searched, one’s property searched or possessions seized. Section 10 of the Constitution preserves the right to dignity, whereas section 14 of the Constitution prescribes that everyone is entitled to “the right to his or her privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.” On the

⁴ 51 of 1977 (hereafter referred to as the “Criminal Procedure Act”).

face of it, this appears to be an absolute prohibition, which would mean that it would have the effect of overriding the provisions contained in Chapter 2 of the Criminal Procedure Act, providing for search and seizure operations in certain defined circumstances. This in turn would deprive the police of an essential tool and technique of the criminal investigative process, namely the power to search and seize those objects found.

Search and seizure is currently regulated by Chapter 2 of the Criminal Procedure Act, which employs the standard of reasonable belief that a particular article located on a certain premises is connected with the commission of an offence. The test is therefore objective and the courts have been empowered to set the standard. The general requirement is that information justifying the suspicion should be placed before a Justice of the Peace, justifying the latter to issue a search warrant authorising a particular search and seizure operation.⁵ However provision is also made for the conducting of search and seizure operations, without a warrant in circumstances where a warrant would have been granted, but the delay in obtaining one would have defeated the objects of the search.⁶

In general, searches and seizures that invade privacy must be conducted in terms of legislation clearly defining the power to search and seize. They are only permissible to achieve compelling public objectives. Furthermore they must be endorsed as necessary for such a purpose by an independent authority before they may be conducted. In other words, as a rule, searches and seizures that violate the right to privacy must be authorised by a warrant.⁷

⁵ Section 21 of the Criminal Procedure Act.

⁶ Section 22 of the Criminal Procedure Act .

⁷ *Janse Van Rensburg NO v Minister van Handel en Nywerheid NO* 1999 (2) BCLR 204 (T) 246A.

2. Constitutionalism in relation to search and seizure

All constitutions concern themselves with the exercise of public power.⁸ In modern democratic constitutions such as the South African Constitution⁹, such power is divided between the legislature, the executive and the judiciary.¹⁰ The Constitution also concerns itself with the form in which power is exercised. Law is the medium through which power is exercised and disseminated, beginning with the Constitution itself.¹¹ No rule may be made except in accordance with the Constitution. A democratic Constitution is a rule-making machine.¹² No public body may exercise power except in terms of an authorising rule and no person is above the law.¹³ The Constitution also concerns itself with values and principles. These values are *a priori* commitment upon which the whole edifice of democratic government is structured. They are the *a priori* assumptions that justify and give the Bill of rights a particular form.¹⁴ Encapsulated around human dignity, privacy and associated fundamental rights these values inform the Constitution.

The courts play a pivotal role in the development and application of a fair law of criminal procedure. The success of the Bill of Rights will not only depend on how the courts and the legal profession deal with it, but also how assertively and judiciously those whose rights are entrenched, will invoke this instrument.¹⁵ The spirit, purport and object of the

⁸ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 2002 1.

⁹ Constitution of the Republic of South Africa, 1996.

¹⁰ Cheadle, Davis and Haysom *supra* 1.

¹¹ *Ibid* 1.

¹² *Ibid* 1.

¹³ *Ibid* 1.

¹⁴ *Ibid* 1.

¹⁵ Du Plessis and Corder *Understanding South Africa's transitional bill of rights* (1994) 137.

Constitution was expressed by Mahomed DP in *Shabalala v Attorney-General of Transvaal*¹⁶ where he maintained that:

[T]he dominant theme of the Constitution.....is to emphasise the “historic bridge” which the Constitution provides between a past based on ‘conflict, untold suffering and injustice’ and a future which is stated to be founded on the recognition of human rights.¹⁷

He warned that:

[T]he Constitution is not simply some kind of statutory codification of an acceptable or legitimate past.It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours, ... The past was pervaded with inequality, authoritarianism and repression. The aspiration of the future is based on what is ‘justifiable in an open and democratic society based on freedom and equality’. It is premised on a legal culture of accountability and transparency.¹⁸

Infringement by the executive of the right to privacy of the individual is an everyday occurrence. The Criminal Procedure Act authorises the police service, to search for and seize articles. On the one hand the Criminal Procedure Act authorises the police to infringe the privacy of the individual but on the other hand it guarantees the privacy of the individual. The provisions of the Criminal Procedure Act are qualified by the Constitution, specifically section 36 and 35 of the Constitution.

In all systems it is recognised that the police exercise the powers of search of person or premises, the power to seize property uncovered in such searches, and power to arrest persons whose possible guilt is indicated by the evidence discovered during the investigation. The right to search, seizure and arrest is not left entirely in the discretion of the police. In both the inquisitorial and adversarial systems these

¹⁶ 1995 2 SACR 761 (CC) par 18.

¹⁷ *Ibid.*

¹⁸ *Ibid* par 21.

powers may be exercised only with the authorisation of a judicial officer. It is however universally recognised that the police may in certain circumstances act without prior authorisation.

Pre-trial procedures constitute an important consideration in the application of the Bill of Rights for two main reasons: firstly, while it is conceded that law enforcement officials may require special powers in order to conduct criminal investigations, such powers will inevitably constitute a violation of ordinary fundamental rights and freedoms of the individual:

The powers of search and seizure constitute also “the first and most effective weapons in the arsenal of every arbitrary government. Human personality deteriorates and self reliance disappears where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.”¹⁹

Secondly, there exists the risk that abuses at the pre-trial stage could well taint the fairness of a subsequent criminal trial. Thus many Bills of Rights provide protection against improper exercise of pre-trial investigative powers. The United States Constitution, in the Fourth Amendment,²⁰ confers on individuals the right “to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. Section 8 of the Canadian Charter of Fundamental Rights and Freedoms guarantees the “right to be secure against unreasonable search and seizure.” South African and foreign legislation, namely, that of United States of America and Canada, share certain similarities which will be discussed later in this thesis.

A search warrant should comply with strict requirements as to who may execute the warrant, where, how and when the warrant will become invalid. At this critical juncture in the history of South Africa, when a constitutional democracy based on the rule of law must take root, rampant crime is one of the greatest public concerns. In *S v*

¹⁹ *Brinegar v US* 338 US 160 (1949) 223.

²⁰ USA Constitution, The Fourth Amendment (ratified December 15, 1971).

Makwanyane,²¹ Chaskalson P observed that the level of crime has reached such “alarming proportions” that “it poses a threat to the transition of democracy and the creation of development opportunities for all, which are primary goals of the Constitution.” Crime empties the right to freedom and security of person and the right to property of meaning.²²

The Constitution aims at advancing an ethical criminal justice system that is accountable to society. The Bill of Rights is a powerful instrument in the reconstruction and transformation of South African society. However the Bill of Rights should not be regarded as a panacea for all ills. It should rather be understood and used within the structural context of the whole Constitution, from which it must draw its strength. Today, law enforcement officials must be highly skilled in the use of investigative tools and extremely knowledgeable about the intricacies of the law. One error in judgement during initial contact with a suspect can, and often does impede the investigation and could effect the fairness of the trial. For example, an illegal search may so contaminate evidence obtained that it will not be admitted as evidence in court. In addition to losing evidence for prosecution purposes, failing to comply with constitutional mandates often leads to liability on the part of the law enforcement official.

2.1 Application of the Bill of Rights to Criminal Procedure

Section 39(1) of the Constitution provides the following interpretive commands:

When interpreting the Bill of Rights, a court, tribunal or forum –
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

²¹ 1995 6 BCLR 665 (CC) par 44.

²² See E. Cameron “Rights, constitutionalism and the Rule of Law” 1997 114 *SALJ* 504- 508.

- (b) must consider international law; and
- (c) may consider foreign law.

The Bill of Rights is a distinctive feature of the South African Constitution. The Bill of Rights ensures the perpetuation of democratic governance. It also articulates the fundamental values that the different branches of government must prescribe to. The Bill of Rights also limits the exercise of power by defining the limits of fundamental freedoms. The Bill of Rights contains general provisions which are applicable to criminal procedure, such as the right to privacy, the right to dignity, the right to life and the right to freedom and security of person, as well as provisions directed specifically at criminal justice, namely the rights of arrested, detained and accused persons. The Bill of Rights brings about profound changes to the law of criminal procedure as legislation and common law is no longer determinative. The Bill of Rights affects the administration of criminal justice in a number of ways. Firstly, some rights are capable of being invoked directly in the day to day functioning of the criminal justice system.²³ Secondly, other rights set broad standards of constitutionality against which legislation and common law are to be measured and law or conduct inconsistent with these standards is invalid to the extent of the inconsistency.²⁴ Any deprivation of freedom amply provided for in legislation must meet the broad standard of not being arbitrary or without just cause.²⁵ Thirdly, the Bill of Rights also applies indirectly to the ordinary rules of criminal procedure. Section 39(2) of the Constitution provides that:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

²³ For example, on the arrest of a person for allegedly committing an offence, section 35(1)(b) imposes a duty on the police to inform the arrested person of the right to remain silent.

²⁴ Section 172(1)(a) of the Constitution.

²⁵ Section 12(1)(a) of the Constitution.

Where the language of legislation permits the court must for example interpret the Criminal Procedure Act in conformity with the Bill of Rights. Apart from constitutional rights that can be applied directly, criminal justice will continue to be administered in terms of statutory and common law rules of criminal procedure.²⁶ The constitutional standards set by the Bill of Rights serve, then, only as a safety net and an interpretive norm.²⁷ While the Bill of Rights sets the foundational norms of criminal procedure, it is no replacement of the ordinary rules and principles of criminal procedure. The Bill of Rights constitute a minimum set of guarantees. Therefore ordinary rules of criminal procedure can provide more protection than what the Constitution demands.²⁸

2.2 Limitation of a constitutional right

Section 36 of the Constitution reads:

- (1) 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;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

The truism that no right is absolute perhaps applies more to privacy than to any other right. The balance is struck in the Bill of Rights read together with legislation authorising searches. The Bill of Rights confers certain rights on individuals but it also authorises the limitation of those rights in the limitation clause. According to section 36 of the Constitution, rights in the Bill of Rights, may be limited by a law of

²⁶ Steytler *supra* 3.

²⁷ *Ibid* 3.

²⁸ *Ibid* 3.

general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Search and seizure will therefore be constitutional if it is authorised by a law of general application, such as the Criminal Procedure Act (which in itself contains reasonable requirements to be complied with before a search may be conducted and which indicates how it must be conducted).

The starting point in a limitation analysis would be to ask whether the purpose of the search and seizure is important enough to override a specific manifestation of the right to privacy. Legitimate expectations would be much the same as those expressed in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),²⁹ namely, the interests of national security, the public safety, the economic well being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedom of others. In the context of the South African criminal justice system, the search for and seizure of articles should be regarded as legitimate for the following purposes: (a) to be used as evidential material in a prosecution,³⁰ (b) to be confiscated because their possession is unlawful,³¹ (c) to return them to their rightful owner,³² and (d) to be forfeited to the state if they were used in the commission of an offence.³³

The two main safeguards to ensure the reasonableness of a search are the requirements of objective grounds for the search and prior judicial authorisation. These safeguards are inherent in the jurisprudence of the European Court of Human Rights, the United States Supreme Court and

²⁹ Art 8(2) (November 4, 1950).

³⁰ Section 20 (b) of the Criminal Procedure Act.

³¹ Section 31 of the Criminal Procedure Act.

³² Section 30(b) of the Criminal Procedure Act.

³³ Section 35 of the Criminal Procedure Act.

the Supreme Court of Canada, and have in the main been an integral part of South African law.

The requirement that a right may be limited only to “the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” introduces a proportionality test.³⁴ Legitimate limitations on a constitutional right must occur through and be justified under the prescribed criteria in section 36 of the Constitution and not by giving a restricted definition to the right.³⁵ Constitutional rights should as far as possible be given a broad and generous interpretation, that is not to say that they are unlimited.³⁶ The limitation of a constitutional right for a purpose that is reasonable and justifiable in an open and democratic society involves the weighing up of

³⁴ *S v Makwanyane* 1995 6 BCLR 104.

³⁵ *National Director of Public Prosecutions and Another v Mahomed* [2008] 1 All 181 (SCA)184: Two search and seizure warrants were issued, authorising search and seizure operations at the respondent’s residence and offices. All items seized were sealed and deposited with the Registrar of the Johannesburg High Court, but the respondents claimed privilege in respect of all but three items. On application by the respondent the warrants were set aside by the High Court and the appellant was ordered to return all items seized under the warrant. The appellants conceded that the warrants were invalid in so far as no case had been made out for the search and seizure of the objects listed in certain paragraphs, the appellants contended that those paragraphs could be removed from the warrants and that the remainder of the warrants could be found to be valid. Prior to the hearing of the appeal the appellants indicated that they were prepared to concede the appeal provided that the parties could reach consensus on the variation of the order of the court (*a quo*) by the addition of a preservation order. The respondents did not agree.

³⁶ *Ibid* 184. The majority of the Court held that a preservation order should be granted, but were not unanimous on the extent of the preservation order. It was held that in so far as a preservation order infringes upon the constitutional rights of the owner of the seized property, a court may exercise its powers to allow the infringement only within the parameters of section 36 of the Constitution.

competing values and ultimately an assessment based on proportionality.³⁷

With regard to searches and seizures a balanced and proportional approach is apparent in Canadian law: In *Descoteau et al v Mierzwinski and AG Que*³⁸ it was maintained that in cases where search warrants threaten fundamental freedoms the issuing judge must consider whether a reasonable alternative source or method is available from which the information might be sourced, and whether reasonable steps were taken to obtain the evidence from that alternative source.

In *R v Oakes*³⁹ the court laid down the following two tier test to establish that a limitation is reasonable and demonstrably justified in a free and democratic society. Firstly, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of 'sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important. Secondly, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be

³⁷ *S v Makwanyane* 1995 6 BCLR 665. See also *National Director of Public Prosecutions and Another v Mahomed* 2008 (1) SACR 309 (SCA) 336:

"Constitutional rights as far as is possible, must be given a broad and generous interpretation."

³⁸ [1982] 1 SCR 860 at 870-875 (1982) 70 CCC 385 (SCC) 409.

³⁹ (1986) 26 DLR (4th) 200 (SCC) 227.

required to balance the interests of society with those of individuals and groups. There are three important components of a proportionality test:

- First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.
- Secondly, the means, even if rationally connected to the objective in the first sense, should impair “as little as possible” the right or freedom in question.
- Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of the measure on individuals or groups, the measure will not be justified by the purpose it is intended to serve. Initially the Constitutional Court adopted a more reserved approach⁴⁰ concerning the application of criteria adopted by *Oakes* for the interpretation of section 1 of the Canadian Charter of Rights, but it nevertheless accepted that these criteria may be of assistance to our courts and have a bearing on the way in which the limitation clause should be approached.⁴¹

Another important consideration is whether the limitation serves a legitimate purpose in an open and democratic society. It has been held that the objective of the limitation must relate to concerns which are pressing and substantial in a free and democratic society before it can

⁴⁰ *S v Zuma supra* 35 where Kentridge J observed that “I see no reason in this case ...to fit our analysis into the Canadian pattern....”

⁴¹ *S v Makwanyane supra* par 110.

be characterised as sufficiently important.⁴² Although it is accepted that the current climate of lawlessness calls for effective prosecution of crime,⁴³ it cannot in itself justify all measures aimed at curbing crime. Not even the prevalence and severity of certain crimes may in themselves justify a limitation.⁴⁴ The overall crime prevention objective of legislation as well as the specific contested provision ought to be justified.

2.3 Exclusion of evidence unconstitutionally obtained

Section 28 of the Criminal Procedure Act⁴⁵ provides:

- (1) A police official-
- (a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25(1); or
 - (b) who, without being authorised thereto under this Chapter-
 - (i) searches any person or container or premises or seizes or detains any article; or
 - (ii) performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25(1),
- shall be guilty of an offence...

Section 35(5) of the Constitution reads:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Section 35(5) of the Constitution is closely modelled in structure and wording, on the Canadian Charter's exclusionary rule which is contained in section 24:

⁴² *R v Chauk* (1990) 62 CCC (3d) 193 (SCC) 216, quoted in *S v Coetzee* 1997 1 SACR 379 (CC) par 13.

⁴³ *S v Zuma supra* 41.

⁴⁴ *S v Coetzee* 19971 SACR 379 (CC) par 9.

⁴⁵ 51 of 1977.

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The exclusion of evidence as a constitutional remedy pursues the same object as the general remedy cause – vindicating a constitutional right and deterring and preventing the recurrence of its infringement.⁴⁶ The purpose of disallowing the use of unconstitutionally obtained evidence is the indirect vindication of the right that was violated.⁴⁷ Directly it prevents the violator of the right from benefiting from the violation if it would render an accused's trial unfair or be detrimental to the proper administration of justice.⁴⁸

In accordance with the principle that constitutional remedies should be employed as a last resort,⁴⁹ the constitutional exclusionary rule does not replace other admissibility rules.⁵⁰ It operates in addition to ordinary rules to exclude evidence that would otherwise be admissible.

An accused is faced with the threshold requirement of showing that the contested evidence was "obtained in a manner that violates any right".⁵¹ Section 35(5) of the Constitution places a duty on the court to exclude evidence if its admission would render the trial unfair or otherwise be detrimental to the administration of justice. The court is vested with a value judgement whether the admission of such evidence would have either of the two consequences.⁵² In *Mthembu v S*⁵³ the court

⁴⁶ *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) 138.

⁴⁷ Steytler *supra* 34.

⁴⁸ *Ibid.*

⁴⁹ *S v Mhlungu* 1995 7 BCLR 793 (CC) par 59.

⁵⁰ *R v Garfoli* (1990) 60 CCC (3d) 161 (SCC) 189.

⁵¹ Steytler *supra* 35.

⁵² *S v Madiba* 1998 1 BCLR 38 (D) 44F.

⁵³ 2008 4 All SA 522 (SCA) para 27.

maintained that section 35(5) of the Constitution requires the exclusion of evidence improperly obtained from any person, not only from an accused. In *S v Madiba*⁵⁴ a search was conducted without a warrant. The court assumed that the search was unlawful and constituted an invasion of privacy. However it held that section 35(5) of the Constitution did not require the exclusion of the evidence obtained. The court maintained that the limited extent of the infringement of privacy paled in significance when compared to the importance of achieving the object of arresting the suspect. In *S v Gumede and Others*⁵⁵ the police allegedly contravened section 48 of the Criminal Procedure Act 51 of 1977 by not demanding entry before they kicked down a door. The court focused on the question of whether admission of the evidence, even if unlawfully obtained, would render the trial unfair or otherwise be detrimental to the administration of justice, and held that it would not.

The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair.⁵⁶

3. Direction and focus of this study

This study examines search and seizure as employed in the criminal justice system, from a constitutional perspective. Here the Criminal Procedure Act, the South African Police Service Act⁵⁷ and the

⁵⁴ *Ibid.*

⁵⁵ 1998 (5) BCLR 530 (D) 37.

⁵⁶ *Mthembu v S* 2008 4 All SA 522 (SCA) para 25.

⁵⁷ 68 of 1995 (hereafter referred to as either the "South African Police Service Act or the SAPS Act" unless otherwise indicated).

constitutional position are examined. Under comparative law only the jurisdictions of the United States and Canada are examined, due to length constraints of this study. This study will attempt to show how South African courts have risen to the challenge in attempting to protect fundamental human rights in line with the new constitutional dispensation, when it comes to search and seizure. This study will also address to what extent approaches from foreign jurisdiction namely United States of America⁵⁸ and Canada can be implemented in the South African context. Thus, principles extracted from these foreign jurisdictions are applied to the relevant South African context if they are workable. In both these jurisdictions there is a constitutionally mandated right to protection from unreasonable searches. It is therefore instructive to analyse the case law of these countries and to consider how our law fares and might be reformulated.

This study focuses on the powers granted to police officials to conduct searches and seizures and to gather information in support of the investigation and suppression of crime. This study will examine the extent and efficacy of those powers in the light of constraints imposed by the Constitution. A pervasive theme is the question of whether an appropriate balance can ever be achieved between the inherently conflicting interests of the public in crime control and of the individual in protecting personal privacy and autonomy. However, before any detailed analysis can be made, it is imperative to consider what is meant by the concepts “search” and “seizure”. These concepts have developed pragmatically in South Africa. They have been moulded by many factors, including expediency, changes in investigation and trial process and more recently by the introduction of our “Supreme Constitution”.

Chapter 2 examines the concepts “search” and “seizure” with reference to an understanding thereof in various jurisdictions.

⁵⁸ Henceforth “United States” will be used to indicate court decisions and/or position unless otherwise indicated.

Chapter 3 will examine the right to privacy, the right to dignity and the right to freedom and security of person, focussing upon the general nature of the rights and, specifically upon the search and seizure aspects of these rights. Relevant constitutional provisions will also be examined. International law will also be discussed.

Chapter 4 examines the warrant clause, the requirements for a valid search warrant where the concepts of prior judicial authorisation, reasonable grounds, particular description of things to be seized, particular description of the place or person to be searched and information on oath to a magistrate or justice are critically discussed.

Finally, the execution of search warrants is examined in Chapter 4.

Chapter 5 examines warrantless search and seizure, the provisions for warrantless searches and seizures in terms of the Criminal Procedure Act 51 of 1977 and the SAPS Act 68 of 1995 are discussed.

Chapter 6 contains conclusions and recommendations.

CHAPTER TWO

THE CONCEPTS OF SEARCH AND SEIZURE WITHIN THEIR LEGAL FRAMEWORK

1. Introduction

The modern South African law of search and seizure is part of extensive government regulation of social and commercial activities.¹ Approximately 39 statutes pertaining to criminal and non-criminal regulation deal with powers of search and seizure. Some of these statutes are well defined, others open-ended. This implies that the individual is prone to invasion of his rights. Swanepoel² maintains that our Constitution and the Bill of Rights entrenched therein, have introduced a new element into the equation because they call into question the constitutionality of these laws. Certain provisions of the above mentioned statutes curtail certain fundamental rights of the individual. This curtailment must however be reasonable and justifiable in an open and democratic society based on “human dignity, equality and freedom, taking into account all relevant factors.”³

Search and seizure is one of the most powerful investigating tools at the disposal of police officials in the investigation and prevention of crime.

The task of combating crime and convicting the guilty will in every era seem of such a critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy.⁴

¹ Swanepoel “Warrantless search and seizure in criminal procedure: A constitutional challenge” 1997 30 *CILSA* 341.

² *Ibid* 341.

³ Section 36 of the Constitution, 1996.

⁴ *United States v Leon* 468 US 897 (1984) 347.

Section 14 of the Constitution provides as follows:

Everyone has the right to privacy, 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 communications infringed.

Section 14(a) of the Constitution specifically protects the right not to have one's person or home searched. A person's home, it is widely accepted, constitutes the highest expectation of privacy, which reflects the old adage that the home is a person's castle.⁵ Similarly section 14(b) of the Constitution guarantees persons the right "not to have their property⁶ searched." Further section 14(c) of the Constitution guarantees persons the right "not to have their possessions seized."⁷ The most important legislative provisions that *prima facie* infringe these rights are to be found in the Criminal Procedure Act, followed by the South African Police Service Act.⁸ The right to enter premises, search those premises and remove goods therefrom is a significant invasion of the rights of an individual and must therefore be exercised within certain clearly defined limits so as to interfere as little as possible with the rights and liberties of the person concerned."⁹

⁵ *R v Silveira* (1995) 97 CCC (3d) 450 (SCC) 127.

⁶ "Property" apparently includes both movable and immovable property, see Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 2002 51.

⁷ See also *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 4 SA 552 (CC) 297, in which the Constitutional Court held that the word seizure should be given its ordinary grammatical meaning for it is not a term of art. See also *Bernstein and Others v Bester and Others* 1996 (4) BCLR 449 (CC) 452, where it was maintained that the compulsion to produce a document on pain of a criminal sanction is as much a seizure as the physical removal of that document by another person.

⁸ See also Cheadle, Davis and Haysom *supra* 51.

⁹ *National Director Public Prosecutions and Another v Mahomed* 2008 (1) SACR 309. (SCA) 756.

2. The concepts of search and seizure in various jurisdictions

2.1 In South Africa

2.1.1 The concept of “search”

In the South African legal context, the terms search and seizure are not clearly defined.¹⁰ The question of what constitutes a search is left to common sense and is determined on a case by case basis. Steytler¹¹ and Cheadle¹² refer to American and Canadian jurisprudence in an attempt to define search. It is maintained that an element of physical intrusion concerning a person or property is necessary to establish a search.¹³ “Search” where it relates to a person must be given its ordinary meaning in its context.¹⁴ The South African Police Service National Instruction 2 of 2002 defines search as “any 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”.¹⁵ The latter approach to the concept of search is questionable. What is meant by “visually” is not defined and could include merely looking at something.

¹⁰ Swanepoel “Warrantless search and seizure in criminal procedure” *CILSA* 30 1997 341.

¹¹ *Supra* 67.

¹² *Supra* 51.

¹³ McQuiod- Mason *The Law of Privacy in South Africa* 1978 807.

¹⁴ In *Minister of Safety and Security v Xaba* [2003] 1 All SA 596 (D) the court emphasised the the ordinary meaning and stated that:

“...search when used in relation to a person had to be given its ordinary meaning in context..”

The second edition of the *Oxford English Dictionary* gives the following meaning to “search” where the verb relates to a person: “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.

¹⁵ *Ibid* 97.

2.1.2 Search of arrested person and seizure of articles

Section 23 of the Criminal Procedure Act provides that:

On the arrest of any person, the person making the arrest may:

- (a) if he is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he shall forthwith deliver any such article to a police official; or
- (b) if he is not a peace officer, seize any article referred to in section 20 which is in the possession of or in the custody or under the control of the person arrested and shall forthwith deliver any such article to a police official.¹⁶

In South African law a peace officer may without a warrant or a reasonable belief search an arrested person and seize “any article” referred to in section 20 of the Criminal Procedure Act, which is found in the arrestee’s possession, custody or control, and which may afford evidence of the commission of an offence. The parameters of section 20 of the Criminal Procedure includes all articles relevant to the crime committed. Further in terms of section 23(b) of the Criminal Procedure Act, the peace officer may place in safe custody any object found on the person of the arrestee, which he or she may use to cause bodily injury to himself or herself or others. Although the reasonableness of such a search is not constitutionally doubtful, the following principles should be observed when applying section 23 of the Criminal Procedure Act. Steytler¹⁷ puts it best when he says, firstly, that the “search should pursue an object not inconsistent with the proper administration of criminal justice”.¹⁸

¹⁶ Section 23 of the Criminal Procedure Act.

Section 20 of the Criminal Procedure Act reads:

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) -

- (a) which is concerned or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

¹⁷ Steytler *supra* 98.

¹⁸ Steytler *supra* 98.

Secondly that, “although it might be constitutionally permissible to search the environment in which the accused is arrested, section 23 provides statutory authority only for the search of the person of the arrestee, not the area within which the arrest takes place”.¹⁹ Thirdly section 20 restricts the search to specific categories of goods related to the commission of the crime.

2.1.3 Search of premises

2.1.3.1 Defining the term “premises”

Section 1 of the Criminal Procedure Act defines the term premises as, “includes land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft...”

2.1.3.2 Search of premises by owner or lawful occupier

Section 24 of the Criminal Procedure Act provides for the search of premises by an owner or occupier thereof. Any person who is lawfully in charge or occupies any land and who reasonably suspects that stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on any premises upon that land, or that any article has been placed on such premises or is in the custody or possession of any person upon such premises in contravention of any law relating to intoxicating liquor, dependence-producing drugs, arms and ammunition or explosives, may at any time, if a police official is not readily available, enter such premises with the purpose of searching such premises and any such person thereon, and if any such stock, produce or article is found, he shall take possession thereof and forthwith deliver it to a police official.

¹⁹ *Ibid* 99.

2.1.3.3 Entering of premises for purposes of obtaining evidence

If a police official who is investigating an offence or alleged offence reasonably suspects that a person who may furnish information with regard to such offence is on any premises, such police official may enter such premises without a warrant for the purposes of interrogating such person and obtaining a statement from him provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.²⁰ It should also be noted that the Criminal Procedure Act does not differentiate between search of a private dwelling and other premises. Where a police official wishes to enter a private premises for the purpose of a search for and seizure of an article mentioned in section 20 he is generally required to have a search warrant or search with the consent of an authorised person.

