

A critique of search and seizure in terms of a search warrant in South African criminal procedure

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Abstract

The requirements and safeguards for a valid search warrant in South African criminal procedure are critically analysed in this article. The existence of safeguards to regulate the way in which law enforcement officials may enter the private sphere of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously varied in this regard. Many generations of systemised and egregious violations of personal privacy established norms for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standard of conduct now required by the Bill of Rights. Today, law enforcement officials must be highly skilled in the use of investigative tools and extremely knowledgeable about the intricacies of the law. One error in judgment during initial contact with a suspect can, and often does, impede the investigation and could affect the fairness of the trial. For example, an illegal search may so contaminate evidence obtained that it will not be admitted as evidence in court. In addition to losing evidence for prosecution purposes, failing to comply with constitutional mandates often leads to liability on the part of the law enforcement official.

1 Introduction

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.¹ This article analyses 'search and seizure' in the South African

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¹Constitution of the Republic of South Africa, 1996 (hereafter either the 1996 Constitution or the Constitution). See also *Minister of Safety and Security v Van der Merwe* 2011 2 SACR 301 (CC). All

criminal justice system as is made possible by chapter 2 of the Criminal Procedure Act 51 of 1977,² which provides for search warrants, the entering of premises, and the seizure of property connected with offences. 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, 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 American criminal procedure will also be analysed for comparative purposes.

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 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

The Constitution affects a fundamental balance between the interests of society in bringing offenders to justice and the rights and liberties of persons suspected of crime. There was an inherent need for clear and certain rules within which the state should operate. A person's right to be free from being searched and having his goods confiscated has its origin in common law in the context of eighteenth century English

law-abiding citizens of this country are deeply concerned about the scourge of crime. In order to address this problem effectively, every lawful means must be employed to enhance the capacity of the police to root out crime or at least reduce it significantly. Warrants issued in terms of s 21 of the Criminal Procedure Act 51 of 1977 are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating, and investigating crime. In the course of employing this tool, they inevitably interfere with the equally important constitutional rights of individuals who are targeted by these warrants.

² Hereafter the Criminal Procedure Act. Chapter 2 of the Criminal Procedure Act is entitled 'Search Warrants, Entering of Premises, Seizure, Forfeiture and Disposal of Property Connected with Offences'. In addition to s 19, it also accommodates the following provisions, dealing with search and seizure with a warrant, which are detailed in this chapter: s 20 (the state may seize certain articles); s 21 (an article to be seized under a search warrant); s 25 (power of the police to enter premises in connection with state security or any offence); s 27 (resistance against entry and search); section 28 (wrongful search an offence, and award of damages); s 29 (search to be conducted in a decent and orderly manner).

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

⁴ *Id* 487.

⁵ *Ibid*.

society, where the notion of the sanctity of the home and the property owner's need to be free and secure from government intrusion was of cardinal importance.⁶ The following eloquent remarks aptly illustrate the inviolability of a person's home:

[T]he poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares (*sic*) not cross the threshold of the ruined tenement.⁷

All constitutions concern themselves with the exercise of public power.⁸ In modern democratic constitutions such as the South African Constitution, such power is divided between the legislature, the executive and the judiciary.⁹ The Constitution also concerns itself with the form in which power is exercised. Law is the medium through which power is exercised and disseminated, beginning with the Constitution itself.¹⁰ No rule may be made except in accordance with the Constitution. A democratic Constitution is a rule-making machine.¹¹ No public body may exercise power except in terms of an authorising rule and no person is above the law.¹² The Constitution also concerns itself with values and principles. These values are *a priori* commitment upon which the whole edifice of democratic government is structured. They are the *a priori* assumptions that justify and give the Bill of Rights a particular form.¹³ Encapsulated around human dignity, privacy and associated fundamental rights these values inform the Constitution.

The courts play a pivotal role in the development and application of a fair law of criminal procedure. The success of the Bill of Rights will not only depend on how the courts and the legal profession deal with it, but also how assertively and judiciously those whose rights are entrenched, will invoke this instrument.¹⁴ The spirit, purport and object of the Constitution were expressed by Mahomed DP in *Shabalala v Attorney-General of Transvaal*¹⁵ where he held:

[T]he dominant theme of the Constitution ... is to emphasise the 'historic bridge' which the Constitution provides between a past based on 'conflict, untold suffering and injustice' and a future which is stated to be founded on the recognition of human rights.¹⁶

⁶Dugard *South African criminal law and procedure: Introduction to criminal procedure* (1977) 1-3.

