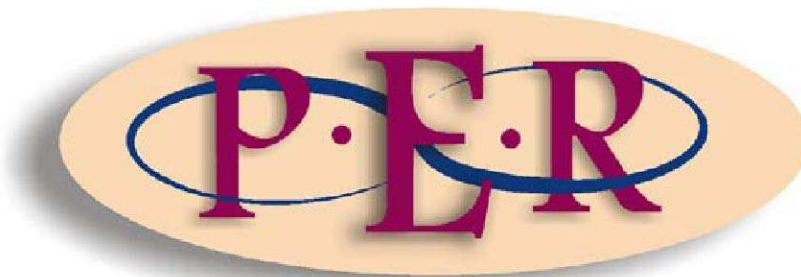

**THE CONSTITUTIONAL VALIDITY OF SEARCH AND SEIZURE POWERS IN SOUTH
AFRICAN CRIMINAL PROCEDURE**

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THE CONSTITUTIONAL VALIDITY OF SEARCH AND SEIZURE POWERS IN SOUTH AFRICAN CRIMINAL PROCEDURE

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Summary

An important part of crime investigation is the obtaining of evidence through the search and seizure of persons and things. The South African Constitution** recognises that state authorities should not be permitted untrammelled access to search and seize. It is a necessary incident to democracy that citizens must be protected from unjustified intrusions of privacy and property by agents of the state. Otherwise, arbitrary state actions could severely affect the personal freedom and associated fundamental rights that are intended to be a predominant feature of democratic society. In this article I consider whether or not certain provisions contained in the *Criminal Procedure Act* 51 of 1977 and the *South African Police Service Act* 68 of 1995 (hereafter the *Criminal Procedure Act* and the *South African Police Service Act* respectively) are in conflict with the Constitution. The provisions deal with search and seizure. I will also turn to the laws of foreign jurisdictions, specifically of the United States and Canada, for guidance and comparison.

At the outset it should be pointed out that this article does not argue for the abolition of the search and seizure provisions contained in the *Criminal*

** *Constitution of the Republic of South Africa* 1996.

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Procedure Act and the *South African Police Service Act*. It is acknowledged albeit reluctantly, that there may still be a need for some of them. It is the investigative and enforcement measures provided for by these provisions, rather than the objectives, which are in issue here. It is submitted that there are search and seizure provisions contained in the *Criminal Procedure Act* and the *South African Police Service Act*, which are inconsistent with the spirit, purport and object of the Constitution.

Keywords: Criminal law, evidence, search, seizure, privacy, criminal procedure, SAPS, South African Police Service, enforcement measures, provisions.

1 Introduction

The *Criminal Procedure Act*¹ had long provided the only legal basis for obtaining warrants to search and seize or to perform such actions without a warrant in certain circumstances. The *Criminal Procedure Act* embodies the general provisions with regard to searching. Specific provisions are contained in many other Acts.² Section 19 of the *Criminal Procedure Act* states that Chapter 2 of the Act shall not derogate from any power conferred by any other Act to enter any premises or to search any person, container or premises or to seize any matter, to declare any matter forfeited or to dispose of any matter. Therefore any other law that confers powers of search and seizure co-exists with the *Criminal Procedure Act* and is not repealed by the *Criminal Procedure Act*.

Since the enactment of the Constitution there have been additional constraints on search and seizure powers. There are now constitutionalised standards by

1 Act 51 of 1977. Hereinafter referred to as the *Criminal Procedure Act* or Act.

2 Eg, the *Special Investigating Units and Special Tribunal Act* 74 of 1996; the *Customs and Excise Act* 91 of 1964.

which such legal powers are measured. Section 14(a) of the Constitution³ 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.⁴

The most important legislative provisions that prima facie infringe these rights are to be found in the *Criminal Procedure Act*.⁵ 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.⁶

The truism that no right is absolute perhaps applies more to privacy than 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 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).

3 *Constitution of the Republic of South Africa* 1996. S 14 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."