2.1.3.4 Resistance against entry or search

In terms of section 27 of the Criminal Procedure Act, a police official who may lawfully search any person or premises in terms of section 26 of the Criminal Procedure Act, may use such force as may be reasonably necessary to overcome any resistance against such search or entry of such premises, including the breaking of any door or window of such premises, provided that such police official shall first audibly demand admission to the premises and notify the occupier and others on the premises of the purpose for which he or she seeks to enter such premises. The proviso of a previous warning shall not apply where the police official concerned reasonably believes that any article which is the subject of the search may be destroyed or disposed of if entry to the premises is demanded. Although the inherent purpose of section 27 of the Criminal Procedure Act is to prevent infringement of privacy it has the potential for misuse if applied without proper control.

²⁰ Section 26 of the Criminal Procedure Act. See also *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A) at 764D-F.

2.1.3.5 Power of police to enter premises in connection with state security or any offence

If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which has been held or is to be held in or upon any premises within his area of jurisdiction, or that an offence has been or is likely to be committed or that preparations for the commission of any offence are being made or are likely to be made upon any premises within his area of jurisdiction, he may issue a warrant authorising a police official to enter the premises, at any reasonable time for the purposes of carrying out such investigations and taking such steps as such police official may consider necessary for the preservation of law and order or the prevention of crime.²¹ In terms of such warrant the premises may be searched and any person in or upon the premises may be searched for any article referred to in section 20 of the Criminal Procedure Act which such police official on reasonable grounds believes to be on such premises, or in the possession of such person and such article may be seized.

A warrant of this nature may be issued on any day and shall be in force until it is executed or cancelled by the person who issued it or a person of similar authority, if the former is not available. A police official may act without a warrant if he on reasonable grounds believes that a warrant would be issued to him if he applied for it and that the delay in obtaining such warrant would defeat the object thereof.²²

²¹ Section 25 of the Criminal Procedure Act.

²² See discussion in Chapter 5 (5.2).

Section 24 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act²³ provides as follows:

- (1) If, on written request under oath to a judge in chambers by a police official of or above rank of director, it appears to the judge that it is necessary in order to prevent any terrorist or related activity, the judge may issue a warrant for the cordoning off, and stopping and searching of vehicles and persons with a view to preventing such terrorist or related activity, in a specified area, and such warrant applies for the period specified therein, which period may not exceed ten days.
- (2) Under such warrant any police official who identifies himself or herself as such, may cordon off the specified area for the period specified and stop and search any vehicle or person in that area, for articles or things which could be used or have been used for or in connection with the preparation for or instigation of any terrorist or related activity.
- (3) The police official may seize any article or thing contemplated in subsection (2), and Chapter 2 of the Criminal Procedure Act, 1977 (Act 51 of 1977), applies with the necessary changes required by the context in respect of any such article or thing.
- (4) Section 29 of the Criminal Procedure Act, 1977 (Act 51 of 1977), applies in respect of the powers conferred upon police officials in terms of this section.
- (5) The provisions of this section shall not be construed as affecting the rights of any police official or law enforcement officer to use any other power in any other law in respect of cordoning off, search or seizure.

2.1.4 Search and other affected rights

Since a search may also infringe upon the rights to dignity²⁴ and to bodily security, including the right against cruel, inhuman or degrading treatment,²⁵ it must be conducted consonant with those rights. In terms of section 29 of the Criminal Procedure Act the search of a person must be conducted with strict regard to decency and order. A woman must be searched by a woman only and if no female police official is available, the search must be conducted by

²³ 33 of 2004.

²⁴ Section 10 of the Constitution.

²⁵ Section 12(1) of the Constitution.

any woman designated for the purpose by a police official. When conducting a search a police official may use force only if, and to the extent to which it is reasonably necessary to overcome any resistance against such search.²⁶

Section 37 of the Criminal Procedure Act provides for the ascertainment of bodily features of an accused person, including the taking of blood samples. In the United States and Canada such evidence is regarded as obtainable through a process of search: a search of the person of the subject.²⁷ In the Canadian case *R v Pohoretsky*²⁸, Justice Lamer, referring to a blood sample taken from an unconscious person for the purpose of obtaining evidence stated:

I consider this unreasonable search to be a very serious one ... a violation of the sanctity of a person's body is much more serious than that of his office or even of his home.

In terms of section 37(2)(a) of the Criminal Procedure Act a medical officer when so requested by a police official, may take a blood sample of a person who is in custody or has been arrested but released, as may be deemed necessary in order to ascertain a characteristic or condition. It is submitted that in the absence of exigent circumstances, a warrant should be obtained.²⁹ On a charge of drunken driving for instance, where time is of essence in obtaining a blood sample, prior authorisation could usually be dispensed with. The exercise of this power by a district surgeon to take a blood sample without any authorisation from a warrant or arresting officer should be dependent upon the existence of reasonable grounds that such sample may be relevant to any criminal proceedings.³⁰

²⁶ Section 27(1) of the Criminal Procedure Act.

²⁷ *R v Dymont* (1988) 55 DLR (4th) 503; *US v Weir* (1981) 657 F2d (8th Cir) 1005.

²⁸ (1987) 39 DLR (4th) 699 at 702.

²⁹ Steytler *supra* 1998 97.

³⁰ Section 37(2)(b) of the Criminal Procedure Act.

2.1.5 The concept of “seizure”

In *Ntoyakhe v Minister of Safety and Security*³¹ the court held that the word “seize” encompasses not only the act of taking possession of an article, but also the subsequent detention³² thereof. Otherwise the right to seize would be rendered worthless.³³ The court then went on to determine that the right of further detention of a seized article is not unlimited and thus does not confer upon the State the right to deprive a person of lawful possession of an article indefinitely.

2.1.5.1 The State may seize certain articles only

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

The State may in terms of section 20 of the Criminal Procedure Act seize anything which:

- (a) is concerned or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (b) may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (c) is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.³⁴

³¹ 2000 (1) SA 257.

³² “Detention” in the *Oxford dictionary* is defined as: “the action of detaining or the state of being detained.”

³³ *Ntoyakhe v Minister of Safety and Security supra* 257.

The objective of section 20, read with section 31 [of the Criminal Procedure Act] is to enable the police to obtain possession of articles for the purpose of investigating crime and prosecuting suspected offenders.

³⁴ Section 20 of the Criminal Procedure Act.

Evidence which was obtained in conflict with these provisions, or in conflict with the Constitution, may still be allowed to be produced as evidence provided the trial is not rendered unfair as a result thereof and the admission of such evidence does not cause the administration of justice to come into disrepute.³⁵ A suspicion of the commission of an offence and a reasonable belief are considered sufficient basis for the seizure of articles. It is submitted that the threshold here is very low particularly when cognisance is taken of the importance the Constitution places on fundamental rights.

2.1.5.2 Article to be seized under search warrant

In terms of section 21 of the Criminal Procedure Act unless the circumstances set out in section 22, 24 and 25 of the Criminal Procedure Act exists, an article may only be seized in terms of a search warrant. If it appears to a magistrate or justice of the peace that there are grounds for believing that such article is in the possession or under the control of a person or upon any premises, and such information is provided to him or her under oath a search warrant may be issued. In order for the search to be lawful, the premises to be searched must be clearly and properly identified in the warrant.³⁶

Once a criminal trial has started, the presiding judge or judicial officer may issue a search warrant if it appears to such judge or judicial officer that such article is required in evidence before him. The search warrant requires a police official to seize the article in question and authorises such police official to search any person identified in the warrant or to enter and search any premises identified in the warrant and search any person found on or at the premises. A search warrant must be executed by day unless the police official is specifically authorised therein to execute it by night. A police official executing a warrant shall after such execution hand to the person affected by, or searched in terms of the warrant a copy thereof upon demand by the affected person. This will ensure that the person understands why his rights enshrined in the Constitution are being limited. It is first constitutionally

³⁵ Section 35(5) of the Constitution – see discussion in chapter 1.

³⁶ *Toich v The Magistrate, Riversdale and Others* 2007 (2) SACR 235 (C) 176.

questionable that in terms of section 21(4) of the Criminal Procedure Act, a police official executing a warrant after such execution, only “upon demand” of any person whose rights in respect of any search or articles seized under the warrant have been affected, hand to him or her a copy of the warrant. Secondly a search warrant should be interpreted strictly and may not authorise the seizure of articles not strictly relevant to the investigation concerned.

2.1.5.3 Circumstances under which an article may be seized without a search warrant³⁷

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20:

- (a) if the person concerned consents to the search for and seizure of the article in question;
- (b) if the police official on reasonable grounds believes that a search warrant will be issued to him under section 21 of the Criminal Procedure Act and that the delay in obtaining such warrant would defeat the object of the search.³⁸

2.1.6 Concluding remarks on the South African perspective

The keywords “search” and “seizure” are often used interchangeably. They are however two separate and distinct concepts. Protection against unreasonableness extends to both concepts. In South Africa the ambit of “search” and “seizure” are not defined comprehensively. It appears that each case is to be assessed on its own merits on an ad hoc basis. An essential part of crime investigation is the obtaining of evidence through searches and seizures. At the same time South African law recognises that state authorities should not be granted untrammelled access to search and seize items

³⁷ See Chapter 5 for discussion.

³⁸ Section 22 of the Criminal Procedure Act. See also *Ntoyakhe v Minister of Safety and Security and Others* 2000 (1) SA 257 (ECD) 147.

belonging to citizens. It is an imperative incident to constitutionalism that citizens must be protected from unjustified intrusions on their privacy and property by agents of the state. Historically, the police have required legal authority for undertaking such measures. The Criminal Procedure Act has long provided the only legal basis for obtaining warrants to search for and seize property or for performing such actions without a warrant in certain circumstances.

Generally, the standard for these measures and the actions taken under their purview has been one of reasonableness. These powers have been predicated on reasonable grounds for believing that evidence will be located at the place to be searched. Since the birth of the Constitution of the Republic of South Africa, there have been additional constraints on search and seizure powers. This has come through the guarantee in sections 10 and 14 of the Constitution to be secure against unreasonable search and seizure.

Search and seizure is arguably the single most complicated area of criminal procedure. Not only are there very detailed legal provisions and an almost infinite variety of factual situations, but the overlap of the Bill of Rights and the Criminal Procedure Act has raised the need for complex and nuanced analysis in order to determine whether the Constitution has been violated.

2.2 In the United States of America³⁹

2.2.1 The concept of “search”

“Searches” and “seizures” are conceptually distinct in the law of the United States of America. Justice Stevens explained how they differ in his concurring opinion in *Texas v Brown*⁴⁰:

Although our Fourth Amendment cases sometimes refer indiscriminately to searches and seizures, there are important differences between the two... The Amendment protects two different interests of the citizen – the interest in retaining possession of property and the

³⁹ For the sake of brevity “United States” will be used throughout hereafter.

⁴⁰ 460 US 730 103 S.Ct. (1983) 443.

interest in maintaining personal privacy. A seizure threatens the former, a search the latter. As a matter of timing, a seizure is usually preceded by a search, but when a container is involved the converse is often true. Significantly, the two protected interests are not always present to the same extent.

The United States Supreme Court defined “search” to mean, “a governmental invasion of a person’s privacy”.⁴¹ The court developed a two-way test to determine whether such an invasion has occurred. The party seeking the suppression of evidence obtained in the search must establish that he or she had a subjective expectation of privacy and that society has recognised that expectation as objectively reasonable. The Fourth Amendment specifically contemplates that “persons” and their “effects” or things can be seized. The term “search” is said to imply:

Some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and.....

A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinary searching is a function of sight, it is generally held that mere looking at that which is open to view is not search.⁴²

The power to search an arrestee’s person without probable cause or a warrant appears to be constitutionally inoffensive.⁴³ In *Chimel v California*⁴⁴ Justice Stewart justified such a search as follows:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.

⁴¹ *Rakas v Illinois* (1978) 439 US 128.

⁴² LaFave and Israel *Criminal Procedure: Constitutional limitations in a nutshell* 2001 302.

⁴³ Steytler *supra* 1998 97.

⁴⁴ 395 US 752 762-763 (1969).

In *United States v Robinson*⁴⁵ the United States Supreme Court allowed a general search incident upon arrest despite the fact that there was no possible danger to the arrestor and no further evidence could be discovered to prove the offence for which the accused was arrested. The court held that a search incident upon a lawful arrest required no further justification. At a police station a further search of an arrestee may be conducted without a warrant and probable cause as part of a routine inventory search incident on him or her being booked into custody.⁴⁶ It is also reasonable upon arrest to search the area within the arrestee's immediate control, in other words, the area from within which he may for example acquire possession of a weapon or destructible evidence.⁴⁷ This power however does not include a general search of the premises in which the arrest took place.

2.2.2 *The concept of "seizure"*

The "act of physically taking and removing tangible personal property is generally a seizure."⁴⁸ A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property.⁴⁹

*Terry v Ohio*⁵⁰ indicated that seizure of a person occurs when an official uses physical force or makes a show of authority, that in some way restrains a person's liberty, so that he is not free to leave.

2.2.3 *Concluding remarks on the American perspective*

In the United States of America, as in South African law, the words "search" and "seizure" are often used interchangeably. They do, however, form two

⁴⁵ 414 US 218 (1973).

⁴⁶ *Illinois v Lafayette* 462 U.S. 460 (1983).

⁴⁷ *Chimel v California supra* 763.

⁴⁸ LaFave *supra* 299.

⁴⁹ *United States v Jacobsen*, 466 US S.Ct (1984) 437.

⁵⁰ *Supra* 328.

separate and distinct concepts. Similarly, an element of intrusion concerning a person or property is necessary to establish a search. In the United States of America, the act of physically taking and removing tangible personal property is generally considered a seizure. However, in South Africa “seize” encompasses not only the act of taking possession of an article, but also the subsequent detention thereof. Further in the United States of America the act of seizure also includes “seizure of a person”.

2.3 In Canada

Section 8 of the Canadian Charter of Rights and Freedoms guarantees everyone a broad and general right against unreasonable search and seizure. Conduct is either a search or a seizure whenever the situation commands a reasonable expectation of privacy.⁵¹ However, in some situations the courts have determined that there is a reduced expectation of privacy relative to *Hunter v Southam*⁵² but which nevertheless entail searches or seizures. In others, the reasonable expectation of privacy varies, depending on the context. Where there is no expectation of privacy, then section 8 of the Canadian Charter of Rights and Freedoms need not even be considered because no search or seizure has occurred.

2.3.1 The concept of “search”

A search is said to be any intrusion, other than arrest upon an individual’s person, property or privacy for the purpose of seizing individuals or things or obtaining information by inspection or surveillance.⁵³ Only if a “form of examination” by government intrudes upon a reasonable expectation of privacy is it considered search under the Canadian Constitution.⁵⁴

⁵¹ Quigley *Procedure in Canadian Criminal Law* 1997 168.

⁵² *Supra* 184.

⁵³ Finkelstein and Finkelstein *Constitutional Rights in the Investigative Process* 1991 89.

⁵⁴ *R v Evans* (1996) 45 CR (4th) 210 (SCC) 279.

The Supreme Court of Canada, in *Cloutier v Langlois*⁵⁵ referring to the United States Supreme Court,⁵⁶ required no reasonable grounds, only that the search should be conducted for a legitimate purpose. The court laid down the following rules:

1. This power does not impose a duty. The police have some discretion in conducting the search.....
2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice,....
3. The search must not be conducted in an abusive fashion and, in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the case.⁵⁷

2.3.2 The concept of "seizure"

Seizure was defined in *R v Dyment*⁵⁸ as "the taking of a thing from a person by a public authority without that persons consent." A seizure also includes compelling a person to give up an item. This type of seizure usually occurs in the regulatory field where documents are ordered to be produced,⁵⁹ or where authorities are empowered to make copies of documents.⁶⁰

⁵⁵ (1990) 53 CCC (3d) 257 (SCC) 277.

⁵⁶ *United States v Robinson* 414 US 218 (1973) 417.

⁵⁷ *Cloutier v Langlois* (1990) 53 CCC (3d) 257 (SCC) 278.

⁵⁸ (1988) 55 DLR (4th) 503 this case concerned a blood sample taken by a doctor from a motorist injured in a car accident and later giving it to the police after being analysed for blood alcohol. It was found that the use of a person's body to obtain information about him violated a constitutionally protected area of personal privacy.

⁵⁹ *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)* (1990) 76 C.R. (3d) 129 (S.C.C.) 127.

⁶⁰ *Quigley supra* 369. *Comité paritaire de l'industrie v Potash* 1994 168 N.R (S.C.C.) 243.

2.3.3 Concluding remarks on the Canadian perspective

Like South Africa and the United States of America, Canada views the concepts of search and seizure as separate. Therefore it is possible to have a search without a seizure or *vice versa* even though both commonly occur together. In South Africa the position pertaining to search and seizure is similar to that of Canada, and South African authors⁶¹ commonly refer to American and Canadian jurisprudence in an attempt to define search and seizure.

3. Conclusion

The concepts “search” and “seizure” are construed in a similar way in the United States of America, Canada and South Africa and, accordingly, South African authors draw from American and Canadian jurisprudence in attempting to explain these concepts appropriately.

In the South African legal context, the terms search and seizure are not clearly defined.⁶² The question of what constitutes a search is left to common sense and is determined on a case by case basis. A search is construed to be any intrusion, other than arrest, upon an individual’s person, property or privacy for the purpose of seizing individuals or things or obtaining information by inspection or surveillance. Seizure is considered to be the taking of a thing from a person by a public authority without that person's consent. A seizure also includes compelling a person to give up an item.

In Chapter 3 I will turn to a discussion of the right to privacy and other affected constitutional rights, and will focus upon the general nature of the rights and specifically upon the search and seizure aspects of those rights. Relevant Constitutional provisions, together with international law, will be examined and

⁶¹ See, for example, Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 2002 51. See also Steytler *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa* 1998 28.

⁶² Swanepoel “Warrantless search and seizure in criminal procedure” *CILSA* 30 1997 341.

discussed. The jurisdictions of United States of America and Canada will again be visited for the purposes of comparison.

CHAPTER THREE

SEARCH AND SEIZURE: THE RIGHT TO PRIVACY AND OTHER AFFECTED CONSTITUTIONAL RIGHTS

1. Introduction

The South African Constitution is regarded as the product of the struggle for a democratic society in South Africa. The Bill of Rights in Chapter 2 of the Constitution aspires to be the “historic bridge” between the past, ridden with strife, suffering and the injustices of apartheid and the future where human rights and democracy will prevail. The primary function of the Bill of Rights is to protect the fundamental rights of individuals when they come into contact with the organs of the state.¹

The Bill of Rights constrains police, prosecutorial and judicial powers, thereby making the enforcement of criminal law more onerous than before. The Bill of Rights imposes positive duties on the state to protect the interests of South Africa’s inhabitants. Constitutionally every individual has the right to have his or her dignity protected.² Everyone has the right “to be free from all forms of violence from either public or private sources,”³ and a duty is placed on the state to protect individuals against criminal violence. The right to freedom and security of the person,⁴ the right to privacy⁵ and the rights of arrested, detained and accused persons⁶ have placed the courts as guardians of the Constitution, in a pivotal position, to prevent abuse of the criminal justice system and to contribute to the development of a fair law of criminal procedure. Section 14 is the privacy clause in the South African Constitution.

¹ Steytler *Constitutional Criminal Procedure: a commentary on the Constitution of the Republic of South Africa* 1998 1-2.

² Section 10 of the Constitution.

³ Section 12(1)(c) of the Constitution.

⁴ Section 12(1) of the Constitution.

⁵ Section 14 of the Constitution.

⁶ Section 35 of the Constitution.

The qualification made in the Interim Constitution that only personal privacy is protected has been omitted in the 1996 Constitution.⁷ Any invasion in a constitutionally protected sphere of privacy is therefore *prima facie* a violation of section 14, which might be justified in terms of the limitation clause.

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit*⁸ Justice Langa DP (as he then was) referred to section 14 of the 1996 Constitution as the “right to privacy in the social capacities in which we act”. In *Mistry v Interim Medical and Dental Council of South Africa and Others*⁹ Sachs J also explained the historical setting of this constitutional safeguard and stressed the unrestricted discretionary powers of state officials and this includes the police, and its impact on privacy rights:

The existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminating laws, security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systemised and egregious violations of personal privacy established norms for citizens that seeped generally into the public administration and promoted amongst a great many officials’ habits and practices inconsistent with the standard of conduct now required by the Bill of Rights.

Prior to the inception of the interim Constitution¹⁰ South African common law recognised an action for the invasion of privacy. McQuoid-Mason maintains that

⁷ Steytler *supra* 1998 82. Section 13 of the Interim Constitution reads:

“Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possession.....” The right to privacy is no longer qualified by the word “personal” and the word “private” is not included in the 1996 Constitutional text. This allows for a much wider and less restricted privacy right.

⁸ 2000 BCLR 1079 (CC) 15-20 para 33.

⁹ 1998 (4) SA 1127 (CC) 76 para 16.

¹⁰ Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

section 14 of the Constitution creates a constitutional right to privacy,¹¹ but this does not mean that “all previous notions of privacy will be forgotten and fall in disuse.”¹² The courts of today continue to employ those common law actions, which “are in harmony with the values of the Constitution.”¹³ The protection provided by the law to privacy was a logical and consequential development under the *actio-iniuriarum*, which affords a general remedy for wrongs to interests of personality. Privacy by its intrinsic nature is profoundly cherished by all individuals, in relation to intrusion into their private lives¹⁴ by the state or by other individuals. The right to privacy is a basic human need, essential for the development and maintenance both of a free society, of dignity and to ensure a mature and stable personality.¹⁵

This discussion of the right to privacy and affected rights focuses both upon the general nature of the right and more specifically, upon its application to search and seizure. The right to privacy and affected rights can be limited in terms of the general limitation clause¹⁶ by law of general application if the limitation (i) is reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality, and (ii) does not negate the essence of the right. The right to privacy can also be suspended¹⁷ in consequence of the declaration of a state of emergency, but only to the extent necessary to restore order.¹⁸

¹¹ McQuoid- Mason *The Law of Privacy in SA* 1978 18.

¹² *Ibid* 18.

¹³ *D v K* 1997 2 BCLR 209 (N) 236.

¹⁴ Devenish *The South African Constitution* 2005 79.

¹⁵ *Ibid* 79.

¹⁶ Section 36 (1) of the Constitution. See chapter 1 for discussion on limitation of rights.

¹⁷ Section 37 of the Constitution.

¹⁸ Section 37(4) of the Constitution.

2. The ambit and scope of the right to privacy and other affected constitutional rights in various jurisdictions

2.1 In South Africa

2.1.1 *The right to privacy*

Section 14 is the privacy clause in the Constitution and it reads as follows:

Everyone has the right to privacy, 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 communications infringed.¹⁹

This section provides for a general right to privacy, together with a direct guarantee of a right to privacy with regard to home life, private communications and the prohibition of unlawful entry and search.²⁰ The general right to privacy extends to those aspects of a “person’s life in regard to which a legitimate expectation of privacy can be harboured”.²¹ This requires that a person must have a subjective expectation of privacy that society accepts as objectively reasonable.²² Persons cannot legitimately complain about violation of privacy if they explicitly or implicitly consented to waive their rights in this regard.

An actionable invasion of privacy at common law occurs when another party commits an act, which has the effect of violating a person’s privacy, and that act is unlawful and intentional. An act which amounts to an invasion of privacy, is unlawful when it is contrary to the subjective desire on the part of the aggrieved person that the facts should remain private, and which is, objectively,

¹⁹ Section 14 of the Constitution.

²⁰ Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 1997 91.

²¹ Currie and De Waal *The New Constitutional and Administrative Law* 2001 361.

²² *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd : In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 10 BCLR 1079 (CC) 235.

unreasonable. The *boni mores*, or norms prevailing in the community, is the standard by which the objective unreasonableness of an act is determined.²³

In *Bernstein v Bester NO*²⁴ Ackerman J noted that, “the concept of privacy is an amorphous and elusive one” and he went on to say:

The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.²⁵

The United States Supreme Court developed a two-part test to delineate a practical definition of privacy. Justice Harlan, in the landmark decision *Katz v United States*²⁶ explained the test as follows:

²³ *Ibid* 167.

²⁴ 1996 4 BCLR 449 (CC) para 65.

²⁵ *Ibid* para 67

²⁶ 389 US 347 361 (1967). See also I Glasser *Visions of Liberty: The Bill of Rights for all Americans* 1991 177-178:

More and more, the Court has relied on a concept called “expectation of privacy” to justify governmental searches and surveillance.... In a series of decisions the courts have upheld the power of the government to wire trap phones, infiltrate undercover agents, conduct camera surveillance by helicopter, search people’s trash cans, obtain their bank records, stop and search their automobiles, stop and seize people in public on the basis of “drug-courier profiles” rather than tangible evidence, test the urine of people not suspected of using drugs, and gain access to telephone-company records that register every phone number one dials. In all these cases, the courts have ruled either that the Fourth Amendment did not restrict such searches and seizures or that it provided a reduced level of protection. The Court has often justified its decision by arguing that in these cases the individual had no expectation of privacy, only a limited expectation of privacy, thereby requiring less Fourth Amendment protection.

This was the contemporary situation. Today the right to privacy clearly exists and has immediate application to all attempts at search and seizure in law enforcement.

First that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectations be one that society is prepared to recognise as reasonable. Thus a man's home is for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the plain view of outsiders is not protected. On the other hand, conversations in the open would not be protected against being overheard for the expectation of privacy under the circumstances would be unreasonable.

In *Bernstein*²⁷ this approach was accepted as "sensible" because it confines any claim to privacy, only to aspects in regard to which a legitimate expectation is held. Following this approach in *Protea Technology Ltd v Wainer*²⁸ it was held that such a legitimate expectation requires a subjective expectation of privacy which society recognises as being objectively reasonable.

Legitimate expectations of privacy have crystallised into three domains or spheres of privacy:²⁹

- those relating to the body of the person;
- those relating to a territorial or spatial aspect; and
- those occurring in the context of communication or information transfer.

These domains coincide with the rights enumerated in section 14 of the Constitution relating to person, home, property and communications. Other areas of privacy requiring protection can also emerge.

Should a formulation of a unifying purpose of the right to privacy be attempted, then, briefly put, it is to allow every individual sufficient space in which he or she can be himself or herself and relate to other persons.³⁰ It is the space "necessary to have one's own autonomous identity."³¹ Protecting the space is a

²⁷ *Supra* 84.

²⁸ 1997 9 BCLR 1225 (W) 1239 H 388.

²⁹ *R v Dyment supra* 178; *Bernstein v Bester supra* 65; *Protea Technology Ltd v Wainer supra* 391.

³⁰ *Steytler supra* 51.

³¹ *Bernstein v Bester NO* 1996 4 BCLR 449 (CC) 93.

central concern of the liberal democratic tradition.³² Within the confines of this liberal democratic tradition, Didcott J proclaimed:

What erotic material I may choose to keep within the privacy of my home and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State.³³

Such an unqualified viewpoint may not be endorsed at all times. It could be limited if appropriately justified because like all rights privacy is not absolute. Langa J stressed that the importance of privacy should also be seen against the backdrop of South Africa's history where this right "in common with others was violated often with impunity by the legislature and the executive."³⁴

The objective aspect of privacy is problematic.³⁵ The Constitutional Court held that "privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."³⁶ Society tends to be more favourably disposed to respect privacy as reasonable in relation to an individual's home, body and family life. "Privacy interests are in their greatest when they relate to personal aspects of a persons existence and are much narrower outside personal matters."³⁷ This will however depend upon the circumstances of the case, since the state may indeed be justified in intervening

³² Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* 1993 287.

³³ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC) 100. The majority of the Constitutional Court may not support such an unqualified view of privacy, see Madala J (103). See also Mokgoro J para 65:

..as in England, a 'South African's home is his (or her) castle. But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials.

³⁴ *Case v Minister of Safety and Security; Curtis supra* 101.

³⁵ Devenish *supra* 80.

³⁶ *Bernstein v Bester* 1996 2 SA 751 (CC).

³⁷ Motlala "The Constitutional Court's approach to international law and its method of interpretation in the 'Amnesty Decision': Intellectual honesty or political expediency?" 21 *SAYIL* 1996 29.

when a private sphere of activity is involved in order, for instance to combat social evils.³⁸

There is a substantial overlap between infringement of the right to privacy and the infringement of other rights. Privacy and human dignity, for example, are intertwined and the former has as its objective the preservation for each individual of “the choice of when and how much he or she will allow others to know about his or her personal affairs, or interfere with his or her mind, or body, or private affairs”.³⁹ Thus, the right to privacy is also protected in other sections of the Bill of Rights, such as those dealing with freedom of association. It is therefore imperative to perceive that the manner in which rights operate is not compartmentalised, but that they operate holistically.