⁷LaFare *Search and seizure: A treatise on the Fourth Amendment* (1987) 4.

⁸Cheadle, Davis and Haysom *South African constitutional law: The Bill of Rights* (2002) 25.

⁹*Id* 26.

¹⁰*Ibid.*

¹¹*Ibid.*

¹²*Ibid.*

¹³*Ibid.*

¹⁴Du Plessis and Corder *Understanding South Africa's transitional bill of rights* (1994) 39.

¹⁵1995 2 SACR 761 (CC) para18.

¹⁶*Ibid.*

However, he warned:

[T]he Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. The past was pervaded with inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency.¹⁷ 17

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

In all systems it is recognised that the police exercise the powers to search a person or a premises, the power to seize property uncovered in such searches, and the power to arrest persons whose possible guilt is indicated by the evidence discovered during the investigation. The right to search, seizure and arrest is not left entirely at the discretion of the police. In both the inquisitorial and adversarial systems these powers may be exercised only with the authorisation of a judicial officer. It is, however, universally recognised that the police may in certain circumstances act without prior authorisation.

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

The powers of search and seizure constitute also the first and most effective weapons in the arsenal of every arbitrary government. ... [t]he human personality deteriorates and self-reliance disappears where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.¹⁸

Secondly, there exists the risk that abuses at the pre-trial stage could well taint the fairness of a subsequent criminal trial. Thus many bills of rights provide protection against improper exercise of pre-trial investigative powers. The United

¹⁷*Id* para 21.

¹⁸*Brinegar v US* 338 US 160 (1949) 223.

States Constitution, in the Fourth Amendment,¹⁹ confers on individuals the right 'to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures'.

A search warrant should comply with strict requirements as to who may execute the warrant, where, how and when the warrant will become invalid. At this critical juncture in the history of South Africa, when a constitutional democracy based on the rule of law must take root, rampant crime is one of the greatest public concerns. In *S v Makwanyane*,²⁰ Chaskalson P observed that the level of crime has reached such 'alarming proportions that it poses a threat to the transition of democracy and the creation of development opportunities for all, which are primary goals of the Constitution'. Crime empties the right to freedom and security of person and the right to property of meaning.²¹

The Constitution aims at advancing an ethical criminal justice system that is accountable to society. The Bill of Rights is a powerful instrument in the reconstruction and transformation of South African society. However the Bill of Rights should not be regarded as a panacea for all ills. It should rather be understood and used within the structural context of the whole Constitution, from which it must draw its strength.

Today, law enforcement officials must be highly skilled in the use of investigative tools and extremely knowledgeable about the intricacies of the law. One error in judgement during initial contact with a suspect can, and often does impede the investigation and could affect the fairness of the trial. For example, an illegal search may so contaminate evidence obtained that it will not be admitted as evidence in court. In addition to losing evidence for prosecution purposes, failing to comply with constitutional mandates often leads to liability on the part of the law enforcement official.

2 Defining search and seizure

The terms 'search and seizure' are not clearly defined in the South African legal context. What is meant by search is left to common sense and is determined on a case by case basis. Steytler²² and Cheadle²³ 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.²⁴ Where

¹⁹Constitution of the United States (1789), Fourth Amendment (ratified 15 December 1971).

²⁰1995 6 BCLR 665 (CC) para 44.

²¹Cameron 'Rights, constitutionalism and the rule of law' (1997) SALJ 504-508.

²²Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa, 1996* (1998) 8.

²³See Cheadle, Davis and Haysom (n 8) 51.

²⁴McQuoid-Mason *The law of privacy in South Africa* (1978) 107.

'search' relates to a person it must be given its ordinary meaning in its context.²⁵ In *Minister of Safety and Security v Xaba*²⁶ 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. The South African Police Service National Instruction²⁷ 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*,²⁸ the term 'seizure' in terms of the National Prosecuting Authority Act 32 of 1998 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.²⁹ 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 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.³⁰

In *Community Repeater Services v Minister of Justice*,³¹ 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.³² 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 concerned was to be seized.³³ The warrants were found to be invalid.³⁴

As regards the concept 'seizure' the court in *Ntoyakhe v Minister of Safety and Security*,³⁵ held that, for the purpose of the Criminal Procedure Act, the word 'seize' encompasses not only the act of taking possession of an article, but also

²⁵The 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'.