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

5 Cheadle, Davis and Haysom *South African Constitutional Law* 51

6 Cited *National Director Public Prosecutions v Mahomed* 2008 (1) SACR 309 (SCA).

2 The South African perspective

2.1 Search and seizure in terms of the Criminal Procedure Act

2.1.1 Search and seizure

In the South African legal context, the terms search and seizure are not clearly defined.⁷ The question of what constitutes a search is left to common sense and is determined on a case by case basis. It is maintained that an element of physical intrusion concerning a person or property is necessary to establish a search.⁸ 'Search' where it relates to a person must be given its ordinary meaning in its context.⁹ Search may also be regarded 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.¹⁰

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

Section 23 of the *Criminal Procedure Act* provides for the search of arrested persons and the seizure of articles.

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 a

7 Swanepoel 1997 *CILSA* 374-391.

8 McQuoid-Mason *Law of Privacy* 807.

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

10 *National Instruction South African Police Service* 1998.

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.¹¹

In South African law a peace officer may without a warrant 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.¹² Further, the peace officer may place in safe custody any object found on the person of the arrestee, which the arrestee may use to cause bodily injury to the arrestee or others.¹³ 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*. Firstly, the "search should pursue an object not inconsistent with the proper administration of criminal justice".¹⁴ Secondly,

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.¹⁵

2.1.2 Search of premises

Section 24 of the *Criminal Procedure Act* provides for the search of premises.

Any person who is lawfully in charge or occupation of any land and who reasonably suspects that stolen stock or produce, as defined in any law relating

¹¹ S 23 *Criminal Procedure Act*.

¹² S 23 *Criminal Procedure Act*.

¹³ S 23(b) *Criminal Procedure Act*, that reads as follows: "On the arrest of any person, the person making the arrest may- (b) if he is not a peace officer, seize any article referred to in s 20 which is in the possession of or in the custody or under the control of the arrested person and shall forthwith deliver any such article to a police official."

¹⁴ Steytler *Constitutional Criminal Procedure* 99.

¹⁵ *Ibid.*

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.¹⁶

2.1.3 *Power of the police to enter premises in connection with state security*

Section 25 of the *Criminal Procedure Act* empowers a police official to enter premises in connection with state security. 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 a police official may consider necessary for the preservation of law and order or the prevention of crime.¹⁷

2.1.4 *Entering of premises for purposes of obtaining evidence*

Section 26 of the *Criminal Procedure Act* provides for the entering of premises by a police official for the 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 reference to such an offence is on any premises, such a police official may enter such premises without a warrant for

¹⁶ S 24 *Criminal Procedure Act*.

¹⁷ S 25 *Criminal Procedure Act*.

the purposes of interrogating such a person and obtaining a statement from him, provided that such a police official shall not enter any private dwelling without the consent of the occupier thereof.¹⁸

2.2 Search and other affected rights

Since a search may also infringe upon the rights to dignity¹⁹ and to bodily security, including the right against cruel, inhuman or degrading treatment,²⁰ 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.

2.3 Seizure

In *Ntoyakhe v Minister of Safety and Security*²¹ the court held that the word 'seize' encompasses not only the act of taking possession of an article, but also the subsequent detention thereof. Otherwise the right to seize would be rendered worthless.²² 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.

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

18 S 26 *Criminal Procedure Act*. *Minister van Polisie v Gamble* 1979 (4) SA 759 (A) at 764D-F.

19 S 10 *Constitution of the Republic of South Africa* 1996 (hereafter the Constitution).

20 S 12 (1) Constitution.

21 2000 (1) SA 257. Detention in the Oxford dictionary is defined as: "the action of detaining or the state of being detained".

22 *Ibid.* "The objective of s 20, read with s 31 (*Criminal Procedure Act*) is to enable the police to obtain possession of articles for the purpose of investigating crime and prosecuting suspected offenders."

The State may in terms of section 20 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 believed to be intended to be used in the commission of an offence.²³

2.3.2 *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* exist an article may be seized only 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 an 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.²⁴

Once a criminal trial has started, the judge or judicial officer presiding may issue a search warrant if it appears to such a judge or judicial officer that such an article is required in evidence before him.²⁵

The search warrant requires a police officer or official to seize the article in question and authorises such an official to search any person identified in the

²³ S 20 *Criminal Procedure Act*.

²⁴ *Toich v The Magistrate, Riversdale* 2007 (2) SACR 235 (C).

