A Constitutional and a Comparative Analysis of a Search Warrant in South African Criminal Procedure

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Abstract
This article analyses 'search and seizure' in the South African criminal justice system as is made possible by Chapter 2 of the Criminal Procedure Act,[1] which provides for search warrants, the entering of premises, and the seizure, of property connected with offences. The primary objective of this article is to determine whether the search and seizure measures employed in the South African criminal justice system are in need of any reform and/or augmentation in accordance with the 'spirit, purport and object' of the Constitution.[2] It determines whether the required judicial scrutiny provides a real control upon the exercise of search and seizure powers. Relating to this, but a distinct issue in itself is the sufficiency of information provided by the applicant to the issuer of the warrant. Proof of reasonable grounds to believe not only that an offence has been committed, but also that there will be evidence of it on the premises to be searched may be necessary to comply with the derogation from the right to privacy contained in section 14 of the South African Constitution. Search and seizure legal principles extracted from United States criminal procedure will be analysed for comparative purposes.

INTRODUCTION

A search warrant judicially authorises and legitimises searches and seizures. In South Africa, the eventual outcome of constitutionalism was that South African courts have now succeeded in imposing strict constraints upon the circumstances when a warrant may be issued and requires that the issuance itself should generally be a judicial act.[3] By prohibiting unreasonable searches and seizures, and through regulation of the warrant process the Constitution imposes important limits on the powers of police and law

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1 Chapter 2 of the Criminal Procedure Act 51 of 1977 (hereinafter the 'Criminal Procedure Act').

2 Constitution of the Republic of South Africa, 1996 Act 108 of 1996.

3 *Zuma and Another v National Director of Public Prosecutions and Others* 2006 (1) SACR 468 (D).

enforcement officials in the prevention and investigation of crime.[4] Because of the fetters placed upon the granting of warrants, the warrant procedure can now be viewed as a due-process safeguard rather than a coercive means of obtaining incriminating evidence through exceptional intrusion into a person's privacy.[5]

In the United States as a due-process safeguard, searches with a warrant are considered to be 'good' and searches without a warrant are 'bad'.[6] The latter is evident in the rhetoric of the United States' Supreme Court, in cases such as *Coolidge v New Hampshire*,[7] where it was expressed that as a general proposition, warrantless searches were unreasonable. In the United States the Fourth Amendment specifically sets out the constitutional requirements for a valid warrant when it states that, 'no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

In terms of section 21 of the Criminal Procedure Act, the general rule is that articles referred to in section 20 of the Criminal Procedure Act should be seized with a search warrant. The only exceptions to this are authorisations in terms of sections 22, 23, 24 and 25 of the Criminal Procedure Act. A search warrant may be issued by a magistrate or justice,[8] who after considering information on oath has reasonable grounds for believing that an article which can be of use in proving a criminal case,[9] is in the possession or under the control of or upon any person or any premises[10] within his area of jurisdiction.[11] A search warrant may also be issued by a judge or a judicial officer presiding at criminal proceedings where it appears to such judge or judicial officer that such article is required in evidence at such proceedings.[12]

This article focuses on the legal aspects of search and seizure. In considering foreign law, as provided for in section 39(1)*(c)* of the Constitution, a comparative legal research methodology is used. From a legal perspective, South Africa has strong law enforcement ties with the United States. In the United States, there is an entrenched protection against unreasonable searches, which has been in place for over two centuries and there is consequently a wealth of case law concerning the reconciliation of searches

4 ibid.
5 ibid.
6 *Coolidge v New Hampshire* 403 U.S. 433 [1971].
7 ibid.
8 In terms of s 1 of the Criminal Procedure Act '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. In terms of Schedule 1 of the latter Act, a commissioned officer of the South African Police Service is *ex officio* a justice of the peace.
9 *Cine Films (Pty) Ltd v Commissioner of Police* 1972 (2) SA 254 (A).
10 cf s 1 of the Criminal Procedure Act 'premises' includes land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft.
11 Section 21(1) of the Criminal Procedure Act.
12 Section 21(1)*(b)* of the Criminal Procedure Act.

and seizures within the meaning of the Fourth Amendment. Precedents regarding the practical deployment and application of search and seizure measures, may prove useful to South African law enforcement and legal practitioners. The South African constitutional text was modeled largely on the Canadian Charter of Rights and Freedoms, with liberal borrowings from Germany and the United States of America.[13] Understandably, the decisions of the constitutional courts of these countries have played a significant role in the determination of the meaning and scope of the rights contained in the South African Constitution.

DEFINING SEARCH AND SEIZURE

United States

In the United States the Supreme Court defined 'search' to mean 'a governmental invasion of a person's privacy.'[14] 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.[15] 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.[16] The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little.[17] 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 way.[18] 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'.[19] In order for investigative action by the 'government against the people' to fall within the scope of the Fourth Amendment, the government (which includes the police) conduct must constitute a 'search' or a 'seizure'.[20]

As regards the term 'seizure' the United States Supreme Court has defined the scope of government conduct that constitutes a Fourth Amendment 'seizure'.[21] The court explained that a seizure of property occurs when there

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13 Dennis Davis, 'Constitutional Borrowing: The Influence of the Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience' (2003) 1(2) Intl J of Comparative L 181–195.