²⁶*Minister of Safety and Security v Xaba* 2004 1 SACR 149 (D).

²⁷South African Police Service National Instruction 2 of 2002.

²⁸*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 2 SACR 349 (CC).

²⁹*Id* 357.

³⁰*Id* 359.

³¹*Community Repeater Services CC v Minister of Justice* 2000 2 SACR 592 (SEC).

³²*Id* 593-594.

³³*Id* 595.

³⁴*Ibid*.

³⁵*Ntoyakhe v Minister of Safety and Security* 2000 1 SA 257 (E).

the subsequent 'detention'³⁶ thereof.³⁷ The court explained that otherwise the right to seize would be rendered worthless.³⁸ 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 person of lawful possession of an article indefinitely.³⁹ 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 20.⁴⁰ The right of the state to keep the article seized is not, however, unlimited. It too must be in accordance with the provisions of Chapter 2 of the Criminal Procedure Act.⁴¹

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.⁴² The Constitutional Court held that the word 'seizure' is not a term of art and should be given its ordinary and natural meaning.⁴³ 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.⁴⁴ 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.

³⁶'Detention' in the (2005) *Compact Oxford English dictionary* is defined as: '1 the state of being detained in official custody ...'

³⁷See *Ntoyakhe v Minister of Safety and Security* (n 35) 264.

³⁸*Id* 264E.

³⁹*Ibid.*

⁴⁰*Ibid.*

⁴¹*Ibid.*

⁴²*Rudolph v Commissioner for Inland Revenue* 1997 4 SA 391 (SCA).

⁴³*Rudolph v Commissioner for Inland Revenue* 1997 7 BCLR 889 (CC) para 11.

⁴⁴*Bernstein v Bester* 1996 4 BCLR 449 (CC).

3 Requirements and safeguards for a valid search warrant

3.1 Prerequisites

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.⁴⁵ 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:⁴⁶

- articles which are 'concerned'⁴⁷ 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;⁴⁸
- articles which may afford evidence of the commission or suspected commission of an offence, whether within South Africa or elsewhere;⁴⁹ or
- 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.⁵⁰

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. It is intended to assist law enforcement officers in their investigations of criminal cases. It stipulates that

⁴⁵Section 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.

⁴⁶Section 20 of the Criminal Procedure Act. (The term 'anything' is expounded upon below.)

⁴⁷The term 'concerned' is further discussed below.

⁴⁸Section 20(a) of the Criminal Procedure Act.

⁴⁹Section 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 Joubert *Applied law for police officials* (2010) 307.

⁵⁰Section 20(c) of the Criminal Procedure Act. Steytler (n 22) 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.

'anything' may be seized. Furthermore, it states that 'anything' is referred to as 'an article' in chapter 2 of the Criminal Procedure Act. 'Anything' is indeed a very wide word 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 developments 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, namely, that the provisions of the Criminal Procedure Act were developed when the idea of a location which is not a physical premises or the seizure of something which is not a tangible object were inconceivable.⁵¹

Furthermore it is submitted that the words 'concerned in' in section 20 of the Criminal Procedure Act are also very wide. It is also submitted that because seizure infringes on the privacy of a person, the words 'concerned in' the commission of an offence should be interpreted restrictively. In the light of criminal investigations and procedure it is submitted that the term 'concerned in' should embrace a meaning which displays for example that the article is concerned in the commission of an offence and which is reasonably necessary to prove the offence, or which would probably be forfeited to the state.

3.2 *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 by a judicial officer, such as a magistrate, a judge or a justice of the peace.⁵² Section 21(1) provides that 'anything'⁵³ which is susceptible to search and seizure may be seized only by virtue of a search warrant issued in the following circumstances:

- by a magistrate⁵⁴ or justice,⁵⁵ if it appears to such a magistrate or justice from information under oath that there are reasonable grounds for

⁵¹The South African Law Reform *Discussion Paper 99 on computer-related crime* (2001) 14.

⁵²Section 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 ...'

⁵³Referred to as 'articles' in s 20 of the Criminal Procedure Act.