A juristic person is entitled to the right to privacy “to the extent required by the nature of the right and “the nature of that juristic person”.⁴⁰ There is little doubt that the nature of the right is capable of being extended to juristic persons,⁴¹ a principle recognised in comparative constitutional jurisprudence⁴² as well as in South African common law.⁴³ With reference to the nature of a juristic person, public juristic persons exercising public authority would not be able to claim privacy protection against state conducted searches.⁴⁴ The extent of the protection depends on the nature of the privacy interest sought to be protected.⁴⁵

*In Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit*⁴⁶ the

³⁸ *Case v Minister of Safety and Security* 1996 1 SACR 587 (CC) para 65.

³⁹ PH King *The Guide to American Law* 1984 288.

⁴⁰ Section 8(4) of the Constitution.

⁴¹ Steytler *supra* 85.

⁴² *Dow Chemical Co v United States* 476 US 227 (1986).

⁴³ *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A).

⁴⁴ Rautenbach and Malherbe *Constitutional Law* 1996 225.

⁴⁵ Steytler *supra* 191.

⁴⁶ 2000 10 BCLR 1079 (CC) 437; 2001 1 SA 545 (CC); 2000 2 SACR 349 (C) 349.

Constitutional Court maintained that although juristic persons are not the bearers of human dignity, they are entitled to the right to privacy although their privacy rights “can never be as intense as those of human beings”. Blanket exclusion of the right to privacy would lead to possible grave violations of privacy in our society, with serious implications for the conduct of affairs.⁴⁷ For instance the state may have a free licence to search and seize material from any non-profit organisation or corporate entity at will. This would undoubtedly lead to serious disruptions and undermine the essence of democracy. Therefore juristic persons do enjoy the right to privacy, although not to the extent enjoyed by natural persons.⁴⁸

2.1.2 *The right to dignity*

Section 10 of the Constitution reads as follows:

Everyone has inherent dignity and the right to have their dignity respected and protected.

Chaskalson P (as he then was) maintained that the right to dignity is the pre-eminent of all fundamental rights.⁴⁹ It is the cornerstone value of the Bill of Rights as a whole and all individual rights are founded on this value.⁵⁰ The right to dignity has been accepted as a foundational value in the South African Constitution. In *S v Makwanyane*⁵¹ O’Reagan J maintained that:

See also *Magajane v Chairperson, Northwest Gambling Board* 2006 (2) SACR 447 para 42-43:

...the scope of a person’s privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.....businesses have lower expectations of privacy as to the disclosure of relevant information to the public and authorities....

⁴⁷ Devenish *supra* 2005 86.

⁴⁸ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. Supra* 15.

⁴⁹ M. Chaskalson The Third Bram Fischer Memorial Lecture 2000 (16) SAJHR 193.

⁵⁰ *Ibid* 193.

⁵¹ 1995 (6) BCLR 665 (CC).

The importance of dignity as a founding value of our new Constitution cannot be over emphasised.....Respect for dignity of all human beings in South Africa is particularly important.....Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.

The right encompassed in section 10 is the right of an individual to have his or her dignity protected. The implication of section 10 is logical and self explanatory. Individuals have a right to claim protection from the state from interference with their dignity by others. Our courts have linked dignity to status, honour, reputation or what amounts to esteem in the eyes of others.⁵²

The right to respect one's dignity interfaces with many rights and, indeed, implies respect for all of a person's rights. The conduct which impairs a person's dignity may simultaneously be the impairment of a person's right to privacy. The right to dignity may accordingly be asserted as an additional ground in a challenge to some other law or practice which impairs a person's rights. This implies for example that when a person challenges a search with or without a warrant, on the basis that it was an unreasonable infringement of his or her right to privacy, he or she might add the impairment of his or her right to dignity.

2.1.3 Freedom and security of the person

Section 12(1) of the Constitution reads:

Everyone has the right to freedom and security of the person, which includes the right-

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b).....
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

There is no definition of the word freedom in Chapter 2 of the Constitution. The concept of freedom includes the freedoms guaranteed in Chapter 2, such as the

⁵² *University of Pretoria v Tommy Meyer Films (Edms) Bpk1979 (1) SA 441 (A) 277.*

right to privacy.⁵³ The primary purpose of the right to freedom is to ensure that the physical integrity of every person is protected, for this is how a guarantee of freedom and of security of the person would ordinarily be understood.⁵⁴

As an aspect of the right to dignity, physical integrity forms an important part of a person's well being.⁵⁵ Within the South African context, the history of state perpetrated violence particularly by the police, is one of the hallmarks of the previous regime and gives the right to privacy an important platform in the Bill of Rights.⁵⁶ The right to security of person, as expressed in the specific rights to be free from all forms of violence, torture or cruel, inhuman or degrading treatment, includes both physical and mental aspects⁵⁷ and creates a comprehensive shield against the use of physical force by the state.

2.2 Foreign law

The 1996 Constitution permits a court, when interpreting the Bill of Rights, to "consider foreign law".⁵⁸ While the provision is "no injunction to do more than this"⁵⁹ the jurisprudence of foreign jurisdictions is an important source because it provides a yardstick or guidance to the practice of human rights in other democratic jurisdictions.⁶⁰ However the courts have warned that the use of foreign precedent calls for circumspection and acknowledgment that transplants require careful management.⁶¹ Foreign law will not necessarily provide a safe guide or means "to interpretation of the Bill of Rights" unless the principles of

⁵³ Cheadle...*et al. supra* 154.

⁵⁴ *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) 59.

⁵⁵ *S v Huma* (2) 1995 2 SACR 411 (W) 414h.

⁵⁶ *Bernstein v Bester NO* 1996 4 BCLR 449 (CC) 89.

⁵⁷ *Minister of Justice v Hofmeyr* 1993 3 SA 141 (A) 1451.

⁵⁸ Section 39(1)(c):

When interpreting the Bill of Rights, a court, tribunal or forum-
....(c) may consider foreign law."

⁵⁹ *S v Makwanyane* 1995 3 SA 391.

⁶⁰ *Steytler supra* 1998 13.

⁶¹ *Sanderson v Attorney-General* 1997 12 BCLR 1675 (CC).

comparative law are adhered to.⁶² First the text and the context of the comparative system ought to be examined. The comparison may be relevant or irrelevant depending on textual and structural differences. The value of foreign judicial decisions should be examined within the context of the particular legal system. Secondly the underlying rationale and purpose of a comparable concept or doctrine should be examined and identified.⁶³ The transportability of principles, doctrines or concepts is not dependent on similarity of language in which they are expressed but rather it is the compatibility of underlying rationales or purposes which determine whether a foreign principle, doctrine or concept can be effectively used.⁶⁴ In this dissertation reference is made to the jurisprudence of the United States and Canada, “jurisdictions most cited by South African courts.”⁶⁵ The South African Bill of Rights is largely modelled on the Canadian Charter.⁶⁶

2.2.1 *In the United States*

In the United States, the courts usually quote the following dictum of Brandeis J, to justify their recognition of a right to privacy:

The makers of our Constitution.....recognised the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone..... the most comprehensive of rights and the right most valued by civilised men.⁶⁷

⁶² *Bernstein v Bester supra* 91.

⁶³ *Ferreira v Levin NO* 1996 1 BCLR 1 (CC) 342.

⁶⁴ Paciocco, *Charter Principles and Proof in Criminal Cases* 1987 82.

⁶⁵ Steytler *supra* 13. See also *National Director of Public Prosecutions and Another v Mahomed* 2008 (1) SACR 309 paragraph 23 Nugent JA referring to Farlam JA says:

He finds support for his view in two decisions from Canada....

⁶⁶ *S v Nortje* 1996 2 SACR 308 (C) 319. See also *Zuma v National Director of Public Prosecutions supra* para 12:

This applies with equal force to the precepts of our law.....

⁶⁷ *Olmstead v United States* 277 US 438 478 (1928). The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

It has also been accepted that the general right to privacy includes a number of so called privacy rights. In determining whether a particular privacy right should be recognised the Supreme Court usually asks itself the question whether such a right is “implicit in the concept of ordered liberty” in such a way that “neither liberty nor justice would exist” if it was sacrificed and whether it is “deeply rooted in this Nation’s history and tradition”.⁶⁸ Compared to other jurisdictions, this inherent limitation of the scope of the right to privacy has resulted in a narrower understanding of it in the United States.⁶⁹ Apart from the inherent limitations of the scope of protection of the right to privacy,⁷⁰ it may justifiably be infringed if a compelling state interest so requires. An infringing statute must be shown to be necessary and not merely rationally related to the accomplishment of a permissible state policy.⁷¹

The Fourth Amendment of the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, the person or things to be seized.

The Fourth Amendment, unlike section 14 of the Constitution, does not only deal with the seizure of possessions but with persons as well. Another important requirement of the Fourth Amendment is that searches must not be unreasonable and further that a warrant can only be issued upon probable

shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized. See Woody 2006 29 “Search and seizure: The Fourth Amendment for Law Enforcement officers” which states: The first clause affirms reasonableness and the second clause affirms the need for a warrant with details.

⁶⁸ *Bowers v Hardwick* 478 US 186.

⁶⁹ *Ibid* 186.

⁷⁰ Maditsi “The Right of Privacy in America: What does it mean?” 1992 *De Rebus* 659.

⁷¹ *Griswold v Connecticut supra* 510.

cause. The United States Supreme Court has struggled to give meaning to many of these concepts.⁷²

In the United States the Supreme Court in interpreting and applying the right to personal liberty and the right to be free from cruel and unusual punishment relied on a conception of these rights which was in turn founded on the respect for human dignity.⁷³ In this way many aspects of the inherent dignity of citizens have come to be protected under these rights, including the right to privacy and the many component parts of the right to privacy.⁷⁴

2.2.2 In Canada

The Supreme Court of Canada views the right to privacy as being “at the heart of liberty in a modern state.”⁷⁵ Founded on the bedrock value of the inherent dignity of the individual and his or her moral autonomy, the right to privacy gives the state no superior claim to prescribe how the identity of the individual is to be shaped.

Section 8 of the Canadian Charter of Rights and Freedoms is simple. It stipulates that:

Everyone has the right to be secure against unreasonable search or seizure.

Much of the framework for analysing section 8 can be derived from *Hunter v Southam*⁷⁶ and *R v Collins*.⁷⁷ The relevant principles formulated by these two cases are as follows: the purpose behind section 8 is to protect the privacy of individuals from unjustified state intrusions but this interest in privacy is however limited to a “reasonable expectation of privacy”. The primary aim of the Charter

⁷² Salzberg *Introduction to American Criminal Procedure* 1980 28.

⁷³ *Furman v Georgia* (1972) 408 US 238.

⁷⁴ *Ibid* 238.

⁷⁵ *R v Dyment* (1988) 45 CCC (3d) 244 (SCC) 459.

⁷⁶ (1984), 41 C.R. (3d) 97 (S.C.C.) 261.

⁷⁷ (1987), 56 C.R. (3d) 193 (S.C.C.) 338.

is to protect individual rights and freedoms from state action means that it must be interpreted to constrain government from infringing upon these rights, rather than to authorise governmental action. In these cases section 8 was interpreted as protecting more than property rights. The purpose behind section 8 is to protect the privacy of the people as well as to guard against trespass of property. As a consequence of this purpose, the court held that intrusion of privacy through searches and seizures could only take place where it was justifiable for the privacy interest of the public to yield to the state interest in law enforcement or other supportable goals.

In Canada notwithstanding the absence of constitutional reference to dignity, the Supreme Court maintained that respect for the inherent dignity of every person is the bedrock of the Canadian Charter of Rights and Freedoms.⁷⁸ The Canadian Supreme Court also stressed that the idea of inherent dignity finds expression in almost every right and freedom by the Charter.⁷⁹

Despite there being significant differences between section 14 of the South African Constitution, the Fourth Amendment of the United States Constitution and section 8 of the Canadian Charter, a brief study of the jurisprudence which has emerged in the United States and Canada can be useful for us. The United States and Canadian courts have interpreted their respective privacy provisions to apply only to state action.⁸⁰ Where the individual is merely a private party acting on his or her own initiative, the Fourth Amendment does not apply.⁸¹ According to Beaudoin and Ratushny⁸² the Canadian courts may distinguish between gathering evidence by a private detective or security officer for a civil matter and in doing so for a criminal matter. Our Bill of Rights however applies

⁷⁸ *R v Oakes* (1986) 19 CRR 308.

⁷⁹ *Morgenthaler Smoling and Scott v R* (1988) 31 CRR 1.

⁸⁰ *Durdeau v McDowell* (1921) 256 US 465 475. *Hunter et al v Dolphin Delivery Ltd* (1987) 33 DLR (4th) 174.

⁸¹ *United States v Pierce* 893 F 2d 669 at 674 (5th Cir 1990).

⁸² Beaudoin and Ratushny *The Canadian Charter of Rights and Freedoms* 1989 29.

to state actions only under section 7(2)⁸³ and not to the actions of private, natural or juristic persons.

3. International law

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides as follows:

- (1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference.

The United Nations Human Rights Committee indicated that article 17 should be given a broad interpretation to include “the place where a person resides or carries out his usual business.”⁸⁴ Interferences ought to be both lawful and not arbitrary, that is, “in accordance with the provisions, aims and objectives of the Covenant and should be in any event, reasonable in the particular circumstances.”⁸⁵

Although formulated differently the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) safeguards the same privacy rights. Article 8 reads as follows:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.

⁸³ Constitution of the Republic of South Africa.

⁸⁴ *Case v Minister of Safety and Security* 1996 1 SACR 587 (CC) para 68.

⁸⁵ UN Human Rights Committee General Comment 16/32 of 23 March 1988.

The European Court of Human Rights regards Article 8 as reflecting a general right to privacy, although it does not refer to the concept privacy specifically. “Private life” and “the home” have been given a broad interpretation. The Court in *Niemitz v Germany*⁸⁶ held that the office of a lawyer fell within the protected sphere of privacy. It is not always possible to distinguish clearly which of an individual’s activities form part of his or her professional or business life.⁸⁷ The inclusion of certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by public authorities.

The broadness of the right to privacy calls for specific focus on the limitation clause in Article 8 (2). The requirement that any limitation should be “in accordance with law” necessitates compliance with both national law and the rule of law criteria.⁸⁸

A legislative regime crafted with the required precision should be applied strictly by administrative agencies.⁸⁹ In *Niemitz v Germany*⁹⁰ the Court criticised a warrant as being too vague because it authorised the search of a lawyer’s office without being specific.

The proportionality test is of critical importance. For an infringement to be “necessary in a democratic society, an interference must be founded on a pressing social need and, in particular, be proportionate to the legitimate aim pursued.”⁹¹ In weighing the alleged harm (seriousness of the crime) and the extent of state interference, the court warned in *Klass v Germany*⁹² that states may not, “in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.” It stressed the dangers of police

⁸⁶ 16 December 1992 Series A No 251-B.

⁸⁷ Steytler *supra* 80.

⁸⁸ *Malone v United Kingdom* 2 August 1984 Series A No 82.

⁸⁹ Steytler *supra* 81.

⁹⁰ *Supra* 334.

⁹¹ *Schönenberger and Durmaz v Switzerland* 20 June 1988 Series A No 137.

⁹² *Klass v Germany* 6 September 1978 Series A no 28.

powers “undermining or even destroying democracy on the ground of defending it.”⁹³ To ensure appropriate guarantees against abuse, the court assessed police powers in terms of “the nature, scope and duration of possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.”⁹⁴ There should be judicial supervision of any interference because of the guarantee of independence and impartiality.⁹⁵

4. Conclusion

The right to privacy and the other affected rights discussed above are guaranteed expressly in our Constitution. In providing for the right to privacy the Constitution gives an indication of its scope by specifying the entitlements it entails. The purpose of the right to privacy is closely related to its scope. Steytler⁹⁶ reflects the view that the purpose of the right is “to allow every individual sufficient space in which he or she can be himself or herself and relate to other persons. It is the space necessary to have one’s own identity.”

In *Powell and Others v Van der Merwe NO and Others*⁹⁷ the court stressed the importance of the right to privacy and associated rights. From this authority and others such as *Zuma and Another v National Director of Public Prosecutions and Others*⁹⁸ it is clear that a person’s right to privacy and affected rights are jealously guarded by the Constitution. It is more than arguable that the various

⁹³ *Ibid* 396.

⁹⁴ *Ibid* 396.

⁹⁵ *Ibid* 396.

⁹⁶ *Supra* 67.

⁹⁷ 2005 (5) SA 62 (SCA) 151, in which the court stated that: Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.

⁹⁸ 2006 (1) SACR 468 (D) 168.

search and seizure provisions, which permit warrantless searches and seizures are likely to present constitutional problems.⁹⁹

In South Africa the right to privacy and other affected rights can be limited in terms of the limitation clause,¹⁰⁰ by law of general application if the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and does not negate the essential content of the right.

The right to privacy and affected rights are also explicitly guaranteed in the Universal Declaration of Human Rights,¹⁰¹ the International Covenant on Civil and Political Rights¹⁰² and the European Convention on Human Rights.¹⁰³

In South Africa the right to privacy and other affected rights can be limited in terms of the limitation clause,¹⁰⁴ by law of general application if the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and does not negate the essential content of the right.

In the United States the Fourth Amendment¹⁰⁵ does not refer specifically to the concept of “privacy”, but it has been found to be implicitly guaranteed in various of its provisions. In the United States the general right to privacy includes a number of so called privacy rights. In determining whether a particular privacy right should be recognised the Supreme Court usually considers whether such a right is “implicit in the concept of ordered liberty” in such a way that “neither liberty nor justice would exist” if it was sacrificed and whether it is “deeply rooted in this Nation’s history and tradition”.¹⁰⁶ The inherent limitation of the scope of the right to privacy has resulted in a narrower understanding of it in the United

⁹⁹ Beaudoin and Ratushny *supra* 401.

¹⁰⁰ Section 36(1) of the Constitution.

¹⁰¹ Article 12.

¹⁰² Article 17.

¹⁰³ Article 8.

¹⁰⁴ Section 36(1) of the Constitution.

¹⁰⁵ “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.”

¹⁰⁶ *Bowers v Hardwick* 478 US 186.

States.¹⁰⁷ The right to privacy may justifiably be infringed if a compelling state interest so requires. An infringing statute must be shown to be necessary and not merely rationally related to the accomplishment of a permissible state policy.¹⁰⁸

In Canada the right to privacy is regarded as being at the heart of liberty. The right to privacy does not give the state any superior claim to prescribe how the identity of the individual is to be shaped. The right to privacy and other fundamental rights such as, the right to freedom and security of the person and dignity are interrelated and should not be viewed compartmentally. Searches and seizures, which generally involve an invasion of privacy must comply with constitutional requirements. In both the United States and Canada, the “reasonable expectation of privacy” defines the scope of constitutional protection from government intrusion.

It is clear that in South Africa, as well as in the United States and Canada, any “state” or government conduct that intrudes on a justified expectation of privacy is considered a search and seizure and ought to be legitimate to pass constitutional scrutiny.

¹⁰⁷ *Ibid* 186.

¹⁰⁸ *Griswold v Connecticut supra* 510.

CHAPTER FOUR

SEARCH IN TERMS OF A SEARCH WARRANT

1. Historical background

An overview of the historical context is imperative if the principles enshrined in our Constitution are to be understood. A person's right to be free from being searched and having their goods confiscated has its origin in common law in the context of eighteenth century English society, where the notion of sanctity of the home and the property owners need to be free and secure from government intrusion were of cardinal importance.¹The following eloquent remarks of William Pitt aptly illustrate the inviolability of a person's home:

[T]he poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares (*sic*) not cross the threshold of the ruined tenement.²

The earliest recognised common law power of search was that of a citizen to pursue a suspected cattle thief.³ The overriding philosophy of the time was the protection and preservation of private property. In *Entick v Carrington*⁴ the Court of Common Pleas rejected the pleas of government to recognise the legality of general warrants, that is warrants which did not name the person to be arrested or specify the exact place to be searched or things to be seized, and instead stressed the immunity from intrusion of the private dwelling of a subject, unless there was express lawful authority to justify such intrusion. An early exception to the common law rule that no man may enter the home of any other man without permission from the owner or the occupier, was the right of the King's officer to enter a man's premises without warrant or permission, for the limited purpose of

¹ *R v Dymnt* (1988) 2 SCR 417, 45 CCC (3d) 244.

² Cited in LaFave 1987 4.

³ Pollock and Maitland *The history of English law* 1968 91.

⁴ (1765), 95 E.R. 807 (Eng. K.B.) 564.

searching for stolen goods which he reasonably believed to be concealed there. This exception was the origin of the search warrant,⁵ which could be issued only on suspicion that stolen goods had been concealed on private premises.

South Africa's pre-1990 political and constitutional history is documented in Chapter 1. Suffice to say that the Constitution has eliminated the core notions and latter day practices of its predecessors, namely, parliamentary sovereignty, a dominant executive, indiscernible separation of powers, underdeveloped political accountability, no Bill of Rights, and finally a racist base.

Our Constitution aims to effect a fundamental balance between the interests of society in bringing offenders to justice and the rights and liberties of persons suspected of crime. There was a perceived need for clear and certain rules within which police officials should operate. By prohibiting unreasonable searches and seizures, and through regulation of the warrant process our Constitution places important limits on the powers of police officials in the prevention and investigation of crime.

2. The rationale for a search warrant

The warrant is a document by which searches are judicially authorised and legitimated.⁶ As a due process safeguard, all searches by warrant are considered to be "good" and all searches without warrant are "bad".⁷ This theory is also most evident in the rhetoric of the United States' Supreme Court in cases such as *Coolidge v New Hampshire*,⁸ where it was expressed that, as a general proposition, warrantless searches were unreasonable. A similar doctrine is apparent in Canada where the seminal case of *Hunter v Southam Inc.*⁹ stated that the absence of a warrant makes a search *prima facie* unreasonable. Another theory and one to which English judges traditionally subscribe, is that

⁵ Stephens *Commentaries on the law of England* (21ed) (Wellington vol. 4) 1993 224.

⁶ Sharpe *Search and Surveillance: the movement from information to evidence* 2000 47.

⁷ *Ibid* 47.

⁸ 403 US 433 (1971) 118.

⁹ (1985) 14 CCC (3rd) 641 SCC 724.

warrants are coercive instruments and they must therefore be limited to those situations that have been set out in statute, as a result of a democratic process.¹⁰

Today in the United States it is well established in the views of the Supreme Court that searches and seizures conducted without a warrant are suspect.

Searches conducted outside the judicial process, without prior approval by a judge or magistrate is per se unreasonable under the Fourth Amendment.... Subject only to a few specifically established and well delineated exceptions.¹¹

The Supreme Court has deemed this “a cardinal principle” of Fourth Amendment Law.¹²

Indiscriminate searches and seizures might be thought to be bad for either or both of two reasons: The first is that they expose people and their possessions to interference by government when there is no good reason to do so. The concern here is against unjustified searches and seizures: it rests upon the principle that every citizen is entitled to security of his person and property unless and until an adequate justification for that security is shown. The second is that indiscriminate searches and seizures are conducted at the discretion of executive officials who may act despotically and capriciously in the exercise of the power to search and seize. This latter concern runs against arbitrary searches and seizures: It condemns the “petty tyranny of unregulated rummages.”¹³

In *Johnson v United*¹⁴ Justice Jackson submitted that there are exceptional circumstances in which, on balancing the need for effective law enforcement

¹⁰ Sharpe *supra* 87.

¹¹ *Katz v United States* 389 US 347, 357 (1967).

¹² *Mincey v Arizona* 437 US 385 (1978) 547.

¹³ Minn *Perspectives on the Fourth Amendment* 1974 349.

¹⁴ 333 U.S. 10 (1948) 479.

against the right of privacy, it may be contended that a warrant for search may be dispensed with.

In *Beheermaatschappij Helling I NV v Magistrate, Cape Town*¹⁵ the court noted with reference to *Powell NO v Van der Merwe and Others*:¹⁶

Our law has a long history of scrutinising search warrants with rigour and exactitude – indeed, with sometimes technical rigour and exactitude. The common law rights so protected are now enshrined, subject to reasonable limitation, in section 14 of the Constitution...

The courts tend to jealously safeguard individual rights because of the pervasive nature of these powers of search and seizure in the hands of the state.¹⁷

This chapter will address the warrant requirement to conduct search and seizure. Secondly, the extent to which warrants serve to safeguard legitimate expectations of privacy, and certain aspects of the warrant process will be addressed in detail. Thirdly, the protections the warrant procedure affords will be considered. Principles extracted from comparative law will be considered and applied where it is relevant. Finally, the conclusion will consider the impact and influence of comparative law on our law.

3. Search warrants

3.1 The issuing of general search warrants

3.1.1 In South Africa

Section 21 of the Criminal Procedure Act governs the procedure with regards to search warrants. Subsection (1) provides that subject to section 22, 24 and

¹⁵ 2007 (1) SACR 99 (C) 112.

¹⁶ *Supra* (SCA Case No 503/2002, 1 April 2004) (unreported at that time).

¹⁷ Cowling Search and seizure SACJ 2007 400. *Powell NO v Van der Merwe and Others supra* 49.

25,¹⁸ an article referred to in section 20 shall be seized only by virtue of a search warrant issued –

- (1) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
- (2) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.

Section 21 makes provision for two instances where a warrant may be issued: before the trial and during the trial. If a police official needs to obtain a search warrant and a magistrate is not available, a justice of peace should be approached, instead of conducting a search without a warrant.¹⁹ “Justice” means a person who is a justice of the peace under the provisions of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.²⁰ A commissioned²¹ police officer is a justice of the peace, (holders of the following offices are justices of the peace: commissioned officers in the South African Police Service, National Defence Force and Correctional Services, directors of public prosecutions, registrars and magistrates). Such a commissioned officer is empowered to issue a search warrant.

Section 25(1)²² stipulates that:

If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing-

- (a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or

¹⁸ Sections 22, 24 and 25 of the Criminal Procedure Act are discussed in chapter 2.

¹⁹ *S v Motloutsi* 1996 (1) SA 548 (C) 258.

²⁰ Section 1 of the Criminal Procedure Act.

²¹ Section 1 of the South African Police Act defines a commissioned police officer as a police official with the rank of Captain and above. “Police official” means a member of the South African Police Service.

²² Criminal Procedure Act.

is to be held in or upon any premises within his area of jurisdiction; or
(b) that an offence has been or is being or is likely to be committed or that
preparations or arrangements for the commission of any offence are being or
are likely to be made in or upon any premises within his area of jurisdiction,
he may issue a warrant authorizing a police official to enter the premises in question at any
reasonable time....

Where the person issuing the warrant is part of the office of the executing officer
then objectively speaking neutrality and impartiality are in doubt and obviously
this does not augur well for the protection constitutional rights and values.
Furthermore commissioned officers may lack legal training and knowledge, and
could have a direct interest in the matter, which can hamper objectivity.

3.1.2 *In the United States*

In the United States, both the United States Constitution and the Constitutions
of the various states describe the circumstances under which warrants may be
issued.²³ They generally provide that:

- (1) a warrant shall not be issued unless there is probable cause;
- (2) the warrant must be supported by oath or affirmation; and the place to be searched and
the things to be seized must be particularly described.²⁴

The United States Supreme Court expressed strong preference for the use of
warrants because it interposes an orderly procedure involving judicial
impartiality whereby a neutral and detached magistrate can make informed and
deliberate decisions.²⁵

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers and effects against
unreasonable searches and seizures, shall not be violated and no Warrant shall issue, but

²³ Klotter, Walker and Hemmens *Legal Guide for Police: Constitutional Issues* 2005 91.

²⁴ *Ibid* 91.

²⁵ Israel and LaFave *Criminal Procedure: Constitutional Limitations* 2001 78.

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

It has been maintained that “probable cause” is the level of justification required to make an arrest or conduct a search. The evidence in most probable cause statements is usually that the crime was committed.²⁶

3.1.3 In Canada

In Canada the general power to issue a search warrant is conferred upon a justice of the peace.²⁷ Under section 2 of the Canadian Criminal Code (1985), a justice is defined as either a justice of the peace or a provincial court judge. The most common type of search warrant issued is that under section 487 of the Canadian Criminal Code. It is a general search warrant since it may be used in relation to any Code offence or an offence under any other federal Act, even if that Act contains its own search and seizure provisions.²⁸

Section 487 reads as follows:

- (1) A justice who is satisfied by information on oath that there are reasonable and probable grounds to believe that there is in a building, receptacle or place:
 - (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
 - (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against the Act or any other Act of Parliament, or
 - (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without a warrant,

he may at any time issue a warrant under his hand authorising a person named therein or a peace officer

²⁶ Woody *Search and seizure: The Fourth Amendment for law enforcement officers* 2006 38.