²⁵ S 21 *Criminal Procedure Act*.

warrant or to enter and search any premises identified in the warrant and search any person found on or at the premises.²⁶

A search warrant must be executed by day unless the police official is specifically authorised therein to execute it by night.²⁷

2.4 Objective grounds for the search

The safeguards against an unjustified interference with the right to privacy and other fundamental rights include prior judicial authorisation and an objective standard, that is whether there are *reasonable grounds* to believe based on information obtained 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.²⁸

It is insufficient merely to ask if the articles are possibly connected with an offence.²⁹ The question arising is what criteria should be employed to determine the basis of such grounds. One may infer that for seizure of property on reasonable grounds to be justifiable there should exist an objective set of facts which causes the 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*³⁰ had to consider and pronounce upon the constitutionality of the provisions contained in the *National*

26 S 21 *Criminal Procedure Act*.

27 S 21 *Criminal Procedure Act*.

28 Cheadle, Davis and Haysom (n 5) 193. see also *Rajah v Chairperson: North West Gambling Board* [2006] 3 All SA 172 (T) 394 the court held that for a search and seizure to be valid in terms of s 21 of the *Criminal Procedure Act*, "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."

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

30 2000 (10) BCLR 1079 (CC) 539.

*Prosecuting Authority Act*³¹ (*NPA Act*) that authorise the issuing of warrants of search and seizure for purposes of a "preparatory investigation".³² 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 some object which is connected with the investigation is on the premises sought to be searched.

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.³³

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 14.³⁴ The information need not comply with the strict rules of evidence,³⁵ and hearsay evidence of informers and anonymous tips may be used,³⁶ subject however to the cautionary rule.³⁷ The test adopted in *Van der Merwe v Minister of Justice*³⁸ is that the threshold is too low if it consists only of the requirement that the police apply for a warrant and state in their affidavit that the tendered hearsay evidence is true or correct. While the identity of informers need not be disclosed, information should be placed before an independent decision maker

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

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

33 *Investigating Directorate: Serious Economic Offence v Hyundai Motor Distributors (Pty) Ltd*: In *RE: Hyundai Motors Distributors (Pty) Ltd v Smit* 2000 (10) BCLR 1079 (CC) 52. In *Parker-Ross v Director: Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) 339, Tebutt J declared unconstitutional a provision of the *Investigation of Serious Economic Offences Act* 117 of 1991, authorising searches to be conducted without prior judicial authorisation.

34 *Constitution of the Republic of South Africa* 1996.

35 Kriegler *Hiemstra Suid Afrikaanse Strafproes* 38.

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

37 Steytler (n 14) 88.

38 1995 (2) SACR 471 (O) 89.

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.³⁹ The essence of reasonable grounds is that they are objective⁴⁰ and can be reviewed by a court.⁴¹

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 a warrant would defeat the object of the search.⁴²

2.5 Provisions for warrantless searches and seizures in the South African Police Service Act 68 of 1995

According to section 13(6) of the *Police Service Act*⁴³ 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 the illegal movement of people or goods across the borders of South Africa. The search may be conducted:

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

39 *Ibid* 89.

40 Du Toit *et al Commentary* 27.

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

42 S 22 *Criminal Procedure Act*. See also *Ntoyakhe v Minister of Safety and Security* 2000 (1) SA 257 (ECD).

43 Act 68 of 1995 (hereafter *Police Service Act*).

- (b) in the territorial waters of South Africa;
- (c) inside South Africa within 10 kilometres of or any reasonable distance from such territorial waters; or
- (d) at any airport or within any reasonable distance from such an airport.⁴⁴

Section 13(7) of the *Police Service 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.⁴⁵ 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.⁴⁶

Where it is reasonable in the circumstances in order to exercise a power or perform a function referred to in the Constitution,⁴⁷ section 13(8)(a) of the *Police Service Act* provides that the National or Provincial Commissioner may authorise a police official in writing to set up:

44 See *South African Police Service Amendment Act 41 of 1997*.

45 Steytler (n 14) 95.

46 *Ibid.*

47 See objects of the police in s 205(3) of the Constitution.

- (a) a roadblock(s) on any public road in a particular area; or
- (b) 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:

- (a) 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
- (b) 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.

The police official must, on demand of any person whose rights are or have been affected by the search and seizure, exhibit a copy of the written authorisation to hold the roadblock or checkpoint.