⁵⁴A '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.

⁵⁵Section 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.

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

- by a judge or a judicial officer presiding at criminal proceedings,⁵⁶ 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.⁵⁷

In terms of the Criminal Procedure Act authority is also granted to justices of the peace to issue search warrants.⁵⁸ 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.⁵⁹ 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 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.⁶⁰ The latter rule has also been recited and invoked in the United States by state courts in state decisions.⁶¹ This approach of the United

⁵⁶This 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.

⁵⁷*Park Ross v Director: Office for Serious Economic Offences* 1995 2 All SA 202 (C).

⁵⁸Sections 21(1) and 25(1) of the Criminal Procedure Act.

⁵⁹*S v Motloutsi* 1996 1 SACR 78 (C).

⁶⁰*Coolidge v New Hampshire* 403 US 433 [1971].

⁶¹*Mollet v State* 939 P2d 1 (O kla) 743 [1997].

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.⁶² An independent, detached, responsible officer is therefore required to make such an assessment.⁶³

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.⁶⁴ The court in *Cornelissen v Zeelie NO*⁶⁵ 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.⁶⁶ It is submitted that this principle needs to be clearly invoked in the Criminal Procedure Act.⁶⁷ The decision-maker 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.

3.3 Search and seizure warrants to maintain internal security and law and order

Section 25 of the Criminal Procedure Act also makes provision for the issuance of a search warrant. Unlike section 21 of the Criminal Procedure Act where the application for a search warrant is based on the suspected presence of an article mentioned in section 20 of the Criminal Procedure Act, the reason for obtaining a search warrant in terms of section 25 is linked either to state security, or to the commission of an offence. The discussions, submissions, arguments and

⁶²*Park Ross v Director: Office for Serious Economic Offences* (n 57) para 219.

⁶³*SA Police v Associated Newspapers* 1966 2 SA 503 (A).

⁶⁴Section 205 of the Criminal Procedure Act.

⁶⁵*Cornelissen v Zeelie NO* 1994 2 SACR 41 (W) para 69i.

⁶⁶*Ibid.*

⁶⁷This principle is not enshrined in s 21 of the Criminal Procedure Act.

comparisons above, with regards to a neutral and detached judicial officer, and the justice of peace (s 21(1) of the Criminal Procedure Act) are equally applicable to search warrants to maintain internal security and law and order under section 25 of the Criminal Procedure Act.

A warrant issued in terms of section 25 of the Criminal Procedure Act confers very wide powers on the police. It is submitted that where the person issuing the warrant is part of the office of the executing officer then, objectively speaking, neutrality and impartiality are questionable and in doubt. This could well pose a threat to relevant constitutional rights and values. Furthermore it is submitted that commissioned police officers may lack legal knowledge and could have a direct interest in the matter, and this has the potential to encroach upon fundamental human rights.

It is also submitted that a very contentious issue is the fact that a police official who acts in terms of section 25 may take 'such steps'⁶⁸ as he considers necessary for the preservation of the internal security of the Republic or the prevention of any offence, which could well be a minor offence, causes a subjective standard to be applied. The police official is allowed a discretionary power. The standard for the police official's conduct is arbitrary, because it applies to that which the police official considers necessary and not to that which is necessarily objectively reasonable and justifiable. However, if the law enforcement officer enters the premises under authority of section 25(1)(b)(ii) with the purpose of searching and seizing the premises or any person thereupon for an article referred to in section 20 and which he reasonably suspects to be upon a person or on the premises, the test is an objective one.⁶⁹

3.4 *Information under oath*

Section 21(1) of the Criminal Procedure Act requires that information on oath must be provided to a magistrate or justice before a search warrant may be issued. The information may be given verbally or in writing.⁷⁰ Information in writing is however preferable, because it facilitates proving what information was given to the magistrate or justice. It should be noted that hearsay evidence may be regarded as 'information' for the purposes of section 21(1) of the Criminal Procedure Act. A police official may submit an affidavit in which hearsay evidence is used, for example, information from an informer, if the police official is of the opinion that the hearsay evidence is true and/or correct.⁷¹

⁶⁸Section 25(1)(b)(i) of the Criminal Procedure Act.

⁶⁹*Ndabeni v Minister of Law and Order* 1984 3 SA 500 (D).