²⁷ Harr and Hess *Constitutional Law and the Criminal Justice System* 2001 174.

²⁸ Section 487(1)(a) and (b) as interpreted by *R v Multiform Manufacturing Company* (1990), 79 C.R. (3d) 390 (SCC).

- (d) to search the building, receptacle or place for any such thing and to seize it, and
- (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

3.2 The issuing of warrants to maintain internal security and law and order

3.2.1 In South Africa

Section 25(1) of the Criminal Procedure Act provides that if it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing:

- (a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his or her area of jurisdiction; or
- (b) that an offence has been or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction

he may issue a warrant authorising a policeman to enter the premises in question at any reasonable time for the purpose-

- (i) of carrying out such investigations and of taking such steps as such policeman may consider necessary for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence,
- (ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 and which such policeman on reasonable grounds suspects to be in or upon or at the premises or in the possession or under the control of such person; and
- (iii) of seizing any such article.

In *Control Magistrate, Durban v AZAPO*,²⁹ warrants were issued in terms of section 25(1) of the Criminal Procedure Act, on the basis of confidential information supplied to the magistrate in affidavits. The magistrate failed to provide reasons for his belief that the circumstances mentioned in section 25(1)

²⁹ 1986 (3) 394 (A).

existed. On appeal the decision by the provincial division setting the warrants aside was reversed.

Only information placed under oath before a magistrate or justice may be considered in coming to the decision to issue the warrant.³⁰

In *Wolpe v Officer Commanding South African Police, Johannesburg*³¹ police officials entered a hall where a conference was being held by the South African Congress of Democrats together with other organisations. The chairman requested the police to leave the meeting and indicated that it was a private meeting. The police refused to leave. The Congress of Democrats brought an urgent application to the court for an interdict to prohibit the police from attending the meeting. They argued that the police do not have greater powers than any other individual, except in so far as they are vested with wide powers by statute. The application was refused. The judge concluded that if there was a suspicion that as a result of the holding of the meeting a disturbance of public order would occur on the same day, the police were entitled to attend the meeting in order to prevent the disturbance of order, even though the meeting was private. According to the judge the liberty of the individual must in such circumstances give way to the interests of the state. He however suggested that the legislature should define the duties and powers of the police in connection with the combating of what the state from time to time considered dangerous. This led to the inclusion of section 25 in the Criminal Procedure Act. It is submitted that the fact that a police official who acts in terms of this section may take any steps that he considers necessary for the preservation of the internal security of the Republic or the prevention of any offence, which could well be a minor offence, brings a subjective standard to be applied. It is further submitted that the standard for the police official's conduct is arbitrary, because it applies to what the police official considers necessary and not that which is necessarily objectively justifiable. This appears to be an inherent violation of the right to privacy enshrined in the Constitution.

³⁰ *Naidoo and Another v Minister of Law and Order and Another* 1990 (2) SA 158 (W) 166.

³¹ 1955 (2) SA 87 (W) 244.

3.2.2 In the United States

The United States of America PATRIOT Act³² is a statute enacted by the United States government in October 2001. The Act increases the ability of law enforcement agencies to search e-mail communications, telephone, medical, financial and other records and enhances the discretion of law enforcement agencies in detaining and deporting immigrants suspected of terrorism related acts. The PATRIOT Act has generated great controversy since its enactment. Opponents of the Act have been vociferous in asserting that it was passed opportunistically after the September 11 terrorist attacks, believing there to be little debate on critical issues pertaining to fundamental human rights.³³

3.2.3 In Canada

Before a warrant may be issued, there must be compliance with the provisions of section 487 of the Canadian Criminal Code. Under the Canadian Criminal Code a justice may issue a warrant authorising the search of a building, receptacle or place and seizure of anything that there are reasonable grounds to believe will afford evidence of an offence against the Code or any other Act of Parliament.³⁴

3.3 Prerequisites for a valid search warrant

Some of the requirements of a search warrant are stated in the Constitution itself, others have been added by the Criminal Procedure Act, legislation and court interpretation. For a search warrant to be valid the following requirements must be met:

³² 36 of 2001. The contrived acronym stands for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.

³³ "Congressional Record" *US Government Printing Office*. (visited on 10 March 2009) http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi.2001_record&page.

³⁴ Section 487(c).

3.3.1 Prior judicial authorisation

3.3.1.1 In South Africa

As a general rule a search should be authorised by a judicial officer.³⁵ This power is, however extended to justices of the peace.³⁶ Where the person issuing the warrant is part of the office of the executing officer, then objectively, there is no neutral or detached officer.³⁷ Some kind of prior authorisation by an independent authority is usually necessary before a search may be carried out.³⁸

In *Zuma v National Director of Public Prosecutions*³⁹ the court referred to the decision in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*⁴⁰ where Langa DP reasoned that the task of the independent authority issuing a search warrant as being, first to establish the level of suspicion to justify an invasion of privacy, and secondly whether there are reasonable grounds to suspect that evidence sought is on the specific premises. This was confirmed in *Zuma v National Director of Public Prosecutions*⁴¹ where the court reiterated that the emphasis is on the existence of “reasonable grounds for believing”. In *Powell and Others v Van der Merwe and Others*⁴² the court held that a reasonable suspicion is an impression formed on the basis of diverse factors, including facts and pieces of information falling short of fact such as allegations and rumours.⁴³ It is the total picture that is relevant.

³⁵ Sections 21(1) and 25 of the Criminal Procedure Act.

³⁶ Section 21(1)(a) of the Criminal Procedure Act.

See 3.1.1 Chapter 4 for discussion on justices of peace.

³⁷ Steytler *supra* 91.

³⁸ Currie and De Waal *The New Constitutional and Administrative Law* 2001 2.

³⁹ 2006 2 All SA 91 (D) 15.

⁴⁰ 2000 BCLR 1079 (CC).

⁴¹ *Supra* 46.

⁴² *Supra* 75.

⁴³ *Powell NO and Others v Van der Merwe and Others* 2005 1 All SA 149 (SCA) 161 38.

It is also implicit that the judicial officer should have regard to the provisions of the Constitution in making the decision. In *Parker Ross and Another v Director: Office for Serious Economic Offences*⁴⁴ a provision in the Investigation of Serious Economic Offences Act⁴⁵ authorising searches to be carried out without the sanction of a judicial officer was declared unconstitutional by Tebbutt J who stated that:

It would, I feel, accord with the spirit and purport of the Constitution if it was provided that, before any search and seizure pursuant to section 6 of the Act, prior authorisation be obtained from a magistrate or from a Judge of the Supreme Court in Chambers for such search and seizure. Any application for such authorisation should set out, at the very least, under oath or affirmed declaration, information as to the nature of the inquiry....., the suspicion having given rise to that inquiry, and the need, in regard to that inquiry, for a search and seizure ...

The importance of a residual discretion by a judicial officer is acknowledged in South African law with regard to the issuing of a warrant for the interrogation of a witness.⁴⁶ The court in *S v Cornelissen; Cornelissen v Zeelie NO*⁴⁷ held that where jurisdictional facts exist, the magistrate has the discretion to refuse the issuing of a warrant where a person's right to privacy outweighs the interests of justice.

These decisions are best made by an independent authority, usually a judicial officer. The principle needs to be invoked clearly in our law.⁴⁸ The decision-maker must be a neutral and detached person who is capable of acting judicially. The aim is to prevent unreasonable searches.

3.3.1.2 In the United States

The Supreme Court in 1971 made it clear that neither prosecutors nor police officers can be asked to maintain the requisite neutrality when deciding whether

⁴⁴ *Supra* 198.

⁴⁵ 117 of 1991.

⁴⁶ Section 205 of the Criminal Procedure Act.

⁴⁷ 1994 2 SACR 41 (W) 69i.

⁴⁸ See section 21 of the Criminal Procedure Act - this principle is not enshrined in section 21.

a search warrant should be issued.⁴⁹ State courts have recited the rule in state decisions. For example, an Oklahoma court held that the purpose of the warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search.⁵⁰ A New Jersey court opined that searches and seizures may be lawfully undertaken in many circumstances, and one such circumstance is when the search warrant is obtained from a neutral magistrate.⁵¹

In *Coolidge v New Hampshire*⁵² warrants relating to a murder investigation were issued by the State Attorney General, acting as a justice of the peace. Prior to issuing the warrants, the Attorney General had personally taken charge of all police activities relating to the investigation. He later served as chief prosecutor at the trial. The Supreme Court held that the search resulting from these warrants breached the Fourth Amendment. The Court relied upon some seminal dicta in the case of *Johnson v United States*.⁵³

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify an officer in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes and offices secure only in the discretion of officers.

Where there is evidence of ostensible bias, as in *Coolidge*, the Supreme Court is likely to invalidate the warrant, even in the absence of proof of actual partiality. Thus in *Connally v Georgia*⁵⁴ a justice issued a search warrant under a statutory scheme whereby he received no salary, but was paid a prescribed

⁴⁹ *Coolidge v New Hampshire* 403 U.S. 433 (1971) 394.

⁵⁰ *Mollet v State* 939 P.2d 1 (Okla.1997) 743.

⁵¹ *State v Ravotto* 755 A.2d 602 (N.J.2000) 229.

⁵² *Supra* 434.

⁵³ 333 US. 10 (1948) 55.

⁵⁴ 429 US. 245 (1977) 174.

fee for the issuance of every warrant. No fee was payable where a warrant was denied. The justice had testified in pre-trial hearings that he was a justice primarily because he was “interested in a livelihood.” The issuance of the warrant was a breach of the Fourth and Fourteenth Amendments.

Partiality may also arise as an aspect of abdication of responsibility of a justice. In *Lo-Ji Sales Inc. v New York*⁵⁵ the magistrate signed what was, in effect an open search warrant in respect of an adult bookstore. The warrant had been issued after the magistrate had viewed two sample films purchased from the bookstore by the investigator. The magistrate accompanied the police to the bookstore for the purpose of ascertaining whether any material found on the premises might be obscene. This action was not only an improper delegation of judicial power to the police, it demonstrated a clear lack of neutrality. The justice had allowed himself to become a member of the search party which was essentially a police operation and had acted as an adjunct law enforcement officer.

3.3.1.3 In Canada

In *Hunter v Southam*⁵⁶ Dickson J insisted that prior authorisation be obtained from someone who is neutral and impartial. It is not necessary that the person should be a judge, but he or she should be capable of acting judicially. In the criminal law sphere, the authorising person is in fact a judge.⁵⁷ Unlike in South Africa, in most Canadian provinces provincial court judges are clothed with the jurisdiction of justices as well, and therefore any warrant that may be issued by

⁵⁵ 442 US. 319 (1979).

⁵⁶ [1984] 2 S.C.R. 145, 33 Admin. L.R. (2d) 193:

The purpose of a requirement of prior authorisation is to provide an opportunity, before an event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorisation procedure to be meaningful it is necessary for the person authorising the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.

⁵⁷ Quigley *Procedure in Canadian Criminal Law* 1997 178.

a justice may also be issued by a provincial court judge.⁵⁸ In *R v Baylis*⁵⁹ a justice, who was also a commissioner at an airport issued a search warrant for the search of drugs. She was held not to be a neutral and impartial person for this purpose.

3.3.1.4 Concluding remarks

The requirement of prior authorisation in the form of a warrant is a consistent prerequisite for a valid search and seizure in South African law. Such a requirement places an onus on the state (which includes police officials) to demonstrate the superiority of its interests to that of the individual. It accords with the apparent intention of the Constitution to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference.

An important difference between the South African law, the Fourth Amendment of the American Bill of Rights and the Canadian Charter of Rights and Freedoms, is that South African law and the Fourth Amendment specifically requires a police official, before conducting a search to obtain a search warrant based on reasonable grounds and probable cause respectively, supported by oath or affirmation. The Canadian Charter does not specifically require a police official to obtain a search warrant before conducting a search. However in *Hunter v Southam*⁶⁰ the Supreme Court of Canada said that there was now a presumption that a warrantless search was *prima facie* unreasonable. Police officials seeking to justify a warrantless search are required to establish that it was not feasible to obtain a search warrant.

⁵⁸ *Ibid* 179.

⁵⁹ 1988 65 CR (3d) 209 (CCC) 549.

⁶⁰ *Supra* 97.

3.3.2 Objective grounds for the search

3.3.2.1 In South Africa

The safeguards against unjustified interference with the right to privacy include prior judicial authorisation and an objective standard, that is whether there are reasonable grounds to believe based on information under oath that an offence has been or is likely to be committed; that the articles sought or seized may provide evidence of the commission of the offence; and that the articles are likely to be on the premises to be searched.⁶¹

It is insufficient merely to ask whether the articles are *possibly* concerned with an offence.⁶² 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 cause the officer to have the required belief. In the absence of such facts, the reliance on reasonable grounds will be vague.

The Constitutional Court in *Investigating Directorate: Serious Economic Offence v Hyundai Motor Distributors (Pty) Ltd*⁶³ had to consider and pronounce upon the constitutionality of the provisions contained in the National Prosecuting Authority Act⁶⁴ (NPA Act) that authorise the issuing of warrants of search and

⁶¹ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 2002 193; See also *Rajah and others v Chairperson: North West Gambling Board and Others* [2006] 3 All SA 172 (T) 394 the court held that for a search and seizure to be valid in terms of section 21 of the Criminal Procedure Act 51 of 1977, “a warrant may only be issued by a magistrate or judicial officer where it appears from information on oath that there are reasonable grounds for believing that an article is in possession or under the control of or at a premises within the area of jurisdiction of that particular officer..... The present court has a wide discretion to interfere with the magistrate’s decision if he has not applied his or her mind to the matter.”

⁶² *Mandela v Minister of Safety and Security* 1995 2 SACR 397 (W) 401b.

⁶³ 2000 10 BCLR 1079 (CC) 539.

⁶⁴ 32 of 1998. The sections at issue are sections 29(5), 28(13) and 28(14) of the said Act.

seizure for purposes of a “preparatory investigation”.⁶⁵ Langa DP held that section 29(5) of the NPA Act explicitly provides that prior to issuing a search warrant, a judicial officer must be satisfied that there are reasonable grounds to believe that an object which is connected to the investigation is on the premises on which the official requests authorisation to search:

The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals.⁶⁶

For the effective protection of the right to privacy, the information on which reasonable grounds are based, thus authorising a constitutional search, may not itself have been obtained in violation of section 14 of the Constitution. The information need not comply with the strict rules of evidence⁶⁷ and hearsay evidence of informers and anonymous tips may be used,⁶⁸ subject however to the cautionary rule.⁶⁹ The test adopted in *Van der Merwe v Minister of Justice*⁷⁰ is that the threshold is too low when the police in applying for a warrant, only express in their affidavit that the tendered hearsay evidence is true or correct. While the identity of informers need not be disclosed, information should be

⁶⁵ Section 28(13) makes provision for the investigating director to hold a preparatory investigation if he or she is uncertain whether there are reasonable grounds to conduct an inquiry. The standard for a preparatory investigation was lower than the standards encapsulated in section 20 of the Criminal Procedure Act.

⁶⁶ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) (Ltd) and Others*: In *RE: Hyundai Motors Distributors (Pty) Ltd and others v Smit NO and Others* 2000 (10) BCLR 1079 (CC) 52. In *Parker-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) 339, Tebutt J declared a provision of the Investigation of Serious Economic Offences Act 117 of 1991, authorising searches to be conducted without prior judicial authorisation unconstitutional.

⁶⁷ Kriegler *Hiemstra Suid-Afrikaanse Strafproses* 5ed 1993 38.

⁶⁸ *Van de Merwe v Minister of Justice* 1995 2 SACR 471 (SCC) 29.

⁶⁹ Steytler *supra* 88.

⁷⁰ 1995 2 SACR 471 (O) 89.

placed before an independent decision- maker in terms of which the reliability of such hearsay evidence can be assessed. The word of the police cannot be a substitute for the decision of the issuing authority.⁷¹ The essence of reasonable grounds is that they are objective⁷² and can be reviewed by a court.⁷³

3.3.2.2 In the United States

In the United States government agents who have probable cause to believe evidence of crime is located at a specific place or that an individual is involved in crime must go before a magistrate (judge) and swear under oath who or what they are looking for.⁷⁴ All warrants are to be based on probable cause.⁷⁵ In determining whether probable cause for the warrant exists, the reviewing judge must consider the totality of the circumstances, in other words whether a reasonable person would believe what the officer claims. A key term in the United States Fourth Amendment is probable cause. "Probable cause exists when the facts and circumstances within the officer's knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offence has been or is being committed".⁷⁶ In *Zurcher v Stanford Daily*⁷⁷ the majority said that "the critical element ... is a reasonable cause to believe that the specific "things" to be searched for and seized are located in the property to which entry is sought." When dealing with the hearsay evidence of informers and anonymous tips the United States Supreme Court has developed a totality of circumstances test: a

⁷¹ *Ibid* 89.

⁷² Du Toit, de Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act 1996* 27-30.

⁷³ *Highstead Entertainment (Pty) Ltd t/a 'The Club v Minister of Law and Order* 1994 1 SA 387 (C) 393A.

⁷⁴ Harr and Hess *Constitutional Law and the Criminal Justice System* 2001 179.

⁷⁵ *Ibid* 180.

⁷⁶ *Brinegar v United States*. 338 U.S. 160 (1949) 395.

⁷⁷ 436 U.S. 547 (1978) 598.

decision maker must take into consideration the totality of evidence in determining whether there is a reliable foundation for the reasonable grounds.⁷⁸

In *Draper v United States*⁷⁹ probable cause was defined as follows:

Probable cause exists where the facts and circumstances within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

In discussing probable cause for a search warrant the United States Supreme Court made the following statement:

If the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.⁸⁰

In 1986 the United States Supreme Court explained probable cause as follows:

The term 'probable cause'..... means less than evidence which would justify condemnation.....It imports a seizure made under circumstances which warrant suspicion.....Finely tuned standards such as beyond a reasonable doubt or by the preponderance of evidence, useful in formal trials, have no place in the magistrate's decision.

⁷⁸ In *Spinelli v United States* 393 US 410 (1969) 378, the U.S. Supreme Court at first developed a two pronged test. At first the magistrate issuing the warrant had to establish the basis of the knowledge of the informer and second the veracity of the information. The latter question had two prongs: i. The credibility of the informant, and ii. The reliability of the information. If one of the prongs was missing the hearsay evidence was insufficient without further corroboration. In *Illinois v Gates* 462 US 213 1983 the court rejected the two pronged test established in *Spinelli*. It adopted a common sense approach which became known as "totality of circumstances" test. Once a magistrate has determined that he has information before him that he can reasonably say has been obtained in a reasonable way by a credible person, he has ample room to use his common sense and to apply a practical, non technical conception of probable cause.

⁷⁹ 358 US 307 (1959) 358.

⁸⁰ *Dumbra v United States* 268 US 435 (1925) 683.

In its closing comment the court reiterated that:

Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.

In defining the probable cause standard the court in 2000 commented that:

Probable cause to issue a search warrant need not be tantamount to proof beyond reasonable doubt; probability is the touchstone. The probable cause standard for issuing search warrants does not require a showing that an officer's belief that evidence will be found in the searched premises is correct or more likely true than false; rather probable cause to search a home exists as long as the underlying affidavit contained information showing a fair probability that evidence of crime would be found there.⁸¹

3.3.2.3 In Canada

The Supreme Court of Canada in *Hunter v Southam*⁸² held that the Anglo-Canadian legal and political traditions require reasonable and probable grounds for the belief, firstly, that an offence has been committed and, secondly, that something which may afford evidence in respect of the offence may be recovered from the place or person to be searched. Canadian Courts have indicated that the standard of proof to be met in order to establish reasonable grounds for a search is "reasonable probability."⁸³ The courts have repeatedly stated and restated that, a search warrant should not be granted lightly by the justice of the peace. Before issuing a warrant, the justice must be satisfied that there are reasonable grounds for the belief of the informant. It is not for him simply to accept the assurances of the informant that the procedure is proper. There should be before him sufficient information to enable him to decide judicially whether or not the warrant should be issued.⁸⁴ In instances where a police official has received confidential information from a source, which does not want to be revealed or which the official does want to reveal, there is no

⁸¹ *United States v Grant* 218 F.3d 72 (1st Circuit 2000) 449.

⁸² 1984 11 DLR (4th) 641 (SCC) 658.

⁸³ *Regina v Debot* (1986) 26 C.R.R 275, 285.

⁸⁴ *Moran v Canada* 1988 36 CCC (93d) 225.

necessity for him to do so unless the justice concludes that he should do so.⁸⁵ Under section 487 (1) (b)⁸⁶ the words of the section read: “anything that there is reasonable ground to believe will afford evidence” In *Worall v Canada*⁸⁷ an application was brought to quash a search warrant because the information had failed to allege that the “articles will afford evidence.” The Ontario Court of Appeal held that it was not necessary to do so, since there was no provision as to the informant’s belief that they will afford evidence, the words were superfluous and did not need to be included.

3.3.2.4 Concluding remarks

The two main grounds to ensure the reasonableness of a search are the requirements of objective grounds for the search and prior judicial authorisation. These safeguards are in South African law and they are likewise found in the jurisprudence of the United States and Canada. The purpose of objective grounds is to enable the judicial officer to decide whether the case based upon the facts brought before him is a proper one upon which to exercise his discretion and to issue a warrant to search. A search warrant should not be granted lightly by a judicial officer. The judicial officer must be satisfied that there are reasonable grounds for the belief. The United States Constitution describes the circumstances under which a warrant must be issued. It provides that a warrant shall not be issued unless there is probable cause. In the United States it is the function of a judicial officer to issue a search warrant. The US Supreme Court made it clear that neither prosecutors nor police officers can be asked to maintain the requisite neutrality when deciding whether a search warrant should be issued.⁸⁸ This principle is not fully adhered to in South African law. In South Africa as a general rule a search should also be authorised by a judicial officer.⁸⁹ However this power is also extended to justices of the peace.⁹⁰

⁸⁵ *Swarts v Canada* 1916 27 CCC 90.

⁸⁶ Criminal Code of Canada *supra* 142.

⁸⁷ 1965 2 C.C.C. 1.

⁸⁸ *Coolidge v New Hampshire supra* 443.

⁸⁹ Section 21(1) and section 25 of the Criminal Procedure Act.

⁹⁰ Section 21(a) of the Criminal Procedure Act.

Objectively, it is questionable whether the person who issues the search warrant as part of the office of the executing officer can be regarded as neutral or detached.

3.3.3 Particular description of things to be seized

3.3.3.1 In South Africa

The warrant must clearly define the purpose of the search and the articles that must be seized. In *Smith, Tabata and Van Heerden v Minister of Law and Order*⁹¹ it was held that the court will find that the judicial officer had not applied his mind properly to the question whether there has been sufficient reason to interfere with the liberty of the person, if the search warrant only specifies the articles that were supposed to be seized, in broad and general terms. The defect is not cured by an instruction that such a police official must search for documents, which “may” afford evidence of the commission of the crime.⁹²

In *Ferucci and Others v Commissioner, South African Revenue Services*⁹³ the court held that:

[T]he items required to be searched for and seized may not be able to be identified with precision, it could not be expected that a warrant should always individually itemise each of the documents sought. The description of the documents in the warrant would be adequate if the person charged with executing the warrant could, by referring to the warrant itself, ascertain with reasonable accuracy what was to be searched. The person against whom the warrant was executed similarly had to be able to ascertain from the warrant itself what he was obliged to surrender.

It has long been accepted that the Court’s will refuse to recognise as valid a warrant, the terms of which are too general.⁹⁴ In *Divisional Commissioner of SA*

⁹¹ 1989 (3) SA 627 (E) 249.

⁹² *Minister of Justice v Desai* 1948 (3) SA 395 (A) 361.

⁹³ 2002 (6) SA 219 (C) 231 B-E.

⁹⁴ *Pullen NO and Others v Waja* 1929 TPD 838. See also *Minister of Justice and Others v Desai* NO 1948 (3) SA 395 (A) 134.

Police, Witwatersrand Area and others v SA Associated Newspapers Ltd and Another,⁹⁵ part of the warrant authorised seizure of “all other documents including statements of whatsoever nature concerning reports in connection with the conditions in gaol and experience of prisoners in gaols throughout the Republic of South Africa.” The court held that this part of the warrant was too general. It was couched in such wide terms as to justify the interference that the justice of the peace who had issued it had not properly applied his mind to it. In *Cine Films (Pty) Ltd and others v Commissioner of Police and Others*⁹⁶ the warrant stipulated a statutory copyright offence. However, what followed authorised the seizure not only of specified infringing films plus correspondence or circulars referring to such films, but “all stock books, stock sheets, invoices, invoice books, consignment notes, all correspondence, film catalogues”. The latter formulation was challenged. The court held that the warrant had been drawn too widely. The documents to be seized had to be identified with the statutory offence at issue. The challenged portion was set aside. In *National Director of Public Prosecutions and Others v Zuma and Another*⁹⁷ it was held that the warrants were unduly vague on basis that it constituted authority to search an accused person’s premises to find *anything* that would help the appellants in the prosecution.

In *Zuma v National Director of Public Prosecutions*⁹⁸ the court held that it is authoritatively established now, that for validity, a warrant must convey intelligibly to both the searcher and the searched the ambit of the search it authorises. It is not a cure for a warrant which is excessively worded “to say that the subject of the search knew or ought to have known what was being looked for: the warrant must specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute.”⁹⁹

⁹⁵ 1966 (2) SA 503 (A) 276.

⁹⁶ 1972 (2) SA 254 (A) 98.

⁹⁷ 2008 1 All SA 197 (SCA) 442.

⁹⁸ 2006 2 All SA 91 (D). Confirmed in *National Director of Public Prosecutions and Others v Zuma and Another* 2008 1 All SA 197 (SCA). See also *Powell NO and others v Van der Merwe and Others* 2005 1 All 149 (SCA) 664.

⁹⁹ *Powell NO and others v Van der Merwe and Others* 2005 1 All 149 (SCA) 169.

In *Toich v The Magistrate, Riversdale and Others*¹⁰⁰ the Court held with reference to *Pullen NO and Others v Waja*¹⁰¹, *Zuma and Another v National Director of Public Prosecution and Others*¹⁰² that a warrant authorising the arrest of an unspecified person, or the search of unspecified premises, or for unspecified articles, will as a rule be invalid.

Search warrants must be couched in clear and specific terms and police officers executing such warrants must operate within these terms.¹⁰³ Further a warrant can only be issued for the purpose of securing articles that are reasonably believed to be concerned in the commission of an offence and are to be used in subsequent criminal proceedings in order to prove such offence.¹⁰⁴ In *Community Repeater Services CC v Minister of Justice*¹⁰⁵ a number of warrants issued by magistrates in Port Elizabeth failed on both the above grounds.

In *Beheermaatschappij Helling I NV v Magistrate Cape Town*¹⁰⁶ the Court addressed the ambit of the terms of the warrant. It held that the terms of a search warrant will always be construed with reasonable strictness which means that if it is too general or if its terms go beyond those that the authorising statute permits it will be set aside. In this respect it was held that because the search warrants placed no limit on the number or nature of documents liable to be seized, nor did they provide any indication how far back in time the searches could extend, the terms of the warrants went beyond what was considered reasonable in the circumstances. The court also found that the warrants only authorised a search and seizure for “documentation”. In keeping with the principle of strictness, the search for and seizure of computers and other equipment for storing electronic information was not covered by the warrant. The Court held that the terms of the warrant were unlawful which implies that

¹⁰⁰ 2007 4 All SA 1064 (C).

¹⁰¹ *Supra* 32.

¹⁰² *Supra* 121.

¹⁰³ *Divisional Commissioner SAP Wits v Saan* 1996 (2) SA 503 (A) 342.

¹⁰⁴ *Cine Films v Commissioner of Police supra* 574.

¹⁰⁵ 2000 (2) SACR 592 (SEC) 349.

¹⁰⁶ 2007 (1) SACR 99 (CC) 117.

they were invalid, irrespective of how the search and seizure operations were carried out.