In *Sithonga v Minister of Safety and Security*⁴⁸ 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 *Police Service Act*, provides that a police official may set up a roadblock for the purposes of seizing certain articles without written

48 2008 (1) SACR 376.

authorisation from the National or a Provincial Commissioner, if such a police official reasonably believes that:

- (a) 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 1⁴⁹ of the *Criminal Procedure Act*, and
- (b) such an object is present in or is about to be transported in a motor vehicle in a particular area, and
- (c) a search warrant will be issued to him or her under section 21(1)(a) 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
- (d) 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 if 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.⁵⁰ 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.⁵¹

49 Eg, treason, sedition, or murder.

50 Steytler (n 14) 102.

51 *Ibid.*

3 The American perspective

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, deals not only with the seizure of possessions but with persons as well. The United States Supreme Court defined 'search' to mean "a governmental invasion of a person's privacy".⁵² The power to search an arrestee's person without probable cause or a warrant appears to be constitutionally inoffensive.⁵³

The "act of physically taking and removing tangible personal property" is generally a seizure.⁵⁴ A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property.⁵⁵

*Terry v Ohio*⁵⁶ 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.

4 The Canadian perspective

The Supreme Court of Canada views the right to privacy as being "at the heart of liberty in a modern state".⁵⁷ Founded on the bedrock value of the inherent

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

53 Steytler (n 14) 97.

54 LaFave and Israel *Criminal Procedure* 99.

55 *United States v Jacobsen* 466 US SCt (1984).

56 *Supra*.

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

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*⁵⁸ and *R v Collins*.⁵⁹ 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; this interest in privacy is, however, limited to a "reasonable expectation of privacy".⁶⁰

4.1 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.⁶¹ Only if a "form of examination" by government intrudes upon a reasonable expectation of privacy is it considered a search under the Canadian Constitution.⁶²

4.2 Seizure

Seizure was defined in *R v Dymen*⁶³ as "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. This type of seizure usually occurs in

58 (1984) 41 CR (3d) 97 (SCC).

59 (1987) 56 CR (3d) 193 (SCC).

60 *Hunter v Southam supra*, *R v Collins supra*.

61 M Finkelstein and N Finkelstein *Constitutional Rights in the Investigative Process* 1991 89.

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

63 (1988) 55 DLR (4th) 503.

the regulatory field where documents are ordered to be produced,⁶⁴ or where authorities are empowered to make copies of documents.⁶⁵

5 Conclusion

The birth of a supreme Constitution⁶⁶ with an entrenched Bill of Rights can be viewed as the most important event in South African legal history. In the Constitution the basic principles of criminal procedure have been constitutionalised in the entrenched Bill of Rights.⁶⁷ Prior to 1994 criminal procedure was subject to the sovereignty of Parliament and the desire of an often subjective executive, which resulted in an oppressive and authoritarian criminal justice system. 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 and seize or for performing such actions without a warrant in some circumstances.

Section 21 of the *Criminal Procedure Act* makes provisions for search in terms of a search warrant. 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

64 *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)* (1990) 76 CR (3d) 129 (SCC).

65 *Quigley Procedure* 369. *Comité paritaire de l'industrie v Potash* 1994 168 NR (SCC).

66 *Constitution of the Republic of South Africa* 1996.

67 *S v Scholtz* 1996 (2) SACR 623 (C) 625.

articles can be considered legitimate for the following purposes: to be used as evidential material in a prosecution,⁶⁸ to be confiscated because their possession is unlawful,⁶⁹ to return them to their rightful owner,⁷⁰ and to be forfeited to the state if they were used in the commission of a crime.⁷¹ 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.

In the United States the Fourth Amendment, like our Constitution (though the extent of the similarity is debatable) also protects a person's right to be free from unreasonable searches and seizures. The US Constitution also describes the circumstances under which a warrant must be issued. It provides that a warrant shall not be issued unless there is probable cause; the warrant must be supported by oath or affirmation and the place to be searched and the things to be searched must be particularly described. In the United States of America it is the function of a judicial officer to issue a search warrant. 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.⁷² However, this power is also extended to justices,⁷³ who include commissioned officers in the South African Police Services, National Defence Force, Correctional Services, directors of public prosecution and state advocates. If the person who is issuing the search warrant is part of the office of the executing officer it may be asked if that person can be regarded as neutral or detached.