14 *Rakas v Illinois* 439 U.S. 128 [1978].

15 ibid.

16 Wayne R LaFave, *Search and Seizure* (Minn West 2004) 202.

17 ibid.

18 ibid 202–203.

19 ibid 203.

20 *Rakas v Illinois* (n 14) 14.

21 *Soldal v Cook County* 506 U.S. 56 [1992].

is a meaningful interference with an individual's possessory interest in the item.[22] A seizure can be a physical taking of possessions or blocking access to personal belongings.[23] In *Illinois v McArthur*, the court held that police refusal to allow the defendant to enter his residence until a search warrant was obtained constituted a seizure.[24]

In addition to seizure of property, the Fourth Amendment also proscribes the seizure of one's person. An individual is seized when the government imposes a physical restraint which restricts an individual's freedom of movement, including persons arrested and individuals temporarily detained during an ongoing investigation of criminal activity.[25] The act of physically taking and removing tangible personal property is generally a seizure.[26] A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property.[27] In *Terry v Ohio*, the court 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.[28]

South Africa

The terms 'search' and 'seizure' are not clearly defined in the South African legal context.[29] What is meant by search is left to common sense and is determined on a case-by-case basis. Steytler[30] and Cheadle[31] refer to American and Canadian jurisprudence in an attempt to explain search. An element of physical intrusion concerning a person or property is necessary to establish a search.[32] Where 'search' relates to a person it must be given its ordinary meaning in its context.[33] In *Minister of Safety and Security v Xaba*[34] the court explained that 'search' when used in relation to a person had to be given its ordinary meaning in the context of the Criminal Procedure Act.

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22 *Soldal v Cook County* 506 U.S. 56 [1992].
23 ibid.
24 *Illinois v Mc Arthur* 531 U.S. 326 [2001].
25 *United States v Mendenhall* 446 U.S. 544 [1980].
26 LaFave (n 16) 214.
27 *United States v Jacobsen* 466 U.S. 109 [1984].
28 *Terry v Ohio* 392 U.S. 1 [1968].
29 Vinesh Basdeo, 'The Constitutional Challenges of Warrantless Search and Seizure in South African Criminal Procedure: A Comparative Analysis' 2012 (20)2 African J of Intl and Comparative L 163.
30 Nico Steytler, *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (Butterworths 1998) 67.
31 Michael H Cheadle, Dennis Davis and Nicholas Haysom, *South African Constitutional Law: The Bill of Rights* (Juta 2002) 51.
32 David Jan McQuiod-Mason, *The Law of Privacy in South Africa* (Juta 1978) 107.
33 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.'
34 *Minister of Safety and Security v Xaba* 2004 (1) SACR 149 (D).

The South African Police Service National Instruction[35] 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.

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*,[36] the term 'seizure' in terms of the National Prosecuting Authority Act 32 of 1998 (NPA Act) was considered, as well as the constitutionality of such provisions. The court held that although the provisions invaded the right to privacy they were not unconstitutional.[37] The court further explained that the right to privacy was applicable where appropriate to a juristic person and that a search warrant would be granted under the NPA Act for purposes of a preparatory investigation only if there is a reasonable suspicion that an offence, has been or is being committed, or that an attempt was or had been made to commit such an offence.[38]

In *Community Repeater Services v Minister of Justice*,[39] the validity of a search warrant was assessed, where warrants were issued in terms of sections 20 and 21 of the Criminal Procedure Act and where there was a seizure of a radio apparatus in order to exact payment of a license fee. The court found such conduct to be improper, the warrants to have been issued for an improper purpose and it was therefore invalid.[40] The court referred to the general language in which the warrants were couched in that there was no reference to the person from whom the apparatus was to be seized.[41] The warrants were found to be invalid.[42]

As regards the concept 'seizure' the court in *Ntoyakhe v Minister of Safety and Security*,[43] held that for the purpose of the Criminal Procedure Act that the word 'seize' encompasses not only the act of taking possession of an article, but also the subsequent 'detention'[44] thereof.[45] The court explained that otherwise the right to seize would be rendered worthless.[46] Furthermore, the court determined 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

[35] South African Police Service National Instruction 2 of 2002.

[36] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2000 (2) SACR 349 (CC).

[37] ibid.

[38] ibid 359.

[39] *Community Repeater Services CC and Others v Minister of Justice and Others* 2000 (2) SACR 592 (SEC) 594h.

[40] ibid.

[41] ibid.

[42] ibid.

[43] *Ntoyakhe v Minister of Safety and Security* 2000 (1) SA 257 (E).

[44] 'Detention' in the *Oxford Dictionary* is defined as: 'the action of detaining or the state of being detained.'

[45] *Ntoyakhe* (n 43) 264 C, D–E.