3.3.3.2 In the United States

A leading case in this area is *Marron v United States*.¹⁰⁷ *Marron* required that any item seized should be particularly described in the warrant. However in *Coolidge v New Hampshire*,¹⁰⁸ this concept was broadened to allow officers to seize evidence that was not described in the warrant if: (i) it was in plain view and (ii) it was of an incriminating nature. Although *Coolidge* does not allow officers to go on a fishing expedition searching for evidence, if they are conducting a search of a premises and during the search observe other items that are incriminating, they may lawfully seize those items. A court held that items discovered during the execution of a search pursuant to a valid warrant may be seized if:

- (i) they are observed in plain view while the officer is in a place where he or she has a right to be,
- (ii) the discovery is inadvertent, and
- (iii) it is apparent to the officer that he or she is viewing evidence.¹⁰⁹

The Fourth Amendment provides that no search warrants shall issue except those “particularly describing the ... things to be seized.” The degree of particularity required varies depending upon the nature of the materials to be seized. More leeway is permitted in describing contraband that is unlawfully possessed (property, the possession of which is a crime), and thus for example a description merely of “cases of whiskey” would suffice.¹¹⁰ Comparatively innocuous property must be described more specifically so that executing

¹⁰⁷ 235 U.S. 192 (1927).

¹⁰⁸ *Supra* 433 (1971).

¹⁰⁹ *State v Mitchell*, 20 S.W. 3d 546 (2000).

¹¹⁰ LaFave and Israel *Criminal Procedure: Constitutional Limitations in a Nutshell* 2001 83. See *Steel v U.S.* 267 U.S. 498.

officers will not be confused between items sought and other property of a similar nature, which might well be found on the premises.¹¹¹

The things to be seized must be described with reasonable accuracy and certainty. This was expressed in *People v Bradford*¹¹² as follows:

The purpose of the particularity requirement of the Fourth Amendment is to avoid general and exploratory searches by requiring particular description of items to be seized.

If the description of things to be seized is too broad or sweeping, it is not “particular” within the meaning of the Fourth Amendment. For example, a description that described property sought as “books, records, pamphlets, cards, receipts, lists, ... and other recordings concerning the Communist Party” was held to be too broad.¹¹³ Conversely, where the description is specific as to certain items, adding the phrase, “together with other fruits, instrumentalities, and evidence of crime” does not render the warrant invalid if this follows the detailed specific list of items.¹¹⁴

3.3.3.3 In Canada

The Canadian Criminal Code requires that articles to be searched for be stated in the warrant.¹¹⁵ The articles to be seized should be identified with reasonable particularity in the warrant so that the officers to whom it is directed will know exactly what to look for and to prevent wanton ransacking.¹¹⁶ The person executing the warrant is however, not limited to seizing only those articles described in the warrant.¹¹⁷ He may also seize anything that “on reasonable

¹¹¹ *Ibid* 117.

¹¹² 65 Cal. Repr. 2d 145 (1997) 176. See also *U.S. v Abell*, 963 F. Supp. 1178 (1997). For a search warrant to be sufficiently particular, the searcher must be able to reasonably ascertain and identify the things authorised to be seized.

¹¹³ *Stanford v Texas* 379 U.S. 476 (1985) 439.

¹¹⁴ *Andresen v Maryland* 427 U.S. 463 (1976) 549.

¹¹⁵ Salhany *Canadian Criminal Procedure* 1989 74.

¹¹⁶ *Morgentaler v Fauteux, Church of Scientology* (No 6) 21 C.C.C. 1985.

¹¹⁷ Sahany *supra* 74.

grounds he believes has been obtained by or has been used in the commission of an offence".¹¹⁸

In many cases especially those involving extensive documentation, it is impossible to precisely identify the items sought in a search. It is sufficient in those cases if the warrant sets out the class of things to be seized.¹¹⁹ The test is whether a reviewing court can ascertain from the warrant whether the goods actually seized fall within the description¹²⁰ and whether there is a sufficient nexus between the items and offence being investigated.¹²¹

In *R v Harris*¹²² alleged obscene material seized from a business premises under a warrant were found to be insufficient due to insufficient particularity. The court held that the nature and content of the films sought in the search should be set out in the warrant.

Section 487 of the Canadian Criminal Code grants authority to both search places and seize things found there. In addition section 489 grants a power to seize items other than those sought by the warrant if they are reasonably believed to be related to an offence other than that for which the warrant was obtained. In effect this is similar to the American plain view doctrine, which holds that a police officer engaged in lawful activity may seize evidence in plain view, except that the additional items seized need not have been in plain view but may be located in the course of the search.

¹¹⁸ Section 489 Canadian Criminal Code. See also *Welch v Gilmour and Blackstock* 111 C.C.C. 221 (B.C.S.C.) 1955: Money found on the prisoner was returned where there was no ground for believing it was connected with the offence charged.

¹¹⁹ Quigley *supra* 1997 181.

¹²⁰ *R v Church of Scientology* 31 C.C.C. 382 1987.

¹²¹ *R v Turcotte* 2 W.W.R. 97 (Sask. C.A.) 1988.

¹²² 57 C.R. (3d) 356 (Ont. C.A.) 1987.

3.3.3.4 Concluding remarks

The warrant must clearly define the purpose of the search and the articles that must be seized. In South Africa it is authoritatively established now, that for validity, a warrant must convey intelligibly to both the searcher and the searched the ambit of the search it authorises. Search warrants must be couched in clear and specific terms and police officers executing such warrants must operate within these terms. In the United States the Fourth Amendment provides that, “no search warrants shall issue except those “particularly describing the ... things to be seized.” The degree of particularity required varies depending upon the nature of the materials to be seized. The things to be seized must be described with reasonable accuracy and certainty. The Canadian Criminal Code also requires that articles to be searched for be stated in the warrant.¹²³ The articles to be seized should be identified with reasonable particularity in the warrant so that the officers to whom it is directed will know exactly what to look for and to prevent wanton ransacking.

3.3.4 Particular description of the place or person to be searched

3.3.4.1 In South Africa

Section 21(2) of the Criminal Procedure Act provides that a search warrant issued under section 21(1) shall require a police official to seize the article in question (article referred to in section 20) and shall to that end authorise the police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

In *National Director of Public Prosecutions and Others v Zuma and Another*¹²⁴ the court indicated that:

¹²³ Salhany *Canadian Criminal Procedure* 1989 74.

¹²⁴ 2008 1 All SA 197 (SCA) 263.

... there are two criteria for validity that will apply to all warrants for search and seizure on account of their nature alone. A warrant is no more than a written authority to perform an act that would otherwise be unlawful. Like any other written authority it must obviously be intelligible (“capable of being understood”) ... for it must be possible to determine with certainty the scope of its authority. A warrant must also authorise no more than is permitted by its authorising statute. If it purports to authorise what it is not permitted to authorise the warrant will be invalid at least to the extent of the excess.

The protection which prior judicial authorisation affords will be meaningful if the issuing authority indicates clearly the scope of the intrusion with regard to the place to be searched.¹²⁵ In *Toich v The Magistrate, Riversdale and Others*¹²⁶ a warrant was held to be invalid in so far as it authorised the search of a farm and not the search of the accused’s house. The court maintained that the search of her house conducted under the purported authority of the warrant was unauthorised and unlawful and so was the seizure of property. Also, hardly any of the property seized under the warrant was specified in the warrant.

3.3.4.2 In the United States

Similarly in the United States the Fourth Amendment provides that no warrants shall be issued except those “particularly describing the place to be searched.” In a Supreme Court decision in 1987, some allowance was made for mistake by the police in describing the place to be searched.¹²⁷ The Fourth Amendment

¹²⁵ Steytler *supra* 93.

¹²⁶ 2007 4 All SA 1064 (C) 491. The third respondent together with other police officials in the course of their duties with the second respondent, conducted a search and seizure operation on the applicant’s property. Seven articles were seized during the operation. The police officials claimed to have acted in terms of a search warrant. The warrant authorised the third respondent and any other members of the SAPS who could assist in conducting the search and seizure to search “the identified person” and to enter and search “the identified premises”. Only one person and one property were described in the warrant. Neither the applicant nor her premises where the items were seized, were described in the warrant.

¹²⁷ *Maryland v Garrison* 480 U.S. 79 1987 659. Police officers in seeking a warrant to search for controlled substances and related paraphernalia, believed that there was only one apartment in the third floor of the building. It was later discovered that the third floor was divided into two apartments. Prior to becoming aware that they were in the wrong apartment,

only requires that the premises be defined with practical accuracy. The description must be such that the officer executing the warrant can with reasonable effort and certainty, identify the exact place to the exclusion of all others.¹²⁸ In describing the premises to be searched, greater care is generally required in urban areas than in rural areas.¹²⁹ For instance farm property may merely be described in a general way and identified by section, township and range number. In a city however a building should be identified by street and number or by an equally specific description.¹³⁰

A valid warrant for the search of a certain person must indicate the person's name, if known.¹³¹ Where the person's name is unknown facts such as the individual's aliases, approximate age, height and weight, race and clothing is adequate.¹³² In *G6-Bart Important Co v United States* the court held that application for a warrant must set forth facts showing the existence of probable cause, and contain a description of the place to be searched, persons to be searched and property to be seized.¹³³

3.3.4.3 In Canada

The position in Canada is somewhat similar. This is aptly illustrated in the *Time Square Book Store*,¹³⁴ where authority is provided for the proposition that a warrant should set out with reasonable specificity the location in the premises to

the officers discovered contraband that provided evidence for conviction under Maryland's Controlled Substance Act. Reiterating that the warrant clause of the Fourth Amendment prohibits the issuance of a warrant except when it "particularly describes the place to be searched and things to be seized," the Court nevertheless acknowledged that it must judge the constitutionality of the officer's conduct in the light of the information available to them at the time they acted.

¹²⁸ *Commonwealth v Rodriguez* 732 N.E. 2d 906 Mass. 2000 632.

¹²⁹ Israel and LaFave *supra* 81.

¹³⁰ *Ibid* 82. See *Steel v U.S.* 267 U.S. 498 1925.

¹³¹ *Ibid* 83.

¹³² *Ibid* 83.

¹³³ 282 U.S. 344 1987.

¹³⁴ *Times Square Book Store and R., Re* 48 C.R. (3d) 132 (Ont. C.A.) 1985 374.

be searched where the items are thought to be. The usual position has been to restrict the ambit of the search to the premises named in the warrant and the immediate land surrounding it. If the police wish to search other buildings, they should provide the grounds and seek their express inclusion in the warrant.¹³⁵ Some inroads have been made on this position. For example, in *R v Benz*¹³⁶ the Ontario Court of Appeal suggested that a warrant to search a home also granted authority to search vehicles, at least if they were in a garage or driveway on the same land and perhaps even on the street out front.

3.3.4.4 Concluding remarks

In South Africa it is authoritatively established in terms of section 21(2) of the Criminal Procedure Act that a search warrant issued under section 21(1) shall require a police official to seize an article in question (article referred to in section 20 of the Criminal Procedure Act) and shall to that end authorise the police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises. Similarly in the U.S. the Fourth Amendment provides that no warrants shall be issued except those “particularly describing the place to be searched.” In Canada the position is somewhat similar. This is aptly illustrated in the *Time Square Book Store*,¹³⁷ where authority is provided for the proposition that a warrant should set out with reasonable specificity the location in the premises to be searched where the items are thought to be.

3.3.5 Information under oath

3.3.5.1 In South Africa

According to section 21(1) of the Criminal Procedure Act information on oath must be provided to a magistrate or justice before a search warrant may be

¹³⁵ *R v LaPlante* 40 C.C.C. (3d) 63 (Sask. C.A.) 1987 671.

¹³⁶ 51 C.R. (3d) 363 (Ont. C.A.) 1986 437.

¹³⁷ *Times Square Book Store and R., Re* 48 C.R. (3d) 132 (Ont. C.A.) 1985 375.

issued. The information may be given verbally or in writing. Information in writing is however preferable. It is important to note that hearsay evidence may be regarded as “information” for the purposes of section 21(1). A police official may submit an affidavit in which hearsay evidence is used, for example, information from an informer, if the police official is of the opinion that the hearsay evidence is true and/or correct.¹³⁸

The information on oath must indicate that there are reasonable grounds for believing that an article referred to in section 20 of the Criminal Procedure Act is in the possession of or under the control of any person or upon or at any premises within the area of jurisdiction of the person that is approached with the application. If the oath or affirmation is not administered as required by the Criminal Procedure Act, the warrant will be invalid. In *Toich v The Magistrate, Riversdale and Others*¹³⁹ from the record of proceedings before the magistrate, the only document relied upon by the police officer in her application for the warrant was her own undated and unattested “affidavit”. By virtue of the fact that there was no *viva voce* evidence and that the “affidavit” was not attested, there was no evidence of any kind placed before the magistrate on oath. Based on that reason alone it was held that the magistrate had no power under section 21(1)(a) of the Criminal Procedure Act to authorise the issue of a warrant and it was accordingly invalid.

3.3.5.2 In the United States

Comparatively the American Constitution also requires that a warrant be supported by an oath or affirmation.¹⁴⁰ If the oath or affirmation is not administered as required by the American Constitution, the evidence obtained

¹³⁸ *Van der Merwe v Minister of Justice* 1995 (2) SACR 471 (0) 398.

¹³⁹ 2007 (2) SACR 235. “... the validity of a search warrant was to be examined with a jealous regard for the subject’s right to privacy and property. ... the magistrate or justice of the peace authorising the warrant must be satisfied by information on oath not only that the articles to be searched for and seized was under the control or in the possession of a specified person or specified premises within his or her jurisdiction.”

¹⁴⁰ *Harr and Hess supra* 191.

under the warrant will be inadmissible. There is a presumption that the warrant is supported by oath or affirmation; however, this is a rebuttable presumption, and the defence may introduce evidence, including statements from the officer, indicating that no oath was in fact administered.¹⁴¹ If the defence can show that the affiant, such as a police officer, made a false statement or recklessly disregarded the truth, the search warrant will be declared invalid and all evidence obtained by virtue of the search warrant will be inadmissible.¹⁴²

3.3.5.3 In Canada

In Canada the requirement of evidence on oath means that the justice must actually assess information provided by the police in order to decide whether the requisite grounds have been established.¹⁴³ It is not enough for the police merely to assert that they have reasonable and probable grounds, rather the basis for that belief must be made clear to the justice.¹⁴⁴ This means that the (officer swearing the affidavit) must indicate the sources of information and any indicators of reliability.

3.3.5.4 Concluding remarks

The essence of the oath is duly recognised in South African, Canadian and American law. It is an important safeguard against unjustified intrusion into the rights of an individual. The purpose of the oath was intended to govern not only the existence of reasonable grounds for suspecting that a certain article is to be found at a certain place, but also that there are reasonable grounds for believing that the article in question will afford evidence as to the commission of an offence. The information may be given verbally or in writing.

¹⁴¹ *Lee v State*, 2 P.3d 517 (Wyo. 2000) 553.

¹⁴² *Harr and Hess supra* 193.

¹⁴³ *Quigley supra* 179.

¹⁴⁴ *Kourtessis v Minister of National Revenue* (1993), 20 C.R. (4th) 104 (S.C.C.) 526.

4. Execution of warrants

4.1 In South Africa

The search warrant requires a police official to seize the article in question and authorises such official to search any person identified in the warrant or to enter and search any premises identified in the warrant and search any person found on or at the premises.¹⁴⁵

In terms of section 21 of the Criminal Procedure Act a search warrant must be executed by day unless the police official is specifically authorised therein to execute it by night. Conversely section 25 of the Criminal Procedure Act does not make provision for the time of execution of a warrant. The reasonableness of the time when a warrant is executed is significant in terms of the Constitution, since it has an important effect on the extent to which the dignity and privacy of the person concerned is affected. A police official executing a warrant under section 21 of the Criminal Procedure Act, shall upon demand of any person whose rights have been affected by the search or seizure under the warrant, hand to him or her a copy of the warrant.¹⁴⁶

A search warrant should be interpreted strictly.¹⁴⁷ “Once issued by a competent judicial officer no person executing the warrant can widen its scope, even if the statute authorises wider powers than those included in the warrant.”¹⁴⁸ While section 21(3) (a) of the Criminal Procedure Act intends to ensure that privacy of people’s homes is not invaded at unreasonable hours, this does not mean that a search which commenced during the day becomes unlawful at sunset.¹⁴⁹

¹⁴⁵ Section 21(2) of the Criminal Procedure Act.

¹⁴⁶ Section 21(4) of the Criminal Procedure Act.

¹⁴⁷ *Bennet and Others v Minister of Safety and Security and Others* 2006 (1) SACR 523 (T) 143.

¹⁴⁸ *Naidoo and Another v Minister of Law and Order and Another* 1990 (2) SA 158 (W) 289.

¹⁴⁹ *Young and Another v Minister of Safety and Security and others* 2005 (2) SACR 437. “Fact ... that had interrupted his search in order to fetch certain equipment, returning after nightfall, not constituting ..., unauthorised search.”

4.2 In the United States

Once the warrant has been properly issued by the issuing official, the police official is charged with executing the warrant and, in the absence of statutory authority, cannot refuse to do so.¹⁵⁰ A police officer may not automatically assume that a search warrant is valid because a reviewing magistrate has issued it.¹⁵¹ The officer must read the warrant carefully and must be objectively persuaded that the warrant is sufficient. If the warrant is issued to a class of officers, any officer within that legal class may execute it. If it is to a named officer, only that officer or those present with him or her may execute the warrant.¹⁵² A warrant may be executed at night only upon a special showing of a need to do so, as provided by law in several jurisdictions, because of the “Fourth Amendment doctrine that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches.”¹⁵³ On the other hand a federal court has held that a search initiated during the day under a search warrant may continue into the night for so long as is reasonably necessary for its completion.¹⁵⁴

The final step for the officer in carrying out the orders of the court is to return the warrant, with the results of its execution, to the court or a designated agency.¹⁵⁵ The return should list the items particularly described in the search warrant, and indicate where and when these items were seized. Generally, a copy of the inventory is forwarded to the person from whose premises the instruments, articles or things were taken and to the warrant applicant. The latter is not a constitutional requirement however.¹⁵⁶

¹⁵⁰ Klotter *et al supra* 100.

¹⁵¹ *People v Randolph*, 4 P.3d 477 (Colo. 2000) 476.

¹⁵² *United States v Abell*, 963 F. Supp 1178 (S.D. Fla. 1997) 615.

¹⁵³ *Gooding v United States*, 316 U.S. 129, 62 S. Ct. (1942) 155.

¹⁵⁴ *United States v Joseph*, 278 F. 2d 504 (3d Cir. 1960).

¹⁵⁵ *City of West Covina v Perkins* 525 U.S. 234 (1999) 249.

¹⁵⁶ *Ibid* 276.

4.3 In Canada

Only the person to whom the warrant is directed is authorised to conduct the search and seize the named articles.¹⁵⁷ There does not however, appear to be any prohibition against others such as experts, who are more qualified in identifying the articles, from accompanying him.¹⁵⁸ It is submitted that this practice might in some instances be desirable where the purpose would be to assist the police officer to pick out those articles named in the warrant. When the officer goes to conduct a search, it is his duty to carry the warrant and produce it if he or she is requested to do so.¹⁵⁹ A search warrant may only be executed in the territorial division in which the justice who issued it has jurisdiction.¹⁶⁰ Once the warrant has been endorsed, it may then be executed by not only the officer to whom it was originally directed, but by all peace officers in that jurisdiction.¹⁶¹ A warrant must be executed during the daytime unless the justice who issues it authorises otherwise.¹⁶² As a general rule the courts are reluctant to permit night searches unless there are substantial reasons therefore.¹⁶³ Section 29 of the Canadian Criminal Code requires that the police must have the warrant with them and, where feasible, produce it if requested. The purpose of this is to provide proper authority and announcement to the occupiers of the premises and thus to minimise the possibility of violent resistance to the search.¹⁶⁴

¹⁵⁷ Canadian Criminal Code (1985).

¹⁵⁸ *Worall v Canada*, [1965] 2 C.C.C. 1 (Ont. C.A.) 297.

¹⁵⁹ Section 29(1) of the Canadian Criminal Code (1985) 549.

¹⁶⁰ Unless the justice by his appointment has province wide jurisdiction: *Haley v Canada* (1986), 27 C.C.C. (3d) 454 (Ont. C.A.) 278.

¹⁶¹ Section 487 (4) of the Canadian Criminal Code (1985).

¹⁶² Section 488 of the Canadian Criminal Code (1985). See also *Plummer v Canada* (1929), 52 C.C.C.288 (Man. C.A.) 321.

¹⁶³ *Posternak v Canada* (1929), 51 C.C.C. 426 (Alta. S.C. App. Div.).

¹⁶⁴ *Eccles v Bourque* (1974), 19 C.C.C. (2d) 129 (S.C.C.).

5. Conclusion

Searches and seizures should, wherever possible, be conducted only in terms of a search warrant issued by a judicial officer,¹⁶⁵ such as a magistrate or a judge. The Criminal Procedure Act confers powers to search only where the object of the search is to find a person or to seize an article, which falls into one of three classes of articles, which may be seized by the state in terms of the provisions of the Criminal Procedure Act.

According to section 21 of the Criminal Procedure Act the general rule is that articles referred to in section 20 should be seized with a search warrant. The only exceptions to this are authorisation in terms of section 22, 24 and 25(3) of the Criminal Procedure Act. The reason for this requirement of prior authorisation is to ensure that before the search and seizure takes place, the “conflicting interests of the state and the individual”¹⁶⁶ are assessed by an “impartial arbiter”¹⁶⁷ to ensure that there are no unwarranted intrusions on the right to privacy and associated fundamental rights such as the right to dignity and the right to freedom and security of the person. The aim is to prevent unreasonable searches rather than to remedy unconstitutional breaches of privacy after the intrusion.¹⁶⁸ A person other than the official who intends to intrude upon an individual’s privacy, is required to make two judgement calls: first, that there are reasonable grounds for the intrusion, and secondly, even if such grounds exist, is the intrusion justified under the circumstances? Therefore an independent, detached, responsible officer,¹⁶⁹ is required to make such an assessment. This principle is not fully complied with in South African law. The general rule is that a search should be authorised by a judicial officer.¹⁷⁰ This power is however extended to justices of peace who include *de facto* justices of

¹⁶⁵ See also section 21 of the Criminal Procedure Act.

¹⁶⁶ *Hunter v Southam Inc supra* 97.

¹⁶⁷ *Parker Ross and Another v Director: Office for Serious Economic Offences supra* 148.

¹⁶⁸ *Ibid* 160.

¹⁶⁹ *SA Police v SA Associated Newspapers supra* 503. See also *Zuma and Another v National Director of Public Prosecutions and Others* 2006 2 [ALL] *supra* 198.

¹⁷⁰ Section 25(1) and section 25 Criminal Procedure Act.

the peace. It appears to be constitutionally questionable that members of the executive are granted this power.

Section 21 (3) (b) provides for a search warrant to be issued on any day, thus including weekends and public holidays. The search warrant will remain effective until it is executed, or cancelled by the person who issued it or if that person is not available, by a person with like authority.

In terms of section 21 (4), after executing a warrant, a police official must hand a copy of the warrant to any person whose rights were affected by the search and seizure, if the person concerned requests that a copy be handed to him or her. It appears questionable that only upon demand of a person whose rights are affected by a warrant, that a copy of the warrant is handed to such a person.

A search warrant may also be issued in terms of section 25 of the Criminal Procedure Act. Unlike section 21, where the application is based on the suspected presence of an article mentioned in section 20, the reason for obtaining a warrant in terms of section 25 is connected either to state security or to the commission of an offence. In terms of section 25(b)(i) a police official may carry out such investigations and take such steps as such police official may “consider necessary” for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence. The fact that the police official may take such steps as he “considers necessary” brings a subjective standard into the equation, for the attainment of objectives that could well prove to be legally irrelevant or of little importance. The standard for the police official’s conduct appears to be arbitrary, because it applies to that which the police official considers necessary and not that which is necessarily objectively and legally justifiable.

The position in United States is somewhat similar to our law. The Fourth Amendment to the United States Constitution provides that no warrant shall issue except on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be

seized. The preferred means of making a search is with a search warrant. For a search warrant to be valid, the following requirements must be met: a proper official must issue the warrant; the warrant must be issued for particular objects; the warrant must be issued on probable cause; the warrant must be supported by oath or by affirmation and the place to be searched and the things to be seized must be particularly described. It is the function of a judicial officer in the United States to issue a search warrant. This function is not delegated to prosecutors nor to the police because it is doubtful whether they are in a position to maintain the appropriate neutrality when deciding whether a search warrant should be issued.¹⁷¹ In South Africa the latter principle is not fully adhered to. In South African law as a general rule a search should also be authorised by a judicial officer.¹⁷² This power is however also provided to justices of the peace.¹⁷³ If cognisance is taken of the high premium the Constitution places on privacy and associated rights, it is constitutionally questionable whether the person who is issuing the search warrant (which essentially impacts on the mentioned rights) is part of the office of the executing officer can be regarded as neutral or detached.

It is legally accepted that in order to be valid, a warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.¹⁷⁴ If the search is to be legal and the evidence admissible, the officer must follow certain rules when executing the warrant. These include: the warrant must be executed by the officer or officers so commanded or be within the class designated; the warrant must be executed within certain time limitations, only property described in the warrant may be seized under the warrant. The information in support of a warrant and the warrant must specify the items to be searched for, their location in the place being searched, and the offence to which the items relate with reasonable particularity.

¹⁷¹ *Coolidge v New Hampshire supra* 443.

¹⁷² Section 21(1) and section 25 Criminal Procedure Act.

¹⁷³ Section 21(a) Criminal Procedure Act.

¹⁷⁴ *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) 334.

Similar to section 14 of the South African Constitution, section 8 of the Canadian Charter of Rights and Freedoms guarantees that, everyone has the right to be secure against unreasonable search and seizure. In *Hunter v Southam*¹⁷⁵ the Supreme Court of Canada pointed out that section 8 of the Charter guarantees a broad and general right to be secure from unreasonable search and seizure, which is not necessarily restricted to protection of property. It embodies an entitlement to a reasonable expectation of privacy and indicates that an assessment must be made as to whether, in a particular situation, the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, particularly those of law enforcement.

¹⁷⁵ *Supra* 122.

CHAPTER FIVE

WARRANTLESS SEARCHES AND SEIZURES

1. Introduction

Although it is preferable, that searches should only be conducted on the authority of a search warrant issued by a judicial officer, it is quite conceivable that circumstances may arise where the delay in obtaining such a warrant would defeat the object of the search.

Sections 22, 23, 25(3) and 27 of the Criminal Procedure Act deal with warrantless searches.

Section 22 of the Criminal Procedure Act, which provides for search without a warrant, can basically be divided into two parts: a search conducted with the consent of the person concerned, and a search undertaken on the reasonable belief that a warrant will be issued to the police official and that a further delay will defeat the object of the search. A search conducted with the consent of the person concerned places a police official in a much better position than a search without consent. It eliminates the procedural burden of proving the existence of reasonable grounds to the search.

Working out the appropriate balancing of interests in warrantless search and seizure cases is not always easy, especially since the stakes for both individuals and the state tend to be high. As a result warrantless search and seizure law is both intriguing and challenging.

In Canada, two major principles articulated in *Hunter v Southam*¹ were the requirements of prior authorisation by an impartial judicial officer and for reasonable and probable grounds as a constitutional standard for overriding individual privacy interests. Nevertheless, the court also indicated that some

¹ [1984] 2 S.C.R 145.

contexts might permit lower standards. In spite of the suggestion in *R v Simmons*² that permissible departures from *Hunter v Southam* would be “exceedingly rare”, this has certainly proved to be the case. There are two different instances in which departure from *Hunter v Southam* may occur. Firstly, there are some situations, usually involving “exigent circumstances”, where a warrantless search or seizure may take place. Secondly, there are some situations where a search or seizure may take place on less than reasonable and probable grounds for believing that an offence has been committed and that evidence may be located at the site of the search or seizure.³

The development of warrantless search and seizure powers in the United States has been constrained by the reasonableness requirement of the Fourth Amendment. Viewed essentially as “exceptions” to the normative warrant procedure⁴ such searches are validated by three distinct lines of argument:

- The first is that the urgency of the situation necessitates an immediate search, despite the absence of judicial authorisation;
- The second is that there is a minimal level of intrusion caused by the search and therefore minimal violation of privacy;
- This argument may be linked to the third justification, which is that there is no reasonable expectation of privacy in the circumstances existing at the time.

This chapter will address the provisions of the Criminal Procedure Act pertaining to warrantless search and seizure. Provisions of the South African Police Service Act relating to warrantless search and seizure will also be visited. Then the critical principles relating to consent, exigent circumstances, search and seizure incidental to arrest, extracted from the mentioned Acts will be addressed. This chapter will further evaluate whether such warrantless searches and seizures conform to the democratic legal order prescribed by

² [1988] 66 C.R. (3d) 297 (S.C.C.) 146.

³ Quigley *Procedure in Canadian Criminal Law* 1997 200.