An important difference between the Canadian Charter of Rights and Freedoms and the South African Constitution when compared with 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,

68 S 20(b) *Criminal Procedure Act*.

69 S 31 *Criminal Procedure Act*.

70 S 30(b) *Criminal Procedure Act*.

71 S 35 *Criminal Procedure Act*.

72 S 21(1) and s 25 *Criminal Procedure Act*.

73 S 21(a) *Criminal Procedure Act*.

supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. There is no requirement that proof beyond reasonable doubt (which is a South African legal standard) be furnished, but he or she should show more than a mere suspicion.

Section 22 of the *Criminal Procedure Act* provides for search and seizure without a warrant. Section 22 can be divided into two parts: (1) firstly a search conducted with the consent of the person concerned and (2) secondly a search conducted in the reasonable belief that a warrant will be issued to a police official and that a delay in obtaining a warrant would defeat the object of the search.

The *Criminal Procedure Act* makes provisions for a number of instances, depending on the objective thereof, in which a search of premises may be conducted without a warrant. Each of these instances describes the specific circumstances in which a search may be undertaken based solely on the subjective opinion of the police official conducting the search. These instances include the following.

- (a) 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. He or she is not compelled to, as it is not an absolute requirement. It should be noted that the *Criminal Procedure Act* does not differentiate between the search of a private dwelling and other premises.
- (b) 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.⁷⁴ The word 'opinion' obviously has a subjective denotation.

74 S 27 *Criminal Procedure Act*.

(c) Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who is in possession of information concerning 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.⁷⁵ Where the premises are a private dwelling the consent of the occupier has to be obtained. No provision is made in the *Criminal Procedure Act* if the premises are 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.⁷⁶ No provision is made for persons who are hearing impaired ("audibly demand admission"). It is apparent that the *Criminal Procedure Act* does not require that the article about to be done away with should be material, important or significant evidence, and further that its destruction is imminent.⁷⁷

(d) A police official may without a warrant enter any premises and search the premises or any person on the premises for any article listed 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.⁷⁸ 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.

75 S 26 *Criminal Procedure Act*.

76 S 27 *Criminal Procedure Act*.

77 See s 20 and 27 *Criminal Procedure Act*.

78 S 25(3) *Criminal Procedure Act*.

6 Recommendations

6.1 *The Criminal Procedure Act*

The following aspects of the *Criminal Procedure Act* pertaining to search and seizure are questionable from a constitutional perspective and should be addressed by parliament.

Section 20 provides 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 the constitution's support for 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 latitude could lead to warrants being issued without circumspection. With due regard to neutrality and objectivity, the power to issue warrants should be conferred on specific competent judicial officials.

Section 21 also makes provision only for "information on oath". Provision should also be made for "information on affirmation" in the light of the observation of fundamental human rights. Further, 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 provide that the police ought to provide a copy of the warrant to the person whose rights have been encroached upon, upon 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 in obtaining a warrant would defeat the object of the search to search any person, container or premises without a warrant for any article referred to in section 20. It is submitted that the police official is empowered in terms of

section 22 to seize even articles of a trivial nature which may constitute evidence of little importance. This could lead to the abuse of constitutional rights, and these provisions should therefore be reviewed. 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. This could be interpreted as including even a trivial offence. Providing for the police official's opinion (that which he "considers necessary") permits a subjective discretion to be applied. This section permits the violation of fundamental human rights, does not meet the proportionality test and will not survive a constitutional challenge. It ought to be revised.

6.2 *The South African Police Service Act*

The *South African Police Service Act* 68 of 1995 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 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, such searches without reasonable grounds in places adjacent to foreign borders would be a reasonable limitation on the right to privacy.⁷⁹ 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. In 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 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.

The objectives and purpose of the search will not be defeated by obtaining prior judicial authorisation, since the decision to cordon off is not made instantaneously.

According to the *South African Police Service Act* unless a person expressly requests reasons for the setting up of a roadblock, there is no legal duty on a police official to inform such a person thereof. This is an infringement of section 12 of the Constitution, which guarantees everybody the right to freedom of person, which includes the right not to be deprived of his or her freedom 'arbitrarily' or without 'just cause'; to be free from all forms of violence, and not to be treated in a cruel, inhuman or degrading way. It is recommended that there be a legal duty on a police official to inform a person thereof.

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