[46] ibid.

person of lawful possession of an article indefinitely.[47] The word is capable of such construction, and the right conferred by the use thereof in Chapter 2 of the Criminal Procedure Act would be rendered worthless, were it limited to the initial act of seizing, as the subsequent detention thereof would then fall outside the ambit of section 20.[48] However, the right of the state to keep the article seized is not unlimited. It too must be in accordance with the provisions of Chapter 2 of the Criminal Procedure Act.[49]

Section 20 of the Criminal Procedure Act authorises the police to seize any article 'concerned in or believed to be concerned in or which is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence', if such article is required for the purposes of evidence in a criminal trial. This section however, merely describes the nature of the article to be seized without setting out the manner of conducting the search and seizure of such article. The procedure to be followed in conducting a search and seizure is set out in sections 21 and 22 of the Criminal Procedure Act.

Section 14(c) of the Constitution guarantees persons 'the right not to have their possessions seized'. It has also been held that a 'seizure' takes place when a person is effectively deprived of control over an object which falls within his or her sphere of privacy.[50] The Constitutional Court held that the word 'seizure' is not a term of art and should be given its ordinary and natural meaning.[51] The compulsion to produce a document on pain of a criminal sanction must be considered as much a seizure as when a document is physically removed by another person.[52] It is submitted that a limited interpretation of the word 'seize' to encompass the act of seizure only, would render the search and seizure powers under Chapter 2 of the Criminal Procedure Act futile.

Concluding remarks and submissions

The US approach in defining search can be useful to South Africa in defining and approaching the concept 'search' in criminal procedure. The two-pronged approach adopted by the Supreme Court in *Katz v United States*[53] can be of particular assistance to South Africa. The court in *Katz* read the Fourth Amendment as importing only a sense of what conduct is prohibited, and declared 'the Fourth Amendment protects people, not places'.[54] In discounting the necessity of trespass, the court held that the government

47 *Ntoyakhe* (n 43) 264 C, D–E.
48 ibid.
49 ibid.
50 *Rudolph v Commissioner for Inland Revenue* 1997 (4) SA 391 (SCA).
51 *Rudolph v Commissioner for Inland Revenue* 1997 (7) BCLR 889 (CC) 892 para 11.
52 *Bernstein v Bester* 1996 (4) BCLR 449 (CC).
53 *Katz v United States* 389 U.S. 347 (1967).
54 ibid.

had intruded upon the privacy on which *Katz* 'justifiably relied'.[55] This test, often phrased as a 'reasonable expectation of privacy', today constitutes the central inquiry in determining whether police conduct is a 'search'.[56] The current approach to the concept 'search' in both the United States and in South Africa generally explain's 'search' in the context of tangible things. It is submitted that in the light of technological development, especially in the area of electronically generated information or evidence (although outside the scope of this article), the term 'search' should embrace 'search for' both tangible as well as intangible things, information or evidence, primarily because law enforcement officials in the investigation and suppression of crime have to contend with tangible as well as intangible evidence. A further reason for advancing the latter submission is that in South Africa the Criminal Procedure Act is also applied to searches for intangible information. The latter practice has not yet been contested.[57] Although there are cases in which electronic evidence was adduced as evidence, the method by which the evidence was collected has not been contested. The only South African case where the procedure deployed to collect the required electronic evidence came under thorough judicial scrutiny was *Beheermaatschappij Helling I NV v Magistrate, Cape Town*.[58]

It is submitted that the term 'seizure' in the South African criminal procedural context is more clearly defined than the term 'search'. In most respects, it is similar to the US approach to the concept 'seizure'. A difference between the approaches in South Africa and the United States is that in the United States the term seizure includes the seizure of a person as well.[59] In South Africa it only includes seizure of property. It is submitted that in South Africa the *status quo* regarding 'seizure' should be maintained. Should the US approach be adopted it could prove to be problematic because South Africa has specific provisions dealing with seizure of property and specific provisions dealing with arrest of a person in the Criminal Procedure Act. A further distinction between the term 'seizure' as adopted in South Africa is that unlike in the United States, seizure in South Africa includes the subsequent detention of seized property.[60] The latter practise in South Africa is of critical importance in the light of maintaining the integrity of seized evidence

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55 *Katz v United States* 389 U.S. 347 (1967).

56 ibid.

57 Section 20 of the Criminal Procedure Act authorises the seizure of 'anything' and states that 'anything' for purposes of the whole of Chapter 2 of the Criminal Procedure Act is referred to as 'an article'. The term 'anything', should strictly speaking, not be confined to tangibles. Furthermore 'premises' is defined in s 1 of the Criminal Procedure Act and includes land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft.

58 2007 JOL 13758 (C).

59 *Terry v Ohio* 392 U.S. 1 [1968]. In the United States Fourth Amendment seizures include seizure of the person as well as seizure of property.

60 *Ntoyakhe* (n 43) 354.

for eventual presentation in a court of law. It is therefore submitted that South African jurisprudence on the meaning and scope of 'seizure' could provide comparative inspiration to the United States in interpreting and defining 'seizure' in criminal procedure. It is further submitted that the submission made with regard to 'search' above, namely that the definition of 'search' should include searches for tangible as well as intangible things, is equally applicable in defining the term 'seize' in criminal procedure.