⁴ *Coolidge v New Hampshire* 403 U.S. (1971) 433.

our Constitution or whether they are in conflict therewith. Principles extracted from American, Canadian and foreign jurisdictions will be considered and applied where relevant. Finally the conclusion will consider the impact and influence of warrantless searches and seizures on our Constitution.

2. Provisions for warrantless searches and seizures in the Criminal Procedure Act

2.1 General Provisions

In terms of section 20 of the Criminal Procedure Act, the state may, subject to Chapter 2 of the Criminal Procedure Act, seize anything that:

- (a) is concerned or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence within the Republic or elsewhere;
- (b) may afford evidence of the commission or suspected commission of an offence in the Republic or elsewhere; or
- (c) is intended to be used or on reasonable grounds is believed to be intended to be used in the commission of an offence.

The power to seize is limited to articles and items which, are either involved in, used during or may provide proof of an offence in the Republic or elsewhere, or provide proof of the fact that the commission of an offence was planned. Contrary to earlier decisions, articles such as documents which are covered by legal professional privilege cannot be attached or seized in terms of these provisions.⁵ Evidence obtained in conflict with the provisions of section 20 of the Criminal Procedure Act, or in conflict with the Constitution, may still be allowed to be produced in evidence, provided that the trial is not rendered unfair as a result thereof and the admission of such evidence does not cause the administration of justice to come into disrepute.⁶

⁵ *Cheadle, Thompson and Haysom and Others v Minister of Law and Order and Others* 1986 (2) SA 279 (W) 176; *Sasol (Edms) Bpk v Minister van Wet en Orde* 1991 (3) SA 766 (7) 339; *S v Safatsa and Others* 1988 (1) SA 868 (A) 276.

⁶ Bantjies, Bertelsmann, Meyer, Nell and Walker *Criminal Procedure in the Magistrates Court: A Practical Guide* 2007 3-6.

Section 22 of the Criminal Procedure Act provides that a police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20:

- (a) if the person concerned consents to this search for and seizure of the article in question; or
- (b) if the police official on reasonable grounds believes that a search warrant will be issued to him under section 21 of the Criminal Procedure Act (*supra*) and that the delay in obtaining such warrant would defeat the object of the search.⁷

In interpreting section 20 and section 22 of the Criminal Procedure Act it is clear that the onus is on the police to prove, when objectively viewed, the existence of reasonable suspicion upon which the police base the reasonable belief, which facts must exist at the time when the police acted without a warrant, and not only at a later stage.⁸

In terms of section 25(3) of the Criminal Procedure Act, a police official may also act without a warrant if he on reasonable grounds believes that a warrant would be issued to him if he applied for it and that the delay in obtaining such warrant would defeat the object thereof.

Section 26 of the Criminal Procedure Act provides that if a police official, who is investigating an offence or alleged offence reasonably suspects that a person who may furnish information with reference to such offence is on any premises, such police official may enter such premises without a warrant for the purpose of interrogating such person and obtaining a statement from him or her, provided that such a police official shall not enter any private dwelling without the consent of the occupier thereof.⁹ A person so interrogated is entitled to exercise his or her right to silence.¹⁰

⁷ See also *Ntoyakhe v Minister of Safety and Security and Others* 2000 (1) SA 257 (ECD) 126; *Dyani v Minister of Safety and Security and Others* 2001 (1) SACR 634.

⁸ *Mnyungula v Minister of Safety and Security and Others* 2004 (1) SACR 219.

⁹ See also *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A).

¹⁰ *Bantjies... et al. supra* 3-9.

Further in terms of section 27 of the Criminal Procedure Act, a police official who may lawfully search any person or premises or may enter such premises under section 26, he or she may use such force as may reasonably be necessary to overcome any resistance against such search or entry of such premises, including the breaking of any door or window of such premises, provided that such police official must first audibly demand admission to the premises and notify the occupier and others on the premises of the purpose for which he or she seeks to enter such premises. The *proviso* of a previous warning shall not apply where the police official concerned reasonably believes that any article which is the subject of the search may be destroyed or disposed of if entry to the premises is demanded. This is the so-called the “no knock clause”.¹¹ Swanepoel maintains that an element of subjectivity attaches to the word “opinion” in section 27(2) of the Criminal Procedure Act.¹²

2.2 Consent searches

2.2.1 In South Africa

Section 22(a) of the Criminal Procedure Act makes provision for the consent search of a person, container or premises in the absence of a warrant.¹³

Consent by the subject of a search and seizure operation can serve to validate such an operation where it is conducted without a search warrant. In this regard the following should be noted:

¹¹ Joubert *Criminal Procedure Handbook* 2007 136.

¹² Swanepoel, “Warrantless search and seizure in criminal procedure: A constitutional challenge” 1997 *CILSA* 334.

¹³ Section 22(a) reads: “A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20- (a) if the person concerned consents to such search for and seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and seizure of the article in question.”

(a) The consent must be valid

For a valid consent, the police official should inform the person of the purpose of the search.¹⁴ A blanket request of “May I search you?” would therefore be invalid. Where a container or premises is to be searched, the consent must be given by a person “who may consent to the search”, that is a person who has some authority or control over the container or premises.¹⁵ In both instances the onus will be on the state, affecting the search, to show that a valid consent was given.¹⁶ In *S v Motloutsi*¹⁷ a person who was leasing property (lessee) sublet a room to the accused. The court held that the consent from the lessee did not amount to a valid consent in terms of section 22(a) of the Criminal Procedure Act because the lessee did not have the accused’s property in his custody or under his control and he did not have the right to pry into the accused’s private possessions. The only person who could have consented was the accused. Therefore the search and seizure was unlawful.

(b) The consent must be given voluntarily

Where a person consents to the invasion of his or her privacy, the requirements of “reasonable grounds and prior authorisation”¹⁸ do not apply. Waiver of rights is however never lightly inferred.¹⁹ The question of paramount importance then, is whether the consent was validly, that is voluntarily given. The voluntariness of the consent is to be determined from the totality of the

¹⁴ Steytler *supra* 96.

¹⁵ *Ibid* 97.

¹⁶ *S v Hammer* 1994 2 SACR 496 (C) 498 b.

¹⁷ 1996 2 BCLR 220 (C) 229 A-B.

¹⁸ See section 21 of Criminal Procedure Act.

¹⁹ *Powell NO and Others v Van Der Merwe and Others* 2005 1 All 49 (SCA) 49
Powell was confronted at his home, where the warrants and annexures were read to him. The search then proceeded. The next day Powell’s attorney objected that the warrants were void because they were vague and that the search was unlawful. The attorney was present during most of the search. The Court found that initially and for most parts thereafter Powell indicated that he was willing to co-operate with the investigation and had nothing to hide. There was no question that Powell consented to an unlawful search.

circumstances.²⁰ Other indicators of the absence of voluntariness are explicit or implicit threats or shows of force.²¹ For a successful reliance on consent the courts have indicated that the following criminal law standards are relevant: the consent must have been given voluntarily;²² expressly or tacitly;²³ before the otherwise unlawful act is committed;²⁴ by a person capable of forming a will;²⁵ while aware of the true and material facts regarding the act consented to;²⁶ by the person who is going to be harmed.²⁷

(c) Consent cannot validate an irregular search warrant

Section 22(a) of the Criminal Procedure Act stipulates that consent by the subject of a search and seizure operation can serve to validate such an operation where it is conducted without a search warrant. However, what of those situations where police officials are purportedly acting in terms of an invalid warrant? Can it be argued that the consent of the person concerned would have the effect of validating the warrant or validating a warrantless search? This issue was dealt with in *Beheermaatschappij Helling I NV v Magistrate, Cape Town*²⁸ where a search and seizure was conducted under the authority of a warrant that was subsequently found by the court to be invalid. In this case the South African Police Service contended that the subject of the search and seizure had acquiesced by reaching an agreement

²⁰ *Ndlovu v Minister of Police, Transkei* 1993 2 SACR 233 where the accused handed over his vehicle to the police under protest in order to co-operate with them but shortly thereafter instructed his attorneys to recover the vehicle. The Court held that there was no valid consent.

²¹ *S v Madiba* 1998 1 BCLR 38 (D) 167.

²² *Ibid* 167.

²³ *R v Handcock* 1925 OPD 149.

²⁴ *Ndlovu v Minister of Police Transkei* supra 133.

²⁵ *R v C* 1952 (4) SA 117 (0) 439.

²⁶ *Ibid* 437.

²⁷ *R v Williams* (1923) KB 340; *S v Mayekiso en Andere* 1996 (2) SACR 298 (C), accused 1 and 3 shared a home. The police obtained consent from accused 1 to enter the shared home and conducted a search. A bag with a pistol that belonged to accused 3 was seized. The court held that accused 1 had no authority from accused 3 to permit a search of his property in the house. Therefore there was no valid authority to search and seize accused 3's bag, since consent in terms of section 22(a) was not obtained from accused 3.

²⁸ *Supra* 2007 (1) SACR 99 (C) 147.

for the early return of the electronic equipment. The court maintained that it was “trite” law that, if the relevant search warrants were invalid because they had been invalidly issued, no amount of consent or agreement by the subjects of the search could have the effect of rendering them valid or lawful.

Generally, this reflects the realities of any search and seizure operation, since the average citizen when confronted with a search warrant produced by a police official, would tend to defer to the latter and acquiesce in the conduct of the search.²⁹ If this was to have the effect of legitimising an invalid warrant it would drastically undermine the safeguards inherent in the primary requirement of a search warrant.

2.2.2 Consent searches in foreign law

2.2.2.1 In the United States

A favourite tool of police officers is the “consent search.”³⁰ Where effective consent is given, a search may be conducted without a warrant and without probable cause.³¹ In accordance with the general principle that allows a person to waive other constitutional rights, rights protected under the Fourth Amendment may be waived.³² This and other constitutional rights are considered waived only after careful evaluation and only after compliance with certain requirements. The burden of showing that the rights have been waived is on the prosecution.³³

To determine whether rights have been waived, certain principles, have been established by the courts:

²⁹ Cowling “Search and seizure” 2007 (3) SACJ 400.

³⁰ Klotter, Walker and Hemmens *Legal Guide for Police: Constitutional Issues* 2005 122.

³¹ LaFave and Israel *supra* 141.

³² *Schneekloth v Bustamonte* 412 US 218 (1973) 268.

³³ *Ibid* 268.

(a) The consent must be given voluntarily

The United States Supreme Court, in upholding the consent search, included this comment:

We hold only that when the subject is not in custody and the state attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all of the circumstances, and while the subject's knowledge of the rights to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent.³⁴

In *United States v Medenhall*,³⁵ police officers told the suspect that she had a right to decline the search if she desired and she responded, "go ahead". The Court held that this was consent under the circumstances. Mere acquiescence is not consent. The state's burden of proving consent to a warrantless search cannot be satisfied by showing nothing more than acquiescence to a claim of lawful authority.³⁶

(b) The extent of the search is limited to the exact words or meaning of consent.

The consent to search must be such that it is clear that the person intends to give consent and the consent should be in specific terms.³⁷ Consent to search one portion of the premises is not consent to search the other portions.³⁸

³⁴ *Schneckloth v Bustamonte* supra 173.

³⁵ 446 US 544 (1980) 155.

³⁶ *Turner v State* 745A.2d 1074 (Md.Ct.App. 2000) 448.

³⁷ *Florida v Jimeno* 499 US 934 (1991) 270.

³⁸ *Ibid* 270.

(c) Consent may be withdrawn

One danger of conducting a search under the consent rule is that the consent may be withdrawn at any time. If the person giving consent withdraws consent during the search, the officer must honour this and stop the search immediately.³⁹ In this situation, the officer may use any evidence obtained up to this point, or may seize other evidence within view if the circumstances justify it.⁴⁰

(d) The person giving consent must have the capacity to do so

The general rule, as established by the United States Supreme Court, is that:

...[t]he consent of one who possesses common authority over the premises or effects is valid against the absent non-consenting person with whom the authority is shared.⁴¹

Under this rule, valid consent to search may be given by a person who has the immediate and present right to possess those premises. Another issue that police officials may face is where the person giving consent appears to have the legal authority to do so, but it is later discovered that the person did not have the authority.⁴² The Supreme Court held that warrantless entry into a private home by the police is valid if based on consent from a person who the police may reasonably believe to have authority to grant consent, even if it is later determined that the person did not have such authority.

³⁹ *State v Samarghandi* 680 N.E. 2d 738 (Ohio 1997) 516.

⁴⁰ *Ibid* 369.

⁴¹ *Coolidge v New Hampshire* 403 US 443 (1971) 85. See also *US v Sculco* 82 F. Supp. 2d 410 (2000) 382.

⁴² See *Illinois v Rodriguez supra* 172. A woman told the police that she had been beaten by Rodriguez. She referred to Rodriguez's apartment as "our apartment" and produced a key. After the police entered the apartment without a warrant and found drugs in plain view, Rodriguez was arrested and charged. At the trial, he moved to suppress all evidence seized at the time of the arrest, claiming that the woman who had given the consent had no authority to do so, as she had moved out of the apartment several weeks ago.

2.2.2.2 In Canada

The position in Canada is similar to South Africa. Where a person grants consent to the invasion of his or her privacy, the requirements of reasonable grounds and prior authorisation fall away.⁴³ The critical question then is whether the consent was given voluntarily. The requirement of voluntariness is determined from the totality of the circumstances. While it may not be necessary to inform an individual that he or she has a right to refuse, the failure to do so may be a consideration in assessing the voluntariness of the consent.⁴⁴

2.3 Reasonable grounds, and exceptions to the reasonable grounds rule and exigent circumstances

2.3.1 In South Africa

Section 22 (b) of the Criminal Procedure Act reads:

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—

(a)

(b) if he on reasonable grounds believes—

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.⁴⁵

Section 22 of the Criminal Procedure Act provides for search and seizure of certain articles that are linked to criminal activity without a search warrant. However, in order to justify such search and seizure it is imperative for the

⁴³ *Rv Borden* (1994) 119 DLR (4th) 74 (SCC) 87 where the accused consented to the taking of a blood sample on the understanding that the police were investigating only one offence. The purpose of obtaining the blood sample was however for another unrelated offence. The consent was thus invalid as the accused was not apprised of the true reason for the taking of the blood sample.

⁴⁴ *Ibid* 87.

⁴⁵ See also section 20 (Chapter 2) where reference is made to reasonable grounds.

police official to show that there are reasonable grounds for believing that the articles to be seized is concerned in the commission or suspected commission of an offence or which may afford evidence of the commission or suspected commission of an offence.⁴⁶

It is also necessary to establish that reasonable grounds existed for the belief that a search warrant would have been issued if an application had been made therefore, and that the delay in obtaining the warrant would defeat the object of the search.⁴⁷

In *Mnyungula v Minister of Safety and Security*⁴⁸ a police official seized a vehicle on the basis of a reasonable belief that the vehicle was stolen. In fact, his belief was incorrect and the applicant had purchased the vehicle lawfully. The seizure was purportedly effected in terms of sections 20 and 22 of the Criminal Procedure Act. The court emphasised that in interpreting sections 20 and 22 of the Criminal Procedure Act, the onus was on the police to prove, when objectively viewed, the existence of reasonable grounds upon which the police based their reasonable belief. The court referred to *Ndabeni v Minister of Law and Order*⁴⁹ where Didcott J cited *Watson v Commissioner of Customs and Excise*.⁵⁰

There can only be reasonable cause to believe where, considered objectively, there are reasonable grounds for the belief [I]t cannot be said that an officer has reasonable cause to believe merely because he has reasonable cause to believe.

The court further held, that the existence of such “reasonable belief” could be rebutted by the person whose article had been seized by showing that the facts or grounds relied upon by the policeman, in forming his reasonable

⁴⁶ Section 20 Criminal Procedure Act.

⁴⁷ Section 22 (b) (i) and (ii) of the Criminal Procedure Act.

⁴⁸ 2004 (1) SACR 219 (TK) 195.

⁴⁹ 1984 (3) SA 500 (D) 164.

⁵⁰ 1960 (3) SA 212 (N) 273.

belief, had not existed or had been false. In terms of its inherent power the court could then set aside the seizure in the interests of justice.

Is it the law of this land that once a policeman has on incorrect “facts” formed a bona fide reasonable belief that there are sufficient grounds to seize a vehicle, that seizure is ‘forever’ or can the ‘reasonable belief’ later be rebutted by the true facts being shown, causing the seizure to lapse?⁵¹

Criminal law is increasingly being used to enforce social legislation. In order to protect the public, the state seeks to regulate and control the activities of persons, both natural and legal, when they engage in public intercourse.⁵² For the protection of the rights of the general public the state intervenes through preventative measures before actual damage is done. In many cases there are no immediate victims or complainants. The commission of offences is prevented through routine inspections of factories and restaurants and tests of motorist “sobriety”.⁵³ On a social policy perspective it is no longer acceptable to prosecute drunken drivers only once they have caused an accident. The safety and protection of the general public dictates that the state takes preventative measures before death and destruction occur on the roads. In these situations, reasonable grounds as well as prior authorisation are dispensed with. The South African Police Service Act contains a number of provisions where reasonable grounds prior to a search are not necessary, for example, border searches.⁵⁴ Any police official may search any premises, person, vehicle, vessel or aircraft without reasonable grounds or a warrant “where it is reasonably necessary for the purposes of control over illegal movement of people or goods across the borders of the Republic.”⁵⁵

Where exigent circumstances are present it is accepted in many countries that the interests of law enforcement trump the need for judicious

⁵¹ *Ibid* 275.

⁵² Steytler 1998 90.

⁵³ *Ibid* 90.

⁵⁴ See also 3. (section 13 (7) and road blocks (section 13(8)) in discussion below.

⁵⁵ Section 13(6) South African Police Services Act 68 of 1995.

consideration of privacy rights.⁵⁶ Exigent circumstances include the imminent danger of the loss, removal, destruction or disappearance of evidence should the search be delayed to obtain prior authorisation.⁵⁷ This principle is also the general rule in the Criminal Procedure Act. The police may dispense with a warrant where the obtaining of authorisation would destroy the object of the search.⁵⁸ Such a search will be lawful and in consequence constitutional if the police official can demonstrate objectively reasonable grounds for the belief that a warrant would have been issued had it been applied for, and the delay caused by the application would have destroyed the objective of the search.⁵⁹ Section 22(b) of the Criminal Procedure Act provides that in order to seize any article referred to in section 20, a police official may search any person or container or premises without a search warrant if he or she believes on reasonable grounds that: a search warrant will be issued to him or her under section 21(1)(a) if he or she were to apply for a warrant, implying that if there was time and a warrant was applied for it would have been issued. The police official must therefore at least have information under oath or be prepared to provide information under oath himself or herself; and the delay in obtaining the warrant would defeat the object of the search. The object of the search will be defeated if the articles which form the object of the search can be destroyed, disposed of or removed.

⁵⁶ *S v Madiba* 1 BCLR 38 (D) 45.

⁵⁷ *R v Grant* (1993) 84 CCC (3d) 173 (SCC) 538.

⁵⁸ Sections 22(b) and 25(3) of the Criminal Procedure Act.

See *R v Beghin* 1933 EDL 24, when a suspect attempts to swallow evidence for example money, this will constitute reasonable grounds for believing that the delay in obtaining the warrant would defeat the object of the search. See also *Nel v Deputy Commissioner of Police, Grahamstown* 1953 (1) SA 487 (E), in a case of illegal gambling, where the police official believed, as a result of experience, that gambling machines could easily be changed to amusement machines, a search in terms of section 22(b) was justified.

See *S v Motloutsi* supra, if a magistrate is not available to issue a warrant in terms of section 21, a justice of peace must be approached. The unavailability of a magistrate does not render action in terms of section 22(b) lawful.

⁵⁹ *S v Mayekiso* 1996 2 SACR 298 (C) 293.

Search and seizure in terms of section 22(b) does not authorise a police official to close down the business of a suspect. Authorisation to that effect must be obtained.⁶⁰

If a magistrate is not available to issue a warrant in terms of section 21, a justice of the peace must be approached. The only factor of unavailability of a magistrate does not render action in terms of section 22(b) lawful.⁶¹

In the case of *Hako v Minister of Safety and Security and Another*⁶² the search was held to be unlawful for the following reasons: no reasons were given to the court as to why a search warrant was not obtained, the delay in obtaining a warrant would not have defeated the object of the search as the suspect had been in undisturbed possession of the article (in this case a motor vehicle) for approximately two years and the vehicle was being used on a daily basis by the suspect's wife, the police arrived at the suspect's home without prior notification and there was no reason to believe that the suspect was about to dispose of the vehicle. Section 22(b) does not mention when the search and seizure must be executed, which implies that it may be executed during the night.⁶³ This may be considered to be undesirable in the light of right to privacy and affected fundamental rights.

Section 25(3) of the Criminal Procedure Act contains provisions that are similar to section 22(b), in instances where state security or the maintenance of law and order is threatened. A police official may act without a warrant if he or she on reasonable grounds believes that a warrant will be issued to him or her under section 25(1) if he or she applies for a warrant; and the delay in obtaining the warrant would defeat the object of the search.

The fact that a police official who acts in terms of section 25 may take any steps that 'he considers necessary' for the preservation of the internal security of the state or the prevention of any offence, which could well be a trivial offence, causes a subjective standard to be applied in order to attain

⁶⁰ *Goncalves v Minister of Law and Order* 1993 (1) SA 161 (W) 473.

⁶¹ *S v Motloutsi supra* 259.

⁶² 1996 (2) SA 891 (Tk) 183.

⁶³ *Hiemstra Introduction to the Law of Criminal Procedure* 1985 8.

objectives that may well be of little importance.⁶⁴ The standard for the police official's conduct is arbitrary. It applies to that which he considers to be necessary and not that which is objectively justifiable.⁶⁵

2.3.2 *In the United States*

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are per se unreasonable in the absence of one of a number of well-defined exigent circumstances.⁶⁶ Accordingly, the Supreme Court has emphasised that exceptions to the warrant requirement are “few in number and carefully delineated” and that the police bear a heavy burden when endeavouring to demonstrate an urgent need to justify a warrantless search.⁶⁷ The courts have recognised that sometimes situations will arise that reasonably require immediate action or evidence may be destroyed. Police officers who have established probable cause that evidence is likely to be at a certain place and who do not have time to get a search warrant, may conduct a warrantless search.⁶⁸ But there must be demanding (exigent) circumstances. Crawford⁶⁹ notes:

Virtually every crime will constitute an emergency that justifies law enforcement's warrantless entry to the scene. Traditionally courts have identified three different types of emergencies: threats to life or safety, destruction or removal of evidence, and escape. It is difficult to imagine a crime scene that would not automatically present officers with the requisite belief that at least one of these exigent circumstances exists to justify, at the very least, a warrantless entry to assess the situation. Problems arise, however, when officers exceed the scope of the particular emergency that justified the initial entry.

⁶⁴ Swanepoel *supra* 353.

⁶⁵ *Ibid* 353.

⁶⁶ *Coolidge v New Hampshire supra* 433.

⁶⁷ *Welsh v Wisconsin* 466 US 740 (1984) 219.

⁶⁸ Crawford and Kimberly *Crime Scene Searches: The need for Fourth Amendment compliance* 1999 28-31.

⁶⁹ *Ibid*.

In *United States v Johnson*⁷⁰ the court upheld the warrantless search of a suitcase because there was probable cause to believe it contained a sawn-off shotgun. While a warrant is preferred because of the judicial decree that probable cause exists, if a genuinely exigent circumstances exists, such a search is reasonable.

The courts have generally been consistent in holding that officers may enter a home if a delay in procuring a warrant would gravely endanger the life of the officer or others. For example, exigent circumstances existed to justify police officers' warrantless search of the defendant's apartment to search for individuals who had shot at the officers as well as for weapons involved in the shooting, because the police did not know the whereabouts of the armed individual who had just shot at officers from the immediate vicinity of the defendant's apartment, and there was a risk of bodily harm or death to both police officers and civilians.⁷¹

Just as a warrant may be challenged, warrantless searches may also be challenged. The most frequent challenge is that the police official did not establish probable cause or that there was sufficient time to obtain a warrant.⁷²

2.3.2.1 Stop and frisk searches

The question that poses itself in relation to search and seizure is the extent to which a police official may seize weapons or evidence from a suspect when there is no probable cause to make an arrest, and there is no justifiable search incident to the arrest. This relates to what has become known in the United States as "stop and frisk".⁷³ In *Terry v Ohio*⁷⁴ there was considerable doubt as to whether a police official could stop suspicious persons on the

⁷⁰ *Supra* 335.

⁷¹ *Robinson v State* 730 N.E 2d 185 (Ind.2000) 518.

⁷² *Illinois v McArthur* 531 US 326 2001 159.

⁷³ *Terry v Ohio* 392 US 1 (1968) 394.

⁷⁴ *Ibid.*

street, ask them questions and then frisk them for weapons. In this case a police officer stopped a suspect on a street after he had observed the suspect and two other men “casing” a jewellery store. Without putting the suspects under arrest, the police officer patted down their outside clothing for weapons and later removed a pistol from Terry’s overcoat pocket. Admitting that there was no probable cause to make an arrest, the Supreme Court was confronted with two questions. Firstly, did the officer have the authority to detain and secondly, did the officer have the authority to frisk the detained suspect for weapons? The court was cautious to distinguish this “stop and frisk” from a search incident to a lawful arrest, explaining:

The sole justification for the search in the present situation is the protection of the police officer and others nearby, and must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

Two issues are important in this case. Firstly, officers do not need probable cause to make a “*Terry*” stop and frisk. All that is needed is reasonable suspicion.⁷⁵ Secondly, the frisk authorised in this detention situation is only for the protection of the officer and is limited to patting down, rather than a full scale search. The Court explained that, while there is a self-protective search for weapons, the officer must be able to point to particular facts from which he or she reasonably inferred that the individual was armed and dangerous.

2.3.2.2 Plain view searches

The Fourth Amendment and provisions of state constitutions protects individuals against unreasonable searches and seizures. In *Minnesota v Dickerson*⁷⁶ the Supreme Court maintained that the rationale for the plain view doctrine is that if contraband is left in the open and is observed by a police officer from a lawful vantage point, there is no invasion of a legitimate expectation of privacy and thus no “search” within the meaning of the Fourth

⁷⁵ *Alabama v White* 496 US 325 (1990) 274.

⁷⁶ 508 US 366 (1993) 581.

Amendment. In other words, if an officer is in a place where he or she has a right to be and recognises instrumentalities of crime or other evidence, he or she may seize the evidence that is in plain view. The Supreme Court explained that the police are not required to close their eyes and need not walk out and leave the article where they saw it. Any other principle might lead to an absurd result and at times probably defeat the ends of justice.⁷⁷ There are two legal conditions that must be met before this doctrine will apply: the officer must be lawfully present when he or she views the object, and the officer must recognise the article as contraband, illegally possessed, stolen property, or otherwise subject to seizure.⁷⁸

2.3.3 In Canada

In *R v Collins*⁷⁹ it was maintained that the accused bears the onus of persuading the Court, on a balance of probabilities, that Charter rights or freedoms have been violated. Once the accused has demonstrated that the search is warrantless, the burden of persuasion is shifted to the Crown to show, on a balance of probabilities that the search was reasonable. A search will be reasonable if it is authorised by law, if the law itself is reasonable, and if the manner in which it was carried out was reasonable.⁸⁰ The appropriate standard of proof that must be met in order to establish reasonable grounds for a search is one of reasonable probability rather than proof beyond reasonable doubt or a *prima facie* case. The phrase “reasonable belief” approximates the required standard.

In *Hunter v Southam*⁸¹ it was held that in addition to prior authorisation, a reasonable search or seizure requires that there be reasonable and probable grounds in two respects: first, that an offence has been committed and

⁷⁷ *Washington v Chrisman* 455 US 1 (1982) 209.

⁷⁸ *United States v Blair* 214 F. 3d 690 (6th Cir. 2000) 415.

⁷⁹ [1987] 1 S.C.R. (3d) 33 C.C.C. 1.

⁸⁰ *Ibid.*

⁸¹ *Supra* 184.

second, that evidence related to that offence will be discovered in the place to be searched. When is a departure from this standard permissible?

Exigent circumstances

In general, in the criminal/quasi-criminal arena, where a warrantless search or seizure power is justified as reasonable by the Crown, it is because it still requires reasonable and probable grounds for its exercise.⁸² The sources of reasonable and probable grounds are essentially the same as for obtaining a warrant.⁸³ Thus for example, the warrantless search power in section 10 of the Narcotic Control Act and its counterparts in the Food and Drugs Act and the Controlled Drugs and Substances Act⁸⁴ all require the police official conducting the search to have reasonable grounds for believing that an illegal drug or substance will be located on the premises to be searched.