⁷⁰*Steytler* (n 22) 88-89.

⁷¹*Van der Merwe v Minister of Justice* 1995 2 SACR 471 (O).

The information on oath must indicate that there are reasonable grounds for believing that an article referred to in section 20 of the Criminal Procedure Act is in the possession of or under the control of any person or upon or at any premises within the area of jurisdiction of the person that is approached with the application. If the oath is not administered as required by the Criminal Procedure Act, the warrant will be invalid. In *Toich v The Magistrate, Riversdale*,⁷² on evidence before it, the court found that an affidavit for a second search warrant was not attested.⁷³ From the record of proceedings before the magistrate, the only document relied upon by the police officer in her application for the warrant was her own undated and unattested affidavit.⁷⁴ By virtue of the fact that there was no *viva voce* evidence and that the affidavit was not attested, there was no evidence of any kind placed before the magistrate on oath.⁷⁵ On the basis of that reason alone it was held that the magistrate had no power under section 21(1)(a) of the Criminal Procedure Act to authorise the issuance of a warrant and it was accordingly invalid.⁷⁶

3.5 Reasonable grounds for the search

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

⁷²72 2007 2 SACR 235 (C).

⁷³*Ibid* para 239.

⁷⁴*Ibid*.

⁷⁵*Ibid* para 240.

⁷⁶*Ibid*.

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.⁷⁷ It is insufficient to merely ask whether the articles are 'possibly' concerned with an offence.⁷⁸ The question arising is what criteria should be employed to determine the basis of such grounds.⁷⁹ One may infer that for a seizure of property on reasonable grounds to be justifiable there should be an objective set of facts which cause the officer to have the required belief.⁸⁰ In the absence of such facts, the reliance on reasonable grounds will be vague.⁸¹

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 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.⁸² In *Minister of Law and Order v Hurley*,⁸³ the court illustrated the strictness with which the 'reasonable grounds' requirement is enforced. It was maintained by the court that if the section commissioned an officer to exercise a discretionary power on reasonable grounds, such commissioning does not preclude the court from considering whether the officer indeed had reasonable grounds for his belief.⁸⁴ 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*,⁸⁵ 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.⁸⁶ It thus followed that the magistrate had not properly applied his mind when issuing the warrant and the warrant was therefore invalid.⁸⁷

⁷⁷ Cheadle, Davis and Haysom (n 8) 193; see also *Rajah v Chairperson: North West Gambling Board* 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'.

⁷⁸ *Mandela v Minister of Safety and Security* 1995 2 SACR 397 (W).

⁷⁹ *Id* 400-401.

⁸⁰ *Id* 401.

⁸¹ *Ibid*.

⁸² Joubert *Criminal procedure handbook* (2007) 97.

⁸³ *Minister of Law and Order v Hurley* 1986 3 SA 568 (A).

⁸⁴ *Id* 573.

⁸⁵ *Toich v The Magistrate, Riversdale* (n 72).

⁸⁶ *Id* 243.

⁸⁷ *Ibid*.

It is submitted that the approach in *Van der Merwe v Minister of Justice*,⁸⁸ 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.⁸⁹ The inherent essence of reasonable grounds is that they are objective⁹⁰ and can be reviewed by a court.⁹¹ The court in *Zuma v National Director of Public Prosecutions*,⁹² referred to the decision in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*,⁹³ where it stressed that the task of the independent authority issuing a search warrant is first to establish the level of suspicion to justify an invasion of privacy, and second, to establish whether there are reasonable grounds to suspect that the evidence sought is on the specific premises. The latter was confirmed in *Zuma v National Director of Public Prosecutions*,⁹⁴ where the court reiterated that the emphasis is on the existence of 'reasonable grounds for believing'. The court in *Powell v Van der Merwe*,⁹⁵ held that a reasonable suspicion is an impression formed on the basis of diverse factors, including facts and pieces of information.⁹⁶

3.6 Particularity and specificity: The offence, the place or person to be searched and the articles to be seized

In South Africa it is an established principle of the law of criminal procedure that all directives in a warrant must be strictly interpreted to protect any individual against excessive interference by the state.⁹⁷ There must be legal particularity, specificity and accuracy in respect of the authorisation with regard to, *inter alia*, the official to whom the warrant is addressed; the individual and/or premises that constitute the object of the search and seizure; the articles to be seized; the purpose of the search and seizure; the period during which it is allowed; and the

⁸⁸*Van der Merwe v Minister of Justice* 1995 2 SACR 471 (O).