REQUIREMENTS AND SAFEGUARDS FOR A VALID SEARCH WARRANT

The Issuance of a Valid Search Warrant, and the Safeguard Afforded by a Neutral, Independent and Detached Authority

United States

The language in the Fourth Amendment does not require that all searches be conducted pursuant to warrant or even that any searches be so conducted. It requires only that all searches be reasonable and that warrants if employed, must meet certain requirements. However, the court has repeatedly stated that, in most situations, a search conducted without a warrant is *per se* 'unreasonable'.[61] It is only when requiring a warrant would frustrate some compelling interest of law enforcement, almost invariably characterised by an acute need for speed, that warrantless searches become reasonable. The warrant procedure intensifies protection from 'unreasonable' searches in a number of ways. The Fourth Amendment specifically sets out the constitutional requirements for a valid warrant, when it states that 'no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' In *McDonald v United States*[62] the court explained the importance of the warrant requirement and stressed that the presence of a search warrant serves a high function.[63] Furthermore, the court emphasised that absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.[64] This inter-positioning was done not to shield criminals or to make the home a safe haven for illegal activities.[65] The court explained that this was done so that an objective mind might weigh the need to invade the right to privacy in order to enforce the law, because the 'right to privacy is deemed too precious' to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.[66] The court also stressed that 'power is a heady thing', and history

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[61] *Cady v Dombrowski* 413 U.S. 433 (1973) 433–434.
[62] *McDonald v United States* 315 U.S. 335 [1948] 337 para 13.
[63] ibid.
[64] ibid.
[65] ibid.
[66] ibid.

shows that the police acting on their own cannot be trusted.[67] The Fourth Amendment requires a judicial officer to pass on the desires of the police before they violate a person's privacy.

The United States Supreme Court has 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.[68] In the United States because of the important position the judicial officer holds under the Supreme Court's view of the warrant requirement, it would be natural to expect that the judicial officer should be a person of some learning, good sense and sensitivity to constitutional doctrines.[69]

South Africa

Pre-requisites

In South African criminal procedure, section 20 of the Criminal Procedure Act is the basis for search and seizure 'with a warrant' and also for search and seizure 'without a warrant'. Although section 20 of the Criminal Procedure Act does not authorise the search for any particular article, it prescribes which type of articles may be seized when a search in terms of another section of the Criminal Procedure Act takes place.[70] In South African criminal procedure, the power of search is conferred on the state only where the object of the search is to find a certain person or to seize literally 'anything' which falls into one of the following three classes of articles:[71]

(a) articles which are 'concerned'[72] in, or are on reasonable grounds believed to be concerned in, the commission or suspected commission of an offence, whether within South Africa or elsewhere;[73]

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67 ibid: the court explained 'we cannot be true to the constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative' [337 para 13].

68 Jerold H Israel and Wayne R LaFave, *Criminal Procedure: Constitutional Limitations in a Nutshell* (Paul Minn West 2001) 71.

69 *Coolidge* (n 6) 449.

70 Article 20 is much wider than its predecessors, namely s 52 of the Criminal Procedure and Evidence Act 31 of 1917 and s 47 of the Criminal Procedure Act 56 of 1955, as it was prior to the Criminal Procedure Amendment Act 33 of 1975. For example, these sections did not authorise a general search for books that could shed some light on the investigation. There must have been information under oath that there are specific books that are necessary as evidence (see *R v Sulski* 1935 TPD 292). It can be argued that s 20, in fact authorises a general search of a class of articles, without naming them specifically.

71 Section 20 of the Criminal Procedure Act. The term 'anything' is expounded upon below.

72 The term 'concerned' is further discussed below.

73 Section 20*(a)* of the Criminal Procedure Act.

(b) articles which may afford evidence of the commission or suspected commission of an offence, whether within South Africa or elsewhere;[74] or

(c) articles which are intended to be used or are on reasonable grounds believed to be intended to be used in the commission of an offence.[75]

It is submitted that the precise nature of articles that may be seized in terms of section 20 of the Criminal Procedure Act is not clear. Section 20 is intended to assist law enforcement officers in their investigations of criminal cases. Section 20 stipulates that 'anything' may be seized. Furthermore, section 20 states that 'anything' is referred to as 'an article' in Chapter 2 of the Criminal Procedure Act. 'Anything' is indeed a very wide term and would include items such as documents, cheques and money, as is also evident from section 33(3)*(a)* of the Criminal Procedure Act that provides, *inter alia* for the handling of such items by the clerk of the court. It is also submitted that in the light of technological development and advances in search and seizure procedures 'anything' should be susceptible to a wide enough interpretation to also include the search and seizure of intangible information. This article supports the approach of the South African Law Reform Commission, that the provisions of the Criminal Procedure Act were developed when the idea of location which is not a physical premises or the seizure of something which is not a tangible object, were inconceivable.[76]

In *Minister for Safety and Security v Van der Merwe*,[77] the main question was whether search and seizure warrants are valid despite their failure to mention the offences to which the search relates. In order to address this problem effectively, the court stressed that every lawful means must be employed to enhance the capacity of the police to root out crime or at least reduce it significantly.[78] Warrants issued in terms of section 21 of the Criminal Procedure Act are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating, and investigating crime.[79] In the course of employing this tool, they inevitably interfere with the equally important constitutional rights of individuals who are targeted by these warrants. Safeguards are therefore

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[74] Section 20*(b)* of the Criminal Procedure Act. This section may overlap with s 20*(a)*, as some articles which may afford evidence could also have been concerned in the commission of an offence, see Johann Joubert (ed), *Applied Law for Police Officials* (Juta 2010) 307.