There are however, some situations where less than reasonable and probable grounds have been considered reasonable. The administrative or regulatory field is one such broad situation. In *Comité paritaire de L'industrie de la chemise v Potash*⁸⁵ the Supreme Court accepted that inspections or the seizure of documents might occur below the standards set out in *Hunter v Southam (supra)*. As with the absence of a warrant, the rationale is that there is a much reduced expectation of privacy involved in administrative or regulatory searches and seizures.

In the criminal, as opposed to the regulatory sphere, the Supreme Court has been insistent that prior authorisation be required unless exigent circumstances exist. In *R v Grant*⁸⁶ the police conducted perimeter searches of a house used by the accused. They relied upon the authority of section 10 of the Narcotic Control Act, which permits a warrantless search of a premises other than a dwelling if a peace officer has reasonable grounds to believe it

⁸² *Sharpe supra* 205.

⁸³ *R v Grant* 1993 24 C.R. (4th) 1 (SCC) 107.

⁸⁴ Food and Drugs Act, section 42(1); Controlled Drugs and Substances Act, section 11(7).

⁸⁵ 1994 168 N.R. 241 (SCC).

⁸⁶ *Supra* 441.

contains narcotics. However, the Supreme Court held that the provision can only operate in a constitutional manner in exigent circumstances. These were defined to exist where there is:

..... an imminent danger of the loss, removal, destruction or disappearance of the evidence sought in a narcotics investigation if the search or seizure is delayed in order to obtain a warrant.⁸⁷

As a consequence, the court read down section 10 to apply only where it is urgent to obtain a warrant. Parliament has now responded to the *Grant* case by passing the Controlled Drugs and Substances Act. Section 11 of the Act sets out search and seizure powers, but in subsection (7) specifically limits warrantless searches and seizures to exigent circumstances. In the light of this case, other statutory provisions for warrantless searches must similarly be read down to apply only in exigent circumstances and one would therefore expect future legislative amendments of those provisions to comply.⁸⁸ The *Grant* position should apply to any warrantless search and seizure provisions in the criminal or quasi-criminal sphere.

2.4 Search incident to a lawful arrest

2.4.1 In South Africa

In South African law a peace officer may also without a warrant or a reasonable belief search an arrested person and seize any article referred to in section 20 of the Criminal Procedure Act which is found in the arrestee's possession, custody or control which may afford evidence of the commission of an offence.⁸⁹ Where the peace officer is not a police official he ought to forthwith deliver such article to a police official.⁹⁰ Where the person making the arrest is not a peace officer he may seize any article referred to in section

⁸⁷ *Supra* 158.

⁸⁸ Quigley *supra* 201.

⁸⁹ Section 23(a) of the Criminal Procedure Act.

⁹⁰ *Ibid.*

20 which is in the possession, custody or control of the arrestee and he must deliver any such article to a police official⁹¹ (such person has no power to search).

While the reasonableness of such search is not constitutionality suspect, the following principles should be observed when applying section 23 of the Criminal Procedure Act.⁹² The search should firstly, pursue an object not inconsistent with the proper administration of criminal justice. Secondly, it may be constitutionally accepted to search the environment in which the accused is arrested. Thirdly, the seizure (without searching) of section 20 articles in the possession, custody or control of the arrestee is permissible provided that they are in the immediate vicinity where the arrest was effected:

“In the custody or under control” does not only refer to items on the person, but would also include articles found in a motor vehicle, flat or premises that the arrested person is in or on.⁹³ Possession, custody and seizure should be given a restrictive interpretation.⁹⁴

The search incident to a lawful arrest was one of the earliest recognised exceptions to the rule that a search must be made with a search warrant.⁹⁵ It is obvious that the authority to search, incident to a lawful arrest is necessary, because it is senseless to obtain warrants in all instances. A search incident to a lawful arrest is permitted for two reasons: to protect the arresting officer and to avoid destruction of evidence by the arrested person.⁹⁶

⁹¹ Section 23(b) of the Criminal Procedure Act.

⁹² Steytler *supra* 99.

⁹³ *S v Nader* 1963 (1) SA 843 (0) 271.

⁹⁴ Kriegler *Hiemstra Suid-Afrikaanse Strafproses* 1993 39.

⁹⁵ Klotter...*et al. supra* 112.

⁹⁶ *Ibid.*

2.4.2 In the United States

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape, and to, seize any evidence on the arrestee's person in order to prevent its concealment or destruction.⁹⁷ Explaining the rationale for the exception "search incident to a lawful arrest", a Virginia Court held that an arresting officer may search the person arrested to remove any weapons that the latter may attempt to use to resist arrest or effect his escape; in addition it is reasonable for the arresting officer to search for and seize any evidence on the arrested person to prevent its concealment or destruction.⁹⁸ In *United States v Robinson*⁹⁹ the United States Supreme Court condoned a general search incident on arrest despite the fact that there was no suspected danger to the arrestor and no further evidence could be discovered to prove the crime for which the accused was arrested. The court concluded that a search incident upon a lawful arrest required no further justification.¹⁰⁰ Upon arrest it is also reasonable to search the area within the arrestee's immediate control, that is, "the area from within which he might gain possession of a weapon or destructible evidence."¹⁰¹ This power does not include a general search of the premises or even the room in which the search was conducted.¹⁰²

Before a search incident to a lawful arrest can be made, the following requirements must be met:

⁹⁷ 395 US 752, 89 S. Ct. 2034 (1969) 439.

⁹⁸ *Cason v Commonwealth* 530 S.E. 2d 920 (Va. Ct. App. 2000) 492.

⁹⁹ 414 US 218 (1973).

¹⁰⁰ Cited Steytler *supra* 98, at a police station a further search of the arrestee may be conducted without warrant and probable cause as part of a routine inventory search incident on him or her being booked into custody (*Illinois v Lafayette* 462 US 640 (1983) which by its nature, is broader in scope than a search incident on arrest (Dressler 1991 175).

¹⁰¹ *Ibid.* (*Chimel v California* 395 US 752 762-763 (1969) *supra*) 167.

¹⁰² *Ibid.*

(a) The arrest must be lawful

If the arrest is not lawful, all that follows, including the search, is unlawful, and evidence obtained thereby is inadmissible except in “rare cases”.¹⁰³ In *Agnello v United States*¹⁰⁴ the Supreme Court, whilst recognising a right to search both a person “lawfully arrested” and the “place where the arrest is made”, stressed that this right is “an incident of the arrest”.

(b) The search must be made contemporaneously with the arrest

The rationale for authorising a search incident to a lawful arrest is that it is necessary to protect the police official and avoid destruction of evidence.¹⁰⁵ It follows then that the search should be made contemporaneously with the arrest. In determining what is contemporaneous, the courts will consider the place of arrest, the time of arrest, the circumstances surrounding the arrest, and the degree of custodial control.¹⁰⁶

(c) The arrest must be in good faith

If the court finds that an arrest was a hoax or a subterfuge to make the search, the use of evidence obtained as a result of the search will generally be inadmissible.¹⁰⁷

2.4.3 In Canada

In the Charter era, three cases illustrate the options available. In *R v Morrison*,¹⁰⁸ the Ontario Court of Appeal held that a police officer has a right to search as an incident of lawful arrest and may take from the person any

¹⁰³ *State v Pallone* 613 N.W. 2d 568 (Wis 2000) 271.

¹⁰⁴ (1925) US 20.

¹⁰⁵ *Dixon v State* 327 A. 2d 516 (Md. Ct. App. 1974) 183.

¹⁰⁶ *United States v McKibben* 928F. Supp. 1479 (D.S.D. 1996) 239.

¹⁰⁷ *State v Sullivan* 16 S.W. 3d 551 (Ark 2000) 125.

¹⁰⁸ (1987) 58 C.R. (3d) 63 (Ont. CA) 472.

property reasonably believed to be connected with the offence charged. Further it was held, property that may be used as evidence against the person or any weapon or instrument found may be seized even if there were no reasonable grounds to believe that either the evidence or the weapons would be found. This case is interpreted as permitting an automatic search upon arrest.

A different approach was followed in *R v Lerke*¹⁰⁹ which dealt with a search following an arrest by a private citizen. In this case the court indicated a need for reasonable grounds both for believing that items related to the offence would be found in the search and to seize them once found. The court also stated in *obiter* that the right to search incident upon arrest must be reasonable in order to comply with section 8 of the Charter. It is not an automatic right to search.

Between the above two extremes is a non-Charter case, albeit decided since the Charter came into effect, namely, *Cloutier v Langlois*.¹¹⁰ This was a case of private prosecution for common assault by a lawyer against two Montreal police officers who had arrested him after noticing him commit a traffic offence. The actual reason for the arrest was an outstanding warrant for unpaid traffic offences. After the arrest, the police had conducted a frisk search on the street, then took *Cloutier* to a police station. He subsequently launched a private prosecution for assault, arguing amongst other issues, that the officers had no legal right to search him. The Supreme Court held that reasonable and probable grounds are not required to justify a search of the person following a lawful arrest. Nevertheless, the power is not without certain limitations:

1. This power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to

¹⁰⁹ (1986) 49 C.R. (3d) 324 (Alta. C.A.) 218.

¹¹⁰ (1990) 74 C.R. (3d) 316 (S.C.C.) 152.

assess the circumstances of each case so as to determine whether a search meets the underlying objectives.

2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused.

3. The search must not be conducted in an abusive fashion.¹¹¹

This approach suggests that the right to search is automatic upon arrest.

A better way of striking a balance between the constitutionally protected interests of privacy and the concerns of law enforcement “in particular, the protection of the police” would be to permit a search upon arrest on either of two grounds: (1) in order to protect the safety of the police or other persons where there is some basis “perhaps a reasonable suspicion” for believing that safety is threatened; or (2) where reasonable grounds exist, in order to prevent destruction of evidence.¹¹²

2.5 Concluding remarks

Although there are a number of laws, which authorise searches and seizures without a warrant, the most important is the Criminal Procedure Act.¹¹³ These laws violate the right to privacy and must be justified under the limitation clause.¹¹⁴ Although it is preferable that searches should only be conducted on the authority of a search warrant issued by a judicial officer, it is quite conceivable that circumstances may arise where the delay in obtaining such warrant would defeat the object of the search.

Section 22 of the Criminal Procedure Act makes provision for a police official to search without a warrant any person, container or premises for the purpose of seizing any article referred to in section 20, if the person consents to the

¹¹¹ *Ibid.*

¹¹² Quigley *supra* 208.

¹¹³ See section 22.

¹¹⁴ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors supra* 214.

search for and seizure of the article in question, or if the police official has “reasonable grounds” to believe that a search warrant will be issued to him under section 21 and that the delay in obtaining such warrant would defeat the object of the search.¹¹⁵ Where a search warrant could have been obtained in the absence of exigent circumstances, a warrantless search is a violation of the constitutional right to privacy.¹¹⁶

Further in terms of section 23 of the Criminal Procedure Act a peace officer may also without a warrant or a reasonable belief search an arrested person and seize any article found in the arrestee’s possession, custody or control which may afford evidence of the commission of an offence. The peace officer may also place in custody any object found in the person of the arrestee, which may be used to cause bodily harm to himself or herself or others.

Section 25 also empowers a police official to enter any premises for purposes of preservation of law and order, or the prevention of any offence, without a warrant if the police official on reasonable grounds believes that a warrant would be issued to him or her if he or she applied for it and that the delay in obtaining such warrant would defeat the object thereof. In terms of section 25 the police official may take such steps as he or she “considers necessary” for the preservation of the internal security of the Republic or maintenance of law and order or the prevention of any offence. The words “consider necessary”¹¹⁷ appears to have a subjective connotation. It tends to armour a police official with carte blanche authority to act in terms of his or her own subjective discretion. Further the use of the words “preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence”¹¹⁸ are not definitive. The domains encapsulated by these words are very wide. They can be interpreted to cover a very wide spectrum of acts or offences, which could well conflict with the right to privacy and other fundamental rights enshrined in our Constitution.

¹¹⁵ See also *Ntoyakhe v Minister of Safety and Security and Others supra* 149.

¹¹⁶ *S v Moloutsi supra* 115.

¹¹⁷ Section 25 (1)(b)(i).

¹¹⁸ *Ibid.*

Section 26 of the Criminal Procedure Act empowers a police official who is investigating an offence or alleged offence, who reasonably suspects the person in possession of information concerning that offence or alleged offence, is on any premises, such police official may enter such premises without a warrant for the purposes of interrogating such person and obtaining a statement from him or her provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.¹¹⁹

Section 27(1) of the Criminal Procedure Act permits a police official to use force as may be reasonably necessary to enter a premises for purposes mentioned above in section 26, provided that such police official first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter the premises. Considering how strongly our Constitution values fundamental human rights, what is the position with regard to persons who are hard of hearing or deaf? No provision is made in this section for such persons.

3. Provisions for warrantless searches and seizures relating to roadblocks

3.1 In South Africa

According to section 13(6) of the South African Police Service Act (SAPS Act) a police official may search without a warrant, any person, premises, other place, vehicle, vessel or aircraft or any receptacle, and seize any article that is found and may lawfully be seized. The aim of such a search is to exercise control over illegal movement of people or goods within the borders of South Africa. The search may be conducted:

- at any place in South Africa within 10 kilometres, or any reasonable distance from any border between South Africa and any foreign state;

¹¹⁹ See also *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A) 527.

- in the territorial waters of South Africa;
- inside South Africa within 10 kilometres or any reasonable distance from such territorial waters; or
- at any airport or within any reasonable distance from such airport.¹²⁰

Section 13(7) of the SAPS Act provides for searches in an area cordoned off for purposes of public order or safety. The National or a Provincial Commissioner may, “where it is reasonable in the circumstances to restore public order or to ensure the safety of the public in a particular area”, authorise in writing that a particular area be cordoned off, specifying the period (which may not exceed 24 hours), the area and the object of the cordoning off. On the strength of this authorisation, a police official may, “where it is reasonably necessary” to achieve the objective of the authorisation, conduct a search without a warrant (and, presumably without reasonable grounds) of any person, premises, vehicle or receptacle or “any object of whatever nature” and seize any article that may afford evidence of the commission of an offence. Given the broad purpose of the search, there may be insufficient safeguards to achieve the necessary balance between the rights of citizens and law enforcement concerns.¹²¹ The requirement of reasonable grounds for the search of individual premises may be abandoned, but the cordoning off of a particular area should be based on reasonable grounds.¹²²

¹²⁰ See South African Police Service Amendment Act, 1997 (Act 41 of 1997).

¹²¹ Steytler *supra* 95.

¹²² *Ibid.*

“.. the length, objective and intrusiveness of the search should also be reasonably justifiable. It is submitted that there are not sufficient reasons to abandon the principle that an independent and impartial person should be the final arbiter before such drastic measure is taken. The National or a Provincial Commissioner, although of the highest rank in the Police Service, does not stand detached from the search which makes it difficult to bring an independent discretion to bear on the matter. In view of the serious inroads on the right to privacy, it is submitted that a judicial officer would be a more suitable person to make the decision whether the public order or safety has been disturbed or threatened and whether the search to be conducted will assist in remedying the situation.”

Where it is reasonable in the circumstances in order to exercise a power or perform a function referred to in the Constitution,¹²³ section 13(8)(a) of the SAPS Act provides that the National or Provincial Commissioner may authorise a police official in writing to set up:

- a roadblock(s) on any public road in a particular area; or
- a checkpoint(s) at any public place in a particular area.

Section 13(8)(c) empowers a police official who is so authorised, to set up such a roadblock or checkpoint, as the case may be.

In terms of section 13(8)(g)(i) a police official who sets up such a roadblock or checkpoint may:

- search without a warrant any person or vehicle that is stopped or any receptacle or object of whatever nature that is in the possession or in, on or attached to such a vehicle, and
- seize any article referred to in section 20 of the Criminal Procedure Act, that is found in the possession of the person or in, on or attached to the receptacle or vehicle.

In *Sithonga v Minister of Safety and Security and Others*¹²⁴ the court maintained that it is common cause that section 13(8) restricted the setting up of checkpoints to public places. However the Act did not define what a public place was. It was further held that an authorisation in terms of the Act must describe the place where the checkpoint was to be set up with sufficient particularity.

Section 13(8)(d) of the SAPS Act, provides that a police official may set up a roadblock for the purposes of seizing certain articles without written authorisation from the National or a Provincial Commissioner, if such a police official reasonably believes that:

¹²³ See objects of the police in section 205(3) of the Constitution.

¹²⁴ 2008 (1) SACR 376 (T).

- there is an object which is concerned in, or may afford evidence of, or is intended to be used in the commission of an offence listed in Schedule 1 of the Criminal Procedure Act, and
- such object is present in or is about to be transported in a motor vehicle in a particular area, and
- a search warrant will be issued to him or her under section 21(1)(a) of the of the Criminal Procedure Act if he or she has reason to believe that the object will be transported in a specific vehicle and he or she has applied for a search warrant, and
- the delay that will be caused by obtaining the authorisation in terms of section 13(8)(a) (from the National or Provincial Commissioner) will defeat the purpose of the roadblock.

In these circumstances a roadblock may be set up by such a police official on any public road or roads in that area, in order to determine whether a vehicle is in fact carrying such an object.

The requirement that a Commissioner may exercise this power only where it is “reasonable in the circumstances” imposes an objective test.¹²⁵ The purpose of the roadblock ought to be reasonable. A specified objective for the roadblock should be formulated, the objective of which can be assessed. A general crime prevention roadblock grants police officers unstructured search powers which are open to abuse and arbitrary action, while a limited objective, such as the search for weapons, would focus and confine police actions.¹²⁶

3.2 In the United States

Most often roadblocks are used as a means of enforcing regulations concerning the use of vehicles on public highways,¹²⁷ whereas a checkpoint is

¹²⁵ Steytler *supra* 102.

¹²⁶ *Ibid.*

¹²⁷ LaFave *supra* 210. See also *Delaware v Prouse* 440 US. 648 (1979) 288.

maintained in order to check drivers' licences and vehicle registrations. As a means of detecting crime the Model Code of Pre-Arrest Procedure¹²⁸ provides that:

A law enforcement officer may, if

- (a) he has reasonable cause to believe that a felony has been committed; and
- (b) stopping all or most automobiles, trucks, buses or other such motor vehicles moving in a particular direction or directions is reasonably necessary to permit a search for the perpetrators or victim of such felony in view of the seriousness and special circumstances of such felony, order the drivers of such vehicles to stop, and may search such vehicles to the extent necessary to accomplish such purpose. Such action shall be accomplished as promptly as possible under the circumstances.

Although the Model Code encompasses any type of felony, this is not objectionable given the fact that in addition it must appear that a roadblock is "reasonably necessary". However, a general roadblock may not be established on the chance of finding someone who has committed a serious crime.¹²⁹ It is not permissible for the police to blockade a high crime area and search all cars leaving that area,¹³⁰ or to establish roadblocks to curb juvenile problems.¹³¹ Such tactics such as these pose the most serious threat to the interest of privacy.¹³² On the contrary *Whren v United States*¹³³ which addressed the issue of the "pretext stop" that is stopping a vehicle to search for evidence of a crime under the guise of a traffic stop, plain clothes officers saw a truck wait at a stop unusually long, turn suddenly without signalling and

..... except in those situations in which there is at least clear articulable, reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's licence and the registration of the automobile is unreasonable under the Fourth Amendment.

¹²⁸ Model Code of Pre-Arrest Procedure 110.2(2) (1975) US.

¹²⁹ *Carroll v United States* 267 US 132 45 S.Ct. (1925) 377.

It would be intolerable and unreasonable if a prohibition agent were authorised to stop every automobile on the chance of finding ... and thus subject all persons lawfully using the highways to inconvenience and indignity of such search.

¹³⁰ *Wiring v Horall* 85 Cal. App. 497 (1948) 172.

¹³¹ *People v Gale* 46 Cal. 2d 253 (1956) 229.

¹³² *State v Hillesheim* 291 N.W.2d 314 (Iowa 1980) 381.

¹³³ 517 US 806 (1996) 279.

then speed away. The officers stopped the vehicles and as they approached it, they saw the defendant holding bags of crack cocaine. The defendant argued that the police used the traffic stop as a pretext to uncover the drugs. The Court held that as long as probable cause existed to believe a traffic violation occurred, stopping the motorist was reasonable: Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

While the police have a reason for conducting roadblocks, they check everyone rather than a particular individual.¹³⁴ Checkpoints at or near borders need no justification to stop all vehicles to check for illegal entrants into the United States.¹³⁵ The Supreme Court has held that the government's compelling interest in protecting the nation's borders alone justifies stopping any vehicle or individual, but may not be done based on ethnicity, religion or the like.

3.3 In Canada

Similarly in Canada warrantless searches of vehicles that are not connected to driving are permissible if the reasonable expectation of privacy is diminished. Where the search is part of a routine regulatory search concerning motor vehicles' roadworthiness, reasonable grounds are not required, but the search should be confined to that purpose.¹³⁶ In *R v Mellenthin*¹³⁷ it was held as follows:

The primary aim of the program [of random roadblocks] is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of checkpoints should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search.

¹³⁴ *United States v Martinez-Fuerte* 428 US 543 (1976) 159.

¹³⁵ *Ibid.*

¹³⁶ *R v Mellenthin* (1992) 76 CCC (3d) 481 (SCC) 487. Cited Steytler *supra* 101.

¹³⁷ *Ibid.*

Automobiles and other means of transport often create exigent circumstances because of the likelihood of movement before a warrant could be acquired.¹³⁸ In *R v D. (I.D.)*¹³⁹ the Court of Appeal rejected a blanket exception from prior authorisation for vehicle searches, something that is accepted in American jurisprudence. Where it is feasible to obtain one, a warrant is necessary before searching a vehicle.

Intrusive searches of the driver or the vehicle would probably be subject to challenge as an infringement of section 8.¹⁴⁰

In *R v Debot*¹⁴¹ the trial court held that a stop and search of a vehicle and its occupants based on an instruction received from another member of a surveillance team was unreasonable because the officers “did not exercise any direct independent mind of their own to determine whether or not what they were doing was arbitrary.” The search was based on “suspicion and hope”. However the presentation appeal was allowed on the basis that reasonable grounds for belief existed in the mind of the searching officers. It was said to be:

unrealistic and incompatible with effective law enforcement and crime prevention when a police officer is requested by a superior or fellow officer to arrest or search a person suspected of the commission of crime and to be fleeing from the scene, to require that police officer to obtain from his or her superior or fellow officer sufficient information about the underlying facts to enable him or her to form an independent judgement upon which to arrest or search the suspect.

3.4 Concluding remarks

The South African Police Service Act makes provision for a wide array of searches. The National or a Provincial Commissioner may in circumstances

¹³⁸ *R v D. (I.D.)* (1987) 61 C.R. (3d) 292 (Sask. C.A) 638.

¹³⁹ *Ibid.*

¹⁴⁰ *R v Ladouceur* (1990) 77 CR (3d) 110 (SCC) 412.

¹⁴¹ (1986) 30 CCC (3d) 207.

“where it is reasonable in the circumstances to restore public order or to ensure the safety of the public in a particular area” authorise in writing that the area be cordoned off, specifying the period which may not exceed 24 hours, the area and the object of the cordoning off. A police official may on the strength of this authorisation, conduct a search without a warrant (and probably without reasonable grounds) of any person, premises, vehicle or receptacle or “any object of whatever nature” and seize any article that may afford evidence of the commission of an offence.

The power granted to police officials here is very wide, almost without limits. There appears to be inadequate safeguards to ensure the necessary constitutional balance between the rights of citizens and law enforcement prerogatives. The cordoning off of a particular area should be based on reasonable grounds.¹⁴² Importantly, the length, objective and intrusiveness of the search need also be reasonably justifiable. There are insufficient grounds to depart from the principle that a neutral and independent arbiter should decide, before such a “fundamental rights” restricting measure is taken. The National or Provincial Commissioner does not stand detached from the search, which can impede impartiality in the matter. The decision to cordon off is not made instantaneously hence the objectives of the search would not be defeated by obtaining prior judicial authority.

Similarly section 13(8) of the South African Police Service Act allows the setting up of roadblocks and checkpoints without prior authorisation for searches of vehicles and persons and seizures.

Section 13(8)(d) stipulates that any member of the Police Service, under reasonable suspicion may set up a roadblock without prior authorisation, where the delay in obtaining prior authorisation to set up the roadblock will defeat the object. Reasonable suspicion relating to crimes incidental to making an arrest, is constitutionally acceptable. Such searches incidental to arrest are constitutionally justifiable in the interests of law enforcement. Section 13 of the Police Act nowhere makes provision for a person who is

¹⁴² Steytler *supra* 95.

confronted with a roadblock or checkpoint, to be informed in advance of reasons for the roadblock or checkpoint. This appears to be in conflict with the Constitution.¹⁴³ The Police Act stipulates that unless a person expressly requests reasons for setting up of a roadblock, there is no legal duty on the police to inform such person thereof. The argument submitted above applies *mutatis mutandis* to roadblocks and checkpoints.

General crime prevention roadblocks give police officers subjective, discriminatory, unstructured powers which are open to abuse and arbitrary action, while a limited objective such as the search for stolen vehicles or weapons, would focus and restrict police actions.

In the United States the Fourth Amendment prefers a warrant because it necessitates judicial review of government action.¹⁴⁴ “The presumption exists that a warrantless search is unreasonable, thus unlawful and therefore invoking the exclusionary rule with the resulting evidence not permitted in court. But, reasonableness itself dictates that government action may become necessary before getting a warrant signed by a judge. Such practical measures as time, emergency circumstances or probable destruction of evidence or escape of a criminal have resulted in legitimate exceptions being made to the general requirement of a warrant.”¹⁴⁵ Through the development of case law, the Supreme Court has defined the following searches without a warrant to be reasonable under the Fourth Amendment: consent search, frisks, plain view, incident to arrest, exigent circumstances.

4. Conclusion

Exceptions to the general rule that prior authority should be obtained before conducting a search are accepted in a number of contexts. Firstly, where exigent circumstances are present it is accepted that the maintenance of law

¹⁴³ See section 12(1) of the Constitution.

¹⁴⁴ Harr and Hess *supra* 226.

¹⁴⁵ *Ibid.*

and order overrides the need for judicious consideration of privacy rights. Secondly, where no reasonable suspicion is required, then as a general rule no judicial supervision is required. Further where a person consents to the invasion of his or her privacy, the requirement of reasonable grounds and prior authorisation fall away.

The position regarding warrantless search and seizure in the United States is similar in many respects to our law. Similarly the position in Canada is also enlightening and bears some resemblance to our law. Section 8 of the Canadian Charter protects the privacy of persons. Intrusions on privacy through searches and seizures can only take place where it is justifiable for the privacy interest of the public to yield to the state interest in law enforcement or other supportable goals. In both American and Canadian jurisdictions, government conduct that intrudes on a justified expectation of privacy is considered a search or a seizure and must be reasonable to pass constitutional scrutiny.

Warrantless searches and seizures are rather unpredictable and by their very essence unreasonable when viewed from a constitutional perspective, primarily because they violate constitutional rights and impose an unreasonable burden on those who endeavour to defend their individual privacy rights enshrined in the Constitution, against such arbitrary intrusions founded on subjective discretionary powers.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

The birth of the Constitution with an entrenched Bill of Rights can be viewed as the most important event in South African legal history. The right to privacy, the right to freedom and security of the person and associated fundamental rights places an onerous duty on the courts as guardians of the Constitution, to prevent manipulation of the criminal justice system by law enforcement agents of the state. The inherent function of the Bill of Rights is to safeguard the fundamental rights of individuals when they came into contact with the organs of the state. The Bill of Rights places a positive duty on the state to safeguard the fundamental rights of the inhabitants of South Africa. Everyone has the right to be free from all forms of violence, whether from private or public sources.¹ The state must respect, protect, promote and fulfil the rights in the Bill of Rights,² a task which ought to be performed diligently and without delay,³ in order to improve the quality of life of all citizens and free the potential of each person.⁴

[I]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.⁵

¹ Section 12(1)(c) of the Constitution.

² Section 7(2) of the Constitution.

³ Section 237 of the Constitution.

⁴ Preamble to the Constitution.

⁵ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 2002 3 (cited by Laurence H Tribe and MC Dorf *On reading the Constitution* 21 Cambridge

In the absence of a Bill of Rights, the right to privacy and other affected fundamental rights, have often in South Africa been violated by the legislature and the executive through for instance, laws conferring wide powers of search and seizure on the police.⁶

With regard to international law section 39(1) of the Constitution provides that a court or tribunal in interpreting the Bill of Rights must consider international law. With regards to foreign law the Constitution allows a court, when interpreting the Bill of Rights to consider foreign law.