⁸⁹Du Toit *et al Commentary on the Criminal Procedure Act* (2005) 27.

⁹⁰*Ibid.*

⁹¹*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.

⁹²*Zuma v NDPP* (n 3).

⁹³*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 10 BCLR 1079 (CC).

⁹⁴*Zuma v National Director of Public Prosecutions* (n 3).

⁹⁵*Powell v Van der Merwe* 2005 5 SA 62 (SCA).

⁹⁶*Id* 64.

⁹⁷*Pullen NO v Waja* 1929 TPD 838 (E).

acts authorised under the warrant.⁹⁸ The accuracy of the warrant with regard to both the objects that are sought and the places to be searched provides guidance and meaning to the protection which prior judicial authorisation affords.⁹⁹ It is imperative that the content of the warrant should be certain and clear.¹⁰⁰ The articles sought must be described in sufficient detail, in order to prevent the warrant being declared void for vagueness.¹⁰¹

With regard to the articles to be seized, the warrant must clearly define the purpose of the search and the articles that must be seized. In *Rajah v Chairperson: North West Gambling Board*,¹⁰² it was held that a warrant must be interpreted strictly.¹⁰³ It is crucial that warrants be clearly worded.¹⁰⁴ If the search warrant only specifies the articles to be seized in broad and general terms, it may be accepted that the judicial officer did not apply his mind properly.¹⁰⁵ Section 21(2) of the Criminal Procedure Act requires that a warrant must direct a police official to seize the article in question. For this purpose the warrant must specifically authorise such an official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.¹⁰⁶ A search warrant must empower the law enforcement officer executing the search to identify the person identified in the warrant.¹⁰⁷ If the search warrant is directed at the search of premises, such premises must be clearly and accurately identified.

It is a clear principle in South African criminal procedure that search warrants must be couched in clear and specific terms, and police officials executing such warrants must operate within those terms.¹⁰⁸ A warrant can only be issued for the

⁹⁸*Smit and Maritz Attorneys v Lourens* 2002 1 SACR 152 (W): the court ruled that a warrant addressed to 'all law enforcement officers' was invalid. The restrictive interpretation of a 'law enforcement officer' should be an identified officer, so as to provide a safeguard for the rights of persons subject to seizure.

⁹⁹Steytler (n 22) 93.

¹⁰⁰See *Ex parte Hull* 1891 4 SAR 134: a warrant was set aside for vagueness and over-breadth. Kotzé CJ held that the warrant was 'too general and too vague'. He maintained that under a loose and arbitrary exercise of a general power to issue search warrants 'no one would be safe'.

¹⁰¹*Powell v Van der Merwe* 2005 5 SA 62 (SCA).

¹⁰²2006 3 All SA 172 (T).

¹⁰³*Id* 182.

¹⁰⁴*Ibid*.

¹⁰⁵*Smith, Tabata and Van Heerden v Minister of Law and Order* 1989 3 SA 627 (E).

¹⁰⁶Section 21(2) of the Criminal Procedure Act.

¹⁰⁷It is not necessary to identify the person to be searched by name. The person can also be described in another way, as long as the description is detailed and precise (see Kriegler *Suid-Afrikaanse strafproses* (1993) 38. In *Community Repeater Services CC v Minister of Justice* (n 31) the court referred to the general language in which the warrants were couched (there was no reference to the personal entity from whom the apparatus concerned was to be seized), and *inter alia* for that reason held the warrants to be invalid.

¹⁰⁸*Divisional Commissioner SAP Wits v Saan* 1966 2 SA 503 (A).

purpose of securing articles that are reasonably believed to be concerned in the commission of an offence and are to be used in subsequent criminal proceedings in order to prove such an offence.¹⁰⁹ In *Community Repeater Services v Minister of Justice*,¹¹⁰ a number of warrants issued by magistrates failed on both the above-mentioned grounds. The warrants merely authorised the seizure of 'radio apparatus: (repeater)' or 'radio apparatus'.¹¹¹ The warrants contained no reference to any person or entity from whom the radio apparatus was to be seized.¹¹² In *Toich v The Magistrate, Riversdale*,¹¹³ the court explained that a warrant authorising the arrest of an unspecified person, or the search of unspecified premises, or for unspecified articles is as a rule invalid.¹¹⁴