[75] Section 20*(c)* of the Criminal Procedure Act. Steytler (n 29) 82–83, contends that if an article is used in an attempt to commit an offence, it may be seized because a completed, *albeit* an inchoate offence has been committed.

[76] The South African Law Commission, *Discussion Paper 99: Computer-related Crime* (SALC 2001) 14.

[77] 2011 (9) BCLR 961 (CC).

[78] ibid.

[79] ibid.

necessary to ameliorate the effect of this interference.[80] This they do by limiting the extent to which rights are impaired. That limitation may in turn be achieved by specifying a procedure for the issuing of warrants and by reducing the potential for abuse in their execution. Safeguards also ensure that the power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution. These safeguards are: first, the significance of vesting the authority to issue warrants in judicial officers; second, the jurisdictional requirements for issuing warrants; third, the ambit of the terms of the warrants; and fourth, the bases on which a court may set warrants aside.[81] It is fitting to discuss the significance of the issuing authority first. Sections 20 and 21 of the Criminal Procedure Act give authority to judicial officers to issue search and seizure warrants. The judicious exercise of this power by them enhances protection against unnecessary infringement. They possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision. Secondly, the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed and; (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched.[82] Both jurisdictional facts play a critical role in ensuring that the rights of a searched person are not lightly interfered with. When even one of them is missing that should spell doom to the application for a warrant. The third safeguard relates to the terms of a warrant.[83] They should not be too general. To achieve this, the scope of the search must be defined with adequate particularity to avoid vagueness or overbreadth. The search and seizure operation must thus be confined to those premises and articles which have a bearing on the offence under investigation. The last safeguard comprises the grounds on which an aggrieved searched person may rely in a court challenge to the validity of a warrant.[84] The challenge could be based on vagueness, overbreadth or the absence of jurisdictional facts that are foundational to the issuing of a warrant.

General Search and Seizure Warrants

In South Africa the general rule is that searches and seizures should wherever possible, be conducted only by virtue of a search warrant issued

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[80] 2011 (9) BCLR 961 (CC).
[81] ibid.
[82] ibid.
[83] ibid.
[84] ibid.

by a judicial officer, such as a magistrate, a judge or a justice of the peace.[85] Section 21(1) provides that 'anything'[86] which is susceptible to search and seizure may be seized only by virtue of a search warrant issued in the following circumstances:

(a) by a magistrate[87] or justice;[88] if it appears to such a magistrate or justice from information under oath that there are reasonable grounds for believing that any such article is in the possession or under the control of any person or upon or at any premises within his area of jurisdiction; or

(b) by a judge or a judicial officer presiding at criminal proceedings;[89] if it appears to such a 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.

Having regard to section 21(1) of the Criminal Procedure Act, it is submitted that a search and seizure should preferably only be conducted in terms of a search warrant issued by a judicial officer, such as a magistrate. This practice will ensure that an independent and impartial arbiter stands between the individual who is subjected to the search and the police official.[90]

In terms of the Criminal Procedure Act authority is also granted to justices of the peace to issue search warrants.[91] In circumstances where a police official needs to obtain a search warrant and a magistrate is not available, a justice of the peace should be approached, instead of conducting the search without a warrant.[92] A commissioned police officer is a justice of the peace, and therefore a police official with the rank of Lieutenant or of a higher rank has the authority to issue a search warrant. It is submitted that, it is

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[85] Section 21(1) of the Criminal Procedure Act reads: 'Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant.'

[86] Referred to as 'articles' in s 20 of the Criminal Procedure Act.

[87] A 'magistrate', in terms of s 1 of the Criminal Procedure Act, for the purposes of the criminal code, includes additional magistrates, assistant magistrates, chief magistrates and senior magistrates. A judge or a regional magistrate may not issue search warrants at this stage.

[88] Section 1 of the Criminal Procedure Act defines a 'justice' as 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. Commissioned officers in the Police Service, the National Defence Force and the Correctional Services, Directors of Public Prosecutions and their senior staff, registrars and magistrates are considered justices of the peace.

[89] This includes a judge or a regional court magistrate if he presides over the proceedings during which an application for a search warrant is made. An application is usually made by one of the parties to the proceedings, but, in terms of s 21(1)*(b)* of the Criminal Procedure Act, the court is entitled to act *mero motu.* There is no requisite of information under oath and the presiding officer will exercise his discretion on all the facts before him.

[90] *Park Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) All SA 202 (C).

[91] Sections 21(1) and 25(1) of the Criminal Procedure Act.