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.⁷

The most significant constitutional remedy for the infringement of a constitutional right is the exclusion of evidence in terms of section 35(5) of the Constitution. The dominant rationale for the exclusionary rule is that it is a preventive measure against illegal police action. By denying them the products of unlawful actions, the police are disciplined and discouraged from acting unlawfully.

Havard Press 1991 6).

⁶ See for example section 25 of the Criminal Procedure Act.

In terms of section 25(1)(b) a police official may without a warrant enter a premises and search the premises or any person on that premises for any article under section 20 of the Criminal Procedure Act for the maintenance of law and order or the internal security of the Republic. The police official who acts in terms of this section may take such steps as "he considers necessary". The police official is therefore permitted a subjective discretion.

⁷ Section 36(1) of the Constitution.

2. The essence of laws governing search and seizure

Our Constitution is considered the cornerstone of South African freedom. The Constitution is unique because it speaks not only to the desire for freedom, but also to the need therefore. The essence of being a South African to many means the right to be left alone by the state, the right to be safe in their persons, houses and property. While many of us take it for granted, one of the most significant advantages of living in South Africa is to be able to live unimpeded by the state.

Constitutional control ensures that people can enjoy security of home, property and person without fearing intrusion by the state seizing property and assets just because they desire to do so under the umbrella of law enforcement. On the contrary, this security does not mean that the state is barred from carrying out its responsibilities. Limited state power is imperative for the laws of our country to be enforced and for the business of the state to be performed. But a balance is required for a democracy such as ours to prevail, a balance between the power of the state and the freedom of its people; and that is what the law of search and seizure is all about. The introductory chapters addressed the importance of the Constitution to law enforcement and the criminal justice system.

3. Search and seizure

Crime investigation entails obtaining evidence through the searches and seizures of persons, places and things respectively. South African law acknowledges that state authorities should not be permitted untrammelled access to search and seizure. It is a necessary incident of constitutionalism that citizens must be protected from unjustified invasion of their privacy and property by agents of the state. If the latter is not realised arbitrary state actions could severely hamper and prejudice the individual's personal freedom and associated rights that are intended to be a

predominant feature of constitutionalism. Historically the police have required legal authority for conducting searches and seizures. The Criminal Procedure Act has long provided the only legal basis for obtaining warrants to search for and to seize or for performing such actions without a warrant in some circumstances.

The basic human right to privacy is entrenched in section 14 of the Constitution which includes the right not to have one's person, home or property searched or possessions seized. Other constitutional rights that are affected by searches and seizures are the rights to human dignity,⁸ freedom and security of the person⁹ and the right not to be deprived of property.¹⁰ These rights must always be respected, protected and promoted by the state. It is accepted that crime cannot always be effectively combated or investigated unless police officials are adequately empowered to do so. There are two conflicting schools of thought: on the one hand the interest of society in safeguarding human rights, which is of critical importance in a democracy, and on the other hand, the concern of society in combating crime. The two interests ought to be balanced. This is to be achieved by limiting the powers of police relating to search and seizure, as well as related powers, because unlimited or absolute powers will negate the essence of the fundamental rights entrenched in the Constitution. On the other hand these rights can be limited by requiring citizens to sometimes submit themselves to lawful searches and seizures of their persons and/or property.

Since the enactment of the Constitution, there have been additional constraints on search and seizure powers. This has come through the guarantee in section 14 not to have one's person or home or property searched and not to have one's property seized. The most important legislative provisions that prima facie infringe these

⁸ Section 10 of the Constitution.

⁹ Section 12(1) of the Constitution.

¹⁰ Section 25 of the Constitution.

rights are to be found in the Criminal Procedure Act.¹¹ The effect of the Constitution has been to greatly change the law relating to search and seizure, perhaps as much as it has provided greater protection against self incrimination. In many cases the failure of the police to abide by otherwise constitutional search and seizure powers has been held to breach section 14.

The discussion of the Fourth Amendment of the Constitution of United States¹² and the Canadian Charter of Rights and Freedoms reveals similarities between our law pertaining to search and seizures and the law of those countries.¹³ Nevertheless there are some enlightening and conspicuous differences and lessons to be learnt. In the United States, the language of the Fourth Amendment first ascribes the right to the people, not to any person as under our Constitution.¹⁴ Secondly the framers choice of language might be important in properly interpreting the Amendment. It tends to regulate or control the conduct of the state and federal government so that Fourth Amendment violations do not occur rather than on fashioning remedies for

¹¹ Cheadle.....*et al. supra* 191.

¹² *Stanford v Texas* 379 U.S. 476, 85 S. Ct. 506 (1965). "... The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, ... and particularly describing ... things to be seized." (emphasis added). These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever "be secure in their persons, houses, papers, and effects" from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedevilled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced ... as the "worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book" because they placed "the liberty of every man in the hands of every petty officer."

¹³ Refer to the discussion on United States and Canada in Chapters 2-3.

¹⁴ It also concluded in *US v Verdugo-Urquidez* 110 S.Ct. 1056 (1990) 51 that the word "people" in the Fourth Amendment covers only members of the national community and not non-resident aliens.

only those individuals who have suffered a personal Fourth Amendment wrong. Thirdly, the Fourth Amendment covers searches and seizures of “persons, houses, papers and effects,” and draws no distinct line between seizure of persons and objects. That no distinction was intended finds a certain amount of support in the closing six words of the Fourth Amendment.¹⁵ Fourthly, the Fourth Amendment has two parts. The first part deals with unreasonable searches and the second part with warrants. Since the term unreasonable is used first, it might be perceived to predominate so that all searches and seizures must satisfy its command, while the warrant clause would come into operation only when a warrant is sought to justify government action. Similar to our Constitution, the Fourth Amendment plainly recognises a right, but does not indicate against whom it applies. It can be argued that the people have a right to be free from all searches and seizures that are unreasonable, even if conducted by private persons. However our Constitution and the Fourth Amendment have generally been interpreted as providing protection only against the state or federal government and those acting on behalf of it. Further nothing in the language of our Constitution or the Fourth Amendment limits their applicability solely to criminal investigations or to the police.

In Canadian law which is similar to our law, it is a fundamental right of every citizen to be secure against unreasonable and arbitrary searches by the police and the seizure of property for utilisation as evidence. In the renowned case of *Entick v Carrington*¹⁶, Lord Camden stressed that [i]:

¹⁵ “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, the person or things to be seized.”

¹⁶ *Supra* 275.

It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be cruel and unjust; and it would seem, that the search for evidence is disallowed upon the same principle.

The right to search a man's home or premises is regarded as an extraordinary remedy that may be exercised only where there is a clear and unambiguous statutory provision permitting it. Unless the police are in possession of a warrant or other specific authority, they have no right to enter private premises and remain there. The crucial word in section 8 of the Canadian Charter is "unreasonable." It simply means to reach a conclusion based on suspicion instead of "credibly based probability."¹⁷ It is not enough to be merely suspicious. A police officer must have reasonable cause to search a place or person. An officer only has reasonable cause to believe when he or she is able to indicate some information in his or her possession that would lead a reasonable person to conclude that his or her belief is probably true. A similar meaning is attached to the reasonable grounds in South African law.

4. Search and seizure in terms of a search warrant¹⁸ and warrantless search and seizure¹⁹

4.1 Search with a warrant

Section 21 of the Criminal Procedure Act makes provisions for searches in terms of a search warrant. If a magistrate or justice of the peace believes that there are reasonable grounds for believing that an article referred to in section 20 is in the

¹⁷ *Hunter v Southam supra* 97.

¹⁸ Please refer to discussion in chapter 4.

¹⁹ Please refer to discussion in chapter 5.

possession or under the control of any person or upon any premises, and such information is provided to him or her under oath a warrant may be issued. For a search to be lawful the premises to be searched must be clearly defined in the warrant.²⁰ Contrary to section 21 of the Criminal Procedure Act section 14 of the Constitution protects the right not to have one's person or property searched. The Criminal Procedure Act therefore *prima facie* infringes this right. However in the context of criminal justice a search for and seizure of articles can be considered legitimate for the following purposes: may afford evidence of the commission or suspected commission of an offence;²¹ to be confiscated because their possession is unlawful;²² to return them to their rightful owner;²³ and to be forfeited to the state if they were used in the commission of a crime.²⁴

The two main grounds to ensure the reasonableness of a search are the requirements of objective grounds for the search and prior judicial authorisation. These safeguards are inherent in South African law and are also profound in the jurisprudence of the United States and Canada.

A judge or judicial officer may issue a search warrant if it appears to such judge or judicial officer once a criminal trial has started that an article in question is required as evidence before him or her. The search warrant authorises a police official to seize the article in question and to search any person identified in the warrant or to enter and search any premises identified in the warrant and to search any person found on or at the premises. A search warrant must be executed by day unless a police official is specifically authorised to execute it at night. A search warrant must

²⁰ *Toich v The Magistrate, Riversdale and Others* supra 235.

²¹ Section 20(b) of the Criminal Procedure Act.

²² Section 31 of the Criminal Procedure Act.

²³ Section 30(b) of the Criminal Procedure Act.

²⁴ Section 35 of the Criminal Procedure Act.

be interpreted strictly and cannot authorise the seizure of articles not strictly related to the investigation concerned.²⁵

In the United States, the Fourth Amendment is debatably similar to our Constitution as it also protects a person's right to be free from unreasonable searches and seizures. The preferred way to conduct a search, and one that is universally recognised, is in terms of a valid search warrant. In the United States it is the function of a judicial officer to issue a search warrant. The United States Supreme Court made it clear that neither prosecutors nor police officers can be asked to maintain the requisite neutrality when deciding whether a search warrant should be issued.²⁶ This principle is not fully adhered to in South African law. In South Africa as a general rule a search should also be authorised by a judicial officer.²⁷ However this power is also extended to justices,²⁸ who include commissioned officers in the South African Police Services, National Defence Force, Correctional Services, director of public prosecution and state prosecutors. It is objectively questionable whether the person who is issuing the search warrant, as part of the office of the executing officer can be regarded as neutral or detached.

The United States Constitution requires that a warrant must be supported by oath or affirmation. This is similar to South African law. Section 8 of the Canadian Charter of Rights and Freedoms is also similar to South African constitutional provisions. In *Toich v The Magistrate, Riversdale and Others*²⁹ the court maintained that:

... the validity of a search warrant was to be examined with a jealous regard for the subject's right to privacy and property. ... the magistrate or justice of the peace authorising the warrant must be

²⁵ *Bennet and Others v Minister of Safety and Security and Others* 2006 (1) SACR 523 (T) par 24

²⁶ *Coolidge v New Hampshire supra* 443.

²⁷ Section 21(1) and section 25 Criminal Procedure Act.

²⁸ Section 21(a) Criminal Procedure Act.

²⁹ 2007 (2) SACR 235.

satisfied by information on oath not only that the articles to be searched for and seized was under the control or in the possession of a specified person or specified premises within his or her jurisdiction....

An important difference between the Canadian Charter of Rights and Freedoms, the South African Constitution when compared to the Fourth Amendment is that the Fourth Amendment specifically requires a police official, before conducting a search to obtain a search warrant based upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. In discussing probable cause for the issuance of a search warrant, the United States Supreme Court made the following assertion:

If the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offence charged, there is probable cause justifying the issuance of a warrant.³⁰

In the United States there is no requirement that proof beyond reasonable doubt (which is a South African legal standard) be furnished, but he or she must show more than a mere suspicion (reasonable grounds). The United States Supreme Court explained the probable cause standard as follows:

The term “probable cause” means less than evidence which would justify condemnation It imports a seizure made under circumstances which warrant suspicion ... finely tuned standards such as beyond a reasonable doubt or by the preponderance of evidence, useful in formal trials, have no place in the magistrate’s decision.³¹

The Court reiterated that “probable cause” requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.

³⁰ *Dumbra v United States* 268 US 435 (1925).

³¹ *New York v P.J. Video, Inc.* 475 US 868 (1986).

In Canadian law three important principles pertaining to search and seizure are:

- where feasible prior authorisation is required;
- prior authorisation must be granted by someone who is neutral and impartial and capable of acting judicially (in South Africa the capacity to act judicially is not a prerequisite); and
- the person granting authorisation must be satisfied on oath that there are reasonable and probable grounds for believing both that an offence has been committed and that a search of the place for which the warrant is sought will find evidence related to that offence.³²

These principles are in essence similar to South African law.

4.2 Search without a warrant

Section 22 of the Criminal Procedure Act provides for search and seizure without a warrant. Section 22 can be divided into two parts:

- firstly a search conducted with the consent of the person concerned, and
- secondly a search conducted on the reasonable belief that a warrant will be issued to a police official and that a delay in obtaining a warrant will defeat the object of the search.

Where a search is conducted with the consent of the person concerned it places the police official in a much more advantageous position than a search without consent. It eliminates the procedural burden on the police official to prove the existence of reasonable grounds to search. Therefore the police official should where it is

³² *Hunter v Southam supra* 157.

reasonably practical to do so, make it clear that he or she seeks the voluntary co-operation of the person concerned, and should request for consent to search for a section 20 article.³³ Although reasonable ground becomes irrelevant where consent is granted, an onerous duty still rests on the police official to conduct the search with due regard to the individual's fundamental rights to be treated in humane and dignified manner, as encapsulated in the Constitution.

The Criminal Procedure Act makes provisions for a number of instances, depending on the objective thereof where a search of premises may be conducted without a warrant. Each of these instances describes the specific circumstances where a search may be undertaken, based solely on the subjective opinion of the police official conducting the search. These instances include:

- where a police official wishes to enter a private premises for the purpose of a search for and seizure of an article mentioned in section 20 he is generally required have a search warrant. He or she is not compelled to, as it is not an absolute requirement. It should also be noted that the Criminal Procedure Act does not differentiate between search of a private dwelling and other premises.
- Where a police official is of a reasonable "opinion" that an article which is the object of a search "may be destroyed" if he or she demands entry and states his purpose, he or she may with or without the use of force enter the premises without prior notice.³⁴ The word opinion obviously has a subjective connotation.
- Where a police official in the investigation of an offence or alleged offence, reasonably suspects that a person is in possession of information concerning

³³ See also *S v Motloutsi supra* 112.

³⁴ Section 27 Criminal Procedure Act.

an offence or alleged offence, is on any premises including a private premises, he or she may enter such premises without a warrant for the purpose of interrogating and obtaining a statement from such person.³⁵ Where the premises is a private dwelling the consent of the occupier has to be obtained. No provision is made in the Criminal Procedure Act if the premises is not a private dwelling. It can be assumed that no consent is required. Should the police official meet any resistance and he or she is compelled to enter the premises by force, he or she may enter the premises, provided he or she audibly demands entry and states his or her purpose.³⁶ No provision is made for persons who are hearing impaired (“audibly demand admission”).

- A police official may also without a warrant enter any premises and search the premises or any person on the premises for any article mentioned in section 20 for the maintenance of law and order, or the internal security of the Republic, which is likely to be threatened by a meeting or in consequence thereof.³⁷ A police official who acts in terms hereof may take “such steps as such police official may consider necessary,” for the preservation of the internal security of the Republic or prevention of crime (which can be a crime of a trivial nature). The latter creates a subjective standard. This section violates fundamental rights enshrined in the Constitution.

By comparison, there are no provisions in the United States' Fourth Amendment that authorise a search without a warrant. Despite this it was not the intent of the framers of the American Constitution to condemn all warrantless searches.

- Firstly, similar to South African law, search without a warrant is authorised when it is made incident to a lawful arrest. In order for the search to be lawful

³⁵ Section 26 Criminal Procedure Act.

³⁶ Section 27 Criminal Procedure Act.

³⁷ Section 25 Criminal Procedure Act.

the arrest ought to be lawful and the search must be made contemporaneously with the arrest.

- Secondly, similar to South African law a person may waive the rights guaranteed by the Fourth Amendment voluntarily and freely, to allow a so-called “consent search”.
- Thirdly, as in South African law, warrantless searches of movable objects and vehicles are authorised, provided that there is probable cause that would have justified the issuance of a search warrant and the vehicle or article is moving or about to be moved.
- Because the American Constitution only protects against unreasonable searches and seizures, a seizure of articles does not violate the Constitution where there is no search. For the plain view exception to apply, the police official must be lawfully present on the premises when he or she views the object and must have probable cause to believe that the article is illegally possessed or subject to seizure. Unlike our Constitution the Fourth Amendment relates only to persons, houses, papers and effects.
- In the United States there is also the concept of “stop and frisk”, where the police stop suspicious persons on the street or other public places for purposes of questioning them or conducting some investigation. This technique is ordinarily employed when there are no grounds to arrest the suspect and to search him incident to the arrest. Stop and frisk is justifiable in the United States.³⁸

Similarly, in Canada the Charter of Rights and Freedoms requires prior authorisation and reasonable and probable grounds as a standard for overriding individual privacy interests. There are two ways in which departure from these standards may occur. Firstly, in situations involving exigent circumstances, where a warrantless search or

³⁸ *Terry v Ohio supra* 1868.

seizure may be justified. Secondly, in situations a search and seizure may take place on less than reasonable and probable grounds for believing that an offence has been committed and that evidence will be located at the place of the search or seizure.

4.3 Roadblocks

The South African Police Service Act also provides for various searches without a warrant. Roadblocks and checkpoints may be set up without prior authorisation for purposes of searching vehicles and persons, and for seizures.³⁹ A police official acting under reasonable suspicion may set up a roadblock or checkpoint without prior authorisation if the delay in obtaining prior authorisation will defeat the object of the search.⁴⁰ Section 13(8) of the South African Police Service Act does not make provision for a person who is the subject of a roadblock or checkpoint to be informed of the reasons therefore. This is constitutionally questionable. Furthermore the South African Police Service Act provides that where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, the National or a Provincial Commissioner may in writing authorise that the particular area or a part of it to be cordoned off.⁴¹ In this provision there appears to be insufficient safeguards to protect and achieve the necessary balance between the fundamental rights of individuals and law enforcement prerogatives. Provision should also be made for the objective and duration of the search to be reasonably justifiable. The National Commissioner and Provincial Commissioner are of the highest rank in the SAPS, but as they are still part of the office of the executing officials, their independence and neutrality comes into question.

In the United States the following warrantless searches are constitutionally reasonable and justifiable:

³⁹ Section 13(8) South African Police Service Act.

⁴⁰ Section 13(8)(d) South African Police Service Act.

⁴¹ Section 13(7) South African Police Service Act.

- Warrantless vehicle searches where the vehicle contains evidence of crime.
- The investigatory stop and frisk procedure outlined in *Terry v Ohio*.⁴²
- Searches incidental to a lawful arrest.

In Canada warrantless searches of vehicles that are not connected to driving are reasonable where the expectation of privacy is diminished or non-existent. Vehicles are less valued as private domains. Random stops of motor vehicles for routine inspections for purposes of public safety are considered to constitute minimal infringement of the expectation of privacy and do not constitute searches within the meaning of section 8 of the Charter of Rights and Freedoms.

In conclusion the laws pertaining to search and seizure are complicated and sometimes difficult to interpret. This area of police work is susceptible to abuse and litigation. It is a fundamental right of every South African to be secure against arbitrary and unreasonable searches by the state and seizure of property. Attempts to abrogate this right have been strongly and consistently restricted by our courts.

⁴² *Supra* 1868.

5. Recommendations

5.1 Knowing the law

Our laws on search and seizure are largely in line with international trends. The law relating to search and seizure is complex but not impossible to understand. Probably more evidence is inadmissible in criminal cases because of the failure of police officials to follow the legal provisions relating to search and seizure than for any other reasons. If the state's police officials are to carry out their responsibilities diligently, it is a necessity that they are knowledgeable about the laws relating to search and seizure. This implies that police officials must determine prior to the search, whether it is conducted with or without a warrant, the grounds on which they can justify their search before a judicial proceeding. Searches are generally valid because they are made: (1) with a warrant; (2) incident to a lawful arrest; or (3) with consent. If a police official is cognisant of all the legal requirements by which a search and seizure may be validated, he or she can make the determination at the time of the search and seizure and not after it has commenced. On the other hand, if a police official cannot base his or her search on a legal justification, it is better not to conduct the search at all. Once evidence has been contaminated by an illegal search it will not be admissible in court. The failure of the police to adhere to the mandates of our Constitution results not only in the case being dismissed or lost, but also in possible liability on the part of the police official, as well as the state. Failure on the part of the state to properly train and supervise police officials, as well as to enact and enforce constitutional requisites will often result in civil action.

Our Constitution is the guiding light of the criminal justice system. The police need to embrace constitutional development. According to the Constitution, police officials

are responsible for upholding and enforcing the law.⁴³ All policing powers and duties are prescribed by law. All South African police officials must know, understand and be able to apply the law in order to perform their duties diligently, effectively and to lawfully exercise their powers. South Africa is a very young democracy and because the majority of police officials served in the previous dispensation, it is important to understand and appreciate the role played by the law in a democracy. The conduct of the police official is at the core of search and seizure and the conduct of the police official should always demonstrate great deference to an individual's fundamental rights. In the name of constitutionalism the police official should implement search and seizure in a manner that is just and legal, with no potential intrusion into the individual's personal legal rights. Modern constitutional law enforcement supports doing the right thing, and decries unbridled or ill-tempered actions in search and seizure.

Indeed, the police face a dilemma when confronted with serious forms of crime. On the one hand, they are responsible for the protection of society and its citizens, and on the other hand, they must respect the constitutional rights of all individuals. When the level of crime is perceived to threaten the safety of society, the police often feel pressurised to take repressive measures at the expense of fundamental human rights. This is when vigilance is required because there is a risk of abusing individual rights on a grander scale in these extraordinary circumstances than in normal situations. The difficult task of the police is to ensure that a proper balance is achieved between the means necessary to protect democracy and the maintenance of the protection of individual rights. Therefore, police officials should be trained to balance the competing demands imposed upon them by the legal system and become objective, yet vigilant, law enforcers. Objectivity does not imply that police officials cannot be sympathetic and empathetic to the concerns and plight of those

⁴³ Section 205(3) Constitution.

who have been unjustly harmed, just as vigilance does not imply that police officials cannot be fair to those who have harmed and transgressed.

5.2 The Criminal Procedure Act

The following aspects of the Criminal Procedure Act pertaining to search and seizure are questionable from a constitutional perspective:

- Section 20 provides for what kind of articles may be seized by the state. The term “anything” in section 20 is very wide. It refers to any article. Equally the term “concerned” in section 20 is very wide. In the light of fundamental human rights it should be interpreted restrictively and an element of necessity to prove an offence should be attached to the provision.
- Section 21 provides for a warrant to be issued by a justice. In the light of the definition of “justice” in the Criminal Procedure Act, it is submitted that too many officials are empowered to issue warrants, and this practise could lead to warrants being issued without circumspection. With due regard to neutrality and objectivity, the power to issue warrants should be conferred on judicial officials.
- Section 21 also only makes provision for “information on oath”. Provision should also be made for “information on affirmation” in the light of fundamental human rights. Furthermore section 21 provides for a warrant to be handed to a person whose rights have been affected thereby “upon demand” of the person. The police are thus legally empowered to intrude on individual rights. In the light of the Constitution it is submitted that this provision should rather state that the police must provide a copy of the warrant to the person whose rights have been encroached upon, prior to the execution of the warrant.

- Section 22 empowers a police official who on reasonable grounds believes that a search warrant will be issued to him if he applies for a warrant and that the delay of obtaining a warrant would defeat the object of the search, he may search any person, container or premises without a warrant for any article mentioned in section 20. It is submitted that section 22 empowers the police official to seize even articles of a trivial nature on unidentified offences which may constitute evidence of little importance. This could lead to abuse of constitutional rights and these provisions should therefore be more specific and have a narrower ambit.
- In terms of section 25 a police official may take such steps as he “considers necessary” for the maintenance of law and order or the preservation of the internal security of the Republic or the prevention of crime. The offence here can be interpreted to be even a trivial offence. That which the police official considers necessary, permits a subjective discretion to be applied. This section tacitly permits violation of fundamental human rights and does not meet the proportionality test and will not survive constitutional muster. It ought to be revised.
- In terms of section 26 a police official must enter a private dwelling with the consent of the occupier, for purpose of interrogation and obtaining a statement in the investigation of an offence. No provision is made for premises which are not private dwellings, which again enables a police official to encroach upon constitutional rights where the premises is not a private dwelling. It is submitted that these provisions be revised to accommodate for such premises in order to prevent constitutional abuse.
- In terms of section 27 a police official must first “audibly” demand admission into a premises. This provision is discriminatory when one takes cognisance of the emphasis our Constitution places on fundamental rights. No provision is made for persons who are hearing impaired or have similar traits. Such persons should be communicated with in a manner in which they fully

understand the purpose of the police action. Section 27 also provides for the “opinion” of a police official. Again a subjective element attaches hereto.

5.3 The South African Police Service Act

The South African Police Service Act also makes provision for searches without a warrant. Section 13 (6) of the South African Police Service Act provides that a police official may search without a warrant or reasonable grounds, any person, premises, other place, vehicle, vessel or aircraft or any receptacle, and seize any article that is found and may be lawfully seized, where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic. This power is granted in respect of searches within a corridor of 10 kilometres or any reasonable distance from any border with a foreign state, or in South African territorial waters, or inside the Republic within 10 kilometres or any reasonable distance from such territorial waters. I submit that in view of the substantial state interest involved, searches without reasonable grounds in places adjacent to foreign borders would be a reasonable limitation on the right to privacy. Such searches are aimed at exercising control over the illegal movement of people or goods across the borders of South Africa. In view of South Africa’s geography the ten kilometre corridor would mostly be applicable in sparsely populated areas, where it would be ‘reasonably necessary’ to conduct routine roadblocks and searches in order to determine the legality of persons and goods. The ten kilometre areas along the coastline, which include major towns and cities, searches would be ‘reasonably necessary’ only when they are preceded by reasonable suspicion relating to the illegal movement of persons or goods.

Section 13(7)(a) of the South African Police Service Act provides that the National Commissioner or a Provincial Commissioner may, “where it is reasonable in the circumstances to restore public order or to ensure the safety of the public in a

particular area,” authorise in writing that a particular area be cordoned off, specifying the period, which may not exceed 24 hours, the area and the object of the cordoning off. This authorisation empowers a police official ‘where it is reasonably necessary’ to achieve the objective of the authorisation, to conduct a search without a warrant of any person, premises, vehicle or receptacle or any object of whatever nature and seize any article that may afford evidence of the commission of an offence. The cordoning off of a particular area should be based on reasonable grounds. There are insufficient reasons to depart from the principle that an independent and impartial person should be the final arbiter before such a drastic measure is taken. Although the National Commissioner or a Provincial Commissioner occupy the most senior positions in the police service, this does not detach or separate them from the search, which unfortunately makes the independence of the discretion they exercise very questionable. In view of the serious infringement of the right to privacy, it is recommended that a judicial officer is in a better position to decide whether the public order or safety has been threatened or disturbed, and whether the search to be conducted will help remedy the situation. The objectives and purpose of the search will not be defeated by obtaining prior judicial authorisation, since the decision to cordon off an area is rarely made instantaneously.

Section 13(8)(a) of the South African Police Service Act provides that the National Commissioner or Provincial Commissioner may authorise a police official in writing to set up:

- a roadblock or roadblocks on any public road in a particular area; or
- a checkpoint or checkpoints at any place in a particular area.

In *Sithonga v Minister of Safety and Security*⁴⁴ it was held that the SAPS Act did not define what a 'public place' was. The court indicated that the place where the checkpoint was to be set up should be clearly described in the authorisation. It is recommended that 'specific legitimate goals' should be provided in the authorisation.

⁴⁴ 2008 (1) SACR 376. In this case in terms of section 13(8) a police captain obtained authorisation to set up a checkpoint, but instead on the strength of such authorisation, searched private premises and seized vehicles found there. The authorisation did not constitute a search warrant. Because of the serious inroads on individual right to privacy the court held that section 13(8) should be interpreted restrictively. The search and seizure of vehicles was accordingly held to be unlawful.

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TABLE OF ABBREVIATIONS

Canadian Charter	Canadian Charter of Rights and Freedoms, Constitution Act 1982
Constitution	Constitution of the Republic of South Africa, 1996 Act 108 of 1996
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
Fourth Amendment	USA Constitution, the Fourth Amendment (ratified December 15, 1971)
ICCPR	International Covenant on Civil and Political Rights
Interim Constitution	Constitution of the Republic of South Africa, 1993
SAPS Act	South African Police Service Act 68 of 1995
United States	United States of America

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