[92] *S v Motloutsi* 1996 (1) SACR 78 (C)

highly questionable that a commissioned police officer who may have a direct interest in the case is empowered to issue a search warrant. It can be argued that the latter practise opens the door for abuse of an individual's right to privacy and related fundamental human rights, because since a justice of the peace (commissioned police official) is usually involved in the competitive enterprise of ferreting out crime, his judgment can be influenced by emotions, hunch or the compulsion of his job. It is submitted that the approach of the United States can provide guidance to South Africa in this regard. In the United States it was stressed by the Supreme Court that neither prosecutors nor police officers can be asked to maintain the requisite neutrality when deciding whether a search warrant should be issued. The latter rule has also been recited and invoked in the United States by state courts in state decisions.[93] This approach of the United States can be useful to South Africa in approaching the concept of 'a neutral and impartial judicial authority'.

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 primary reason for this requirement of prior authorisation is to ensure that before the search and seizure operation takes place, the conflicting interests of the state and of the individual are assessed by an impartial arbiter to ensure that there is no unwarranted intrusion into basic human rights.[94] An independent, detached, responsible officer is therefore required to make such an assessment.[95]

It is submitted that the rationale underlying the warrant requirement is that the police whose task it is to investigate crime and arrest those they believe to be guilty may be less likely to impartially assess whether a search is legally justified. By having a neutral, detached and independent judicial officer evaluate the basis for a requested search warrant, a buffer is interposed between the police, who are zealously seeking to gather evidence and the individual whose privacy is at stake. The importance of a residual discretion of a judicial officer has been acknowledged in South African law with regard to the issuing of a warrant.[96] The court in *Cornelissen v Zeelie NO*,[97] held that where jurisdictional facts exist, the magistrate has the discretion to refuse the issuance 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.[98] It is submitted that this principle needs to be clearly invoked in the Criminal Procedure Act.[99] The decision-maker

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93 See for example *Mollet v State* 939 P.2d 1 (Okla.) 743 [1997].
94 *Park Ross v Director: Office for Serious Economic Offences* 1995 (2) BCLR 198 (C).
95 *SA Police v Associated Newspapers* 1966 (2) SA 503 (A).
96 Section 205 of the Criminal Procedure Act.
97 *Cornelissen v Zeelie NO* 1994 (2) SACR 41 (W) 69i.
98 ibid.
99 This principle is not enshrined in s 21 of the Criminal Procedure Act.

should be a neutral, independent and detached person who is capable of acting judicially. The objective is to prevent unreasonable searches and to ensure that the fundamental rights enshrined in the Constitution are not eroded.

Concluding remarks and submissions

In South Africa and in the United States, it is an authoritatively established principle of criminal procedure that a search warrant should be issued by a person acting in a judicial manner. This entails neutrality and impartiality. The courts in the United States[100] and in South Africa[101] have repeatedly stressed the importance of conditioning police intrusion on the decision of a 'neutral and detached' judicial officer. Since such a person is not directly involved in the law enforcement enterprise of fighting crime (such as a police official), his judgment will presumably be made strictly on facts and legitimate inferences untainted by emotion, hunch or the compulsion of his job. It is submitted that there are strong indications that this value of the warrant procedure is in fact, not being fully served in South Africa. The submission is made based on the fact that in South Africa a warrant may be issued by a justice, which includes a justice of the peace, who could well be a law enforcement officer.[102]

In the United States, although the language of the Fourth Amendment does not prescribe who shall issue the warrant, the Supreme Court has held the requirement of a 'neutral and detached magistrate' to be of a constitutional dimension.[103] There are several cases where warrants were declared to be invalid for lack of neutrality, independence and impartiality of the judicial officer.[104] It is submitted that the belief that the issuer of the warrant should be 'neutral and detached' (as in *Shadwick v City of Tampa*) does not necessarily mean that he has to be legally qualified, should be approached with caution in South Africa. In *Shadwick v City of Tampa*[105] the court first traced the judicial history of the 'neutral magistrate' requirement noting that the terms 'magistrate' and 'judicial officer' have been employed interchangeably. The court reserved the decision on the question of whether the issuer must be in the judicial branch[106] and held that the issuer must be (i) neutral and (ii) competent to determine probable cause.[107] The court added that legal training is not indispensable in showing competency to judge probable cause.[108] This is consistent with earlier court decisions describing

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100 See for example *United States v Leon* 468 U.S. 897 [1984].
101 See for example *Park Ross* (n 94) 221.
102 See for example s 21 of the Criminal Procedure Act.
103 *Shadwick v City of Tampa* 407 U.S. 345 [1972].
104 See for example *Coolidge* (n 6) and *Shadwick v City of Tampa* ibid.
105 ibid 347.
106 ibid 49.
107 ibid.
108 *Shadwick v City of Tampa* 407 U.S. 345 [1972] 350.

the probable cause decision as 'common sense', 'everyday'[109] 'designed to be applied by laymen'[110] and not necessarily for 'legal technicians'[111] only. It is submitted that for the safeguard 'neutral and detached' judicial officer to achieve its desired effect, the judicial officer should be legally qualified in order to make proper judicial pronouncements. To a large extent, it can be argued that South Africa indirectly exhibits tendencies of the *Shadwick*-approach because section 21(1) of the Criminal Procedure Act empowers a justice of peace to issue a search warrant.

Reasonable Grounds for the Search

United States

The Fourth Amendment protects people against unreasonable searches and seizures.[112] Except under very narrow circumstances,[113] whether a search or seizure is reasonable is dependent in the first instance on whether it is supported by probable cause.[114] Probable cause has been traditionally defined in the criminal investigative context, as a practical, non-technical evidentiary showing of individualised criminal wrongdoing that amounts to more than mere suspicion, but less than proof beyond a reasonable doubt.[115] A totality-of-circumstances approach is followed in determining whether there is probable cause to issue a search warrant.[116] In other words, the entire factual circumstances, including any hearsay information from private citizens or police informers, must be considered in a given case, as set out in an affidavit, and any other sworn proof presented to the magistrate.[117] The task of the magistrate issuing the warrant is to make a common-sense decision, whether given all the circumstances set forth in the 'search warrant affidavit' before him including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, that there is a fair probability that contraband or evidence of a crime will be found in a particular place.[118]

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109 *United States v Ventresca* 380 U.S. 102 [1965].
110 *State v Ruotolo* 117 A.2d 508 [1968].
111 *Ventresca* (n 111) 108.
112 The Fourth Amendment, Constitution of the United States of America (ratified 15 December 1971).
113 Government officials may briefly detain a person suspected of criminal activity based on less probable grounds [*Terry v Ohio* (n 59) 11].
114 *Board of Education of Independent School District No. 92 of Pottawatomie County v Earls* 536 U.S. 822 [2002]: the court held that in the criminal context, reasonableness usually requires a showing of probable cause at 826.
115 *Brinegar v United States* 338 U.S. 160 [1949].
116 ibid 176.
117 *Illinois v Gates* 462 U.S. 213 [1983].
118 ibid 223.

South Africa

The various statutory provisions providing for the power to conduct searches and to seize articles repeatedly refer to 'reasonableness' in their description of the circumstances in which these powers may be exercised. Section 20 of the Criminal Procedure Act provides for the seizure of articles, if such articles are 'on reasonable grounds believed to be' of a certain nature. Section 21(1)*(a)* of the Criminal Procedure Act authorises the issuance of search warrants, where it appears from information on oath that there are 'reasonable grounds for believing' that certain articles will be found at a certain place. Section 24 of the Criminal Procedure Act authorises a person who is in charge of or who is occupying a premises to conduct a search and to seize articles provided that he 'reasonably suspects' that a certain state of affairs exists. Section 26 of the Criminal Procedure Act authorises the police official to enter a premises in the course of the investigation of an offence, provided the police official 'reasonably suspects' that a certain state of affairs exists. Section 27 of the Criminal Procedure Act empowers a police official to use such force as may be 'reasonably necessary' to gain entry to a premises.

The inherent 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.[119] It is insufficient to merely ask whether the articles are 'possibly' concerned with an offence.[120] The question arising is what criteria should be employed to determine the basis of such grounds.[121] One may infer that for a 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.[122] In the absence of such facts, the reliance on reasonable grounds will be vague.[123] A person can only be said to have 'reasonable grounds' to believe or suspect something or that certain action is necessary, if he really 'believes' or 'suspects' it; his belief or suspicion is based on

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[119] Cheadle and others (n 31) 193; see also *Rajah and Others v Chairperson: North West Gambling Board and Others* 2006 (3) All SA 172 (T): the court held that for a search and seizure to be valid in terms of s 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' 179.

[120] *Mandela v Minister of Safety and Security* 1995 (2) SACR 397 (W) 406.

[121] ibid 400–401.

[122] ibid.

[123] ibid.

certain 'grounds' and in the circumstances and in view of the existence of those 'grounds' any reasonable person would have held the same belief or suspicion.[124] In *Minister of Law and Order v Hurley* the court illustrated the strictness with which the 'reasonable grounds' requirement is enforced.[125] It was maintained by the court that if the section commissioned an officer to exercise a discretion on reasonable grounds, such commissioning does not preclude the court from considering whether the officer indeed had reasonable grounds for his belief.[126] This implies that there may be a need for the intervention of judicial authority to ensure that existing rights are not infringed. In *Toich v The Magistrate, Riversdale*,[127] the court maintained that there must be reasonable grounds for believing that the article sought might afford evidence of an offence and because no such ground had been advanced to the magistrate, the magistrate could consequently not harbour such a belief.[128] It thus followed that the magistrate had not properly applied his mind when issuing the warrant and the warrant was therefore invalid.[129]

It is submitted that the approach in *Van der Merwe v Minister of Justice*,[130] namely that the police in applying for a warrant should only express in their affidavit the opinion that the tendered hearsay evidence is true or correct, is too low a standard. Although the identity of informers need not be disclosed, information should be placed before an independent decision-maker in terms of which the reliability of such hearsay evidence can be assessed. The word of the law enforcement officer should not be a substitute for the decision of the issuing authority.[131] The inherent essence of reasonable grounds is that they are objective[132] and can be reviewed by a court.[133]

Concluding remarks: reasonable grounds for the search

From the above discussion of 'reasonable grounds' in South Africa and in the United States, it is submitted that both in South Africa as well as in the United States, it has not been fully agreed upon as to what is meant by a reasonable search, neither has a full working definition of 'reasonable grounds' in South Africa, and 'probable cause' in the United States been propounded upon. No cases and no attempted definitions define the

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124 Johan Joubert, *Criminal Procedure Handbook* (Juta 2009) 97.
125 *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A).
126 ibid 573.
127 *Toich v The Magistrate, Riversdale and Others* [2007] 4 All SA 1064 (C).
128 ibid 243.
129 ibid.
130 *Van der Merwe v Minister of Justice* 1995 (2) SACR 471 (0).
131 Ettiene du Toit, Frederick de Jager, Andrew Paizes and others, *Commentary on the Criminal Procedure* (Juta 2015) 27.
132 ibid.
133 *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 (1) SA 387(C): the court held that the purpose of a search warrant is the procurement of articles which it reasonably believes may be of use in proving a criminal case.

respective terms fully. They only give a sense of what 'reasonable grounds' and 'probable cause' is, which helps in approaching the respective terms. The courts in the respective countries have indicated that 'reasonable grounds' and 'probable cause' exists when facts and circumstances are sufficient in themselves to warrant a man of reasonable caution to respond in a specific manner. This indicates the type of person to whom a thing must be 'reasonable' or 'probable' to, and as such is helpful, but it does nothing to quantify 'reasonable grounds' and 'probable cause' respectively. Nothing indicates that the terms 'reasonable grounds' and 'probable cause' are terms of legal precision and articulation. In fact, what a person of 'reasonable caution' in everyday living treats as 'reasonable' or 'probable' respectively, may ultimately be the best explanation, with one caveat. Thus 'reasonable grounds' and 'probable cause' it can be argued, may ultimately be referred to as the competition of the individual's interest in being free from intrusion, and society's interest in law enforcement and crime prevention, a competition which forms the basis for search and seizure in criminal procedure. Recognising that these competing interests are at work influencing 'reasonable grounds' and 'probable cause' lends an understanding of why certain factors, not really relating to 'reasonableness' and 'probability' in the strict sense, are deemed relevant variables in determining 'reasonable grounds' and 'probable cause'. Occasionally the courts refer to the gravity of an offence in determining 'reasonable grounds' and 'probable cause' respectively. It is well settled that these type of factors are utilised to determine reasonableness, but whether articulated or not, they bear at least to some extent on the 'reasonable grounds' and 'probable cause' question as well.

CONCLUSION

In both South Africa and in the United States it is preferable that a search and/or seizure should where possible only be conducted in terms of a search warrant issued by a judicial officer, such as a magistrate. This practice ensures that an independent judicial officer prevails between the individual and the police official. The rationale motivating the requirement of a search warrant is to provide a safeguard, namely that before a search and seizure takes place, the 'conflicting interests of the state and the individual', are assessed by an 'impartial arbiter', primarily to ensure that there is no unwarranted interference with the individual's fundamental rights such as the right to privacy. The underlying purpose is to prevent unreasonable searches rather than to remedy unconstitutional breaches of privacy after the intrusion. This requirement places an onus on the state (which includes police officials) to demonstrate the superiority of its interests to that of the individual. It is consistent with the intention of the South African 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.

It is clear that the ideal situation entails that a person other than the official who intends to intrude upon an individual's privacy, should make two judgement calls: firstly, that there are reasonable grounds for the intrusion, and secondly, even if such grounds exist, that the intrusion is justified under the circumstances. Therefore, an independent, detached, responsible officer is called upon to make such an assessment. However, in South Africa this principle is not fully adhered to. The general rule is that a search should be authorised by a judicial officer.[134] In South Africa this power is however extended to justices who include *de facto* justices of the peace. It is constitutionally questionable that members of the executive (the police) are granted this power. In South Africa, a search warrant may be issued by a magistrate or justice, who after considering information on oath has reasonable grounds for believing that an article referred to in section 20 of the Criminal Procedure Act, which can be of use in proving a criminal case, is in the possession or under the control of any person or upon or at any premises within his area of jurisdiction.[135] A judge or judicial officer presiding at criminal proceedings is also authorised to issue a search warrant only 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.[136]

It has been emphasised that in order to protect the individual against excessive interference by the state, a warrant should be strictly interpreted. It is constitutionally imperative that a search warrant must clearly define the purpose of the search and the articles that must be seized. Where a search warrant only specifies the articles that are supposed to be seized, in broad and general terms, the court will find that the judicial officer did not apply his mind properly to the question whether there was sufficient reason to interfere with the liberty of the individual, as espoused in the Bill of Rights.

It is clear that a search warrant must clearly define the purpose of the search and the articles sought to be seized. It is authoritatively established in South Africa, that for validity, a warrant must convey intelligibly to both the searcher and the searched the ambit and sphere of the search it authorises. A search warrant must be couched in clear and specific terms and law enforcement officers executing such warrants must operate within these terms.

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[134] Section 21(1) and s 25 Criminal Procedure Act.
[135] Section 21(1)*(a)* of the Criminal Procedure Act.
[136] Section 21(1)*(b)* of the Criminal Procedure Act.