3.7 The execution of search and seizure warrants

Section 21(3)(a) of the Criminal Procedure Act requires that a search warrant must be executed by day¹¹⁵ unless the police official is specifically authorised therein to execute it by night. While section 21(3) of the Criminal Procedure Act intends to ensure that the privacy of people's homes is not invaded at unreasonable hours, this does not mean that a search which commenced during the day becomes unlawful at sunset.¹¹⁶ In *Rajah v Chairperson: North West Gambling Board*,¹¹⁷ the court explained that night execution should be exceptional and only authorised when it is in the interest of the proper administration of justice and critically urgent for the police investigation.¹¹⁸ There must be compelling reasons to justify the authorisation of search and seizure between sunset and sunrise.¹¹⁹ Mere convenience is not a compelling reason for execution of a search warrant at night.¹²⁰

¹⁰⁹*Cine Films (Pty) Ltd v Commissioner of Police* 1972 2 SA 254 (A).

¹¹⁰*Community Repeater Services v Minister of Justice* (n 31) 597.

¹¹¹*Ibid* 593.

¹¹²*Ibid*.

¹¹³*Toich v The Magistrate, Riversdale* (n 72) 120.

¹¹⁴*Ibid* 137-138.

¹¹⁵'Day' is defined in s 1 of the Criminal Procedure Act as the duration of time between sunrise and sunset. Comparatively in the United States the Fourth Amendment regulates when a warrant may be issued but it says nothing about how the warrant should be executed, see *Dalia v United States* 441 US 238 [1979].

¹¹⁶In *Young v Minister of Safety and Security* 2005 2 SACR 437, the court held that the fact that the law enforcement official interrupted his search in order to fetch certain equipment, and returned after nightfall did not constitute an unauthorised search. A similar stance is adopted in the United States where the court ruled that while night time searches of private homes raises special concerns relating to the invasion of privacy, night-time searches are not *per se* unreasonable, see *United States v McCarty* 475 F3d 39 [2007].

¹¹⁷*Rajah v Chairperson: North West Gambling Board* (n 102) 146.

¹¹⁸*Ibid* 187.

¹¹⁹*Ibid*.

¹²⁰*Ibid*.

In converse to section 21, section 25 of the Criminal Procedure Act does not make provision for the time of execution of a search warrant. A search warrant issued in terms of section 25 of the Criminal Procedure Act may be executed on any day, including weekends and public holidays.¹²¹ It is submitted that the reasonableness of the time at which a warrant is executed is significant in terms of the South African Constitution, because it has a profound effect on the dignity and privacy of the individual concerned.

In terms of section 21(3)(b) of the Criminal Procedure Act, a warrant may be issued and may be executed on any day. It remains in force until it is acted upon or is cancelled by the person who issued it, or if such person is not available, by a person with the same authority. Section 21(4) of the Criminal Procedure Act directs a police official executing a warrant under section 21 or section 25 of the Criminal Procedure Act, 'after' such execution, 'upon demand' of any person whose rights have been affected by the search or seizure under the warrant, to hand him or her a copy of the warrant.¹²²

In terms of section 27(1) of the Criminal Procedure Act, a police official who may lawfully search any person or premises, may use such force as may be reasonably necessary to overcome any resistance against such search or entry of such premises, including the breaking of any door or window of such premises, provided that such police official shall first audibly demand admission to the premises and notify the occupier on the premises of the purpose for which he or she seeks to enter such premises.¹²³ The *proviso* of a previous warning does not apply where the police official concerned reasonably believes that any article which is the subject of the search may be destroyed or disposed of, if entry to the premises is demanded.¹²⁴

4 Conclusion

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

¹²¹Section 25(2) of the Criminal Procedure Act.

¹²²Section 21(4) of the Criminal Procedure Act.

¹²³Section 27(1) is also applicable where no warrant has been issued, but the circumstances of ss 22(b) and 25(3) of the Criminal Procedure Act are present.

¹²⁴Section 27(2) of the Criminal Procedure Act.

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.¹²⁵ 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.¹²⁶ 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.¹²⁷

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.¹²⁸

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

¹²⁵Section 21(1) and section 25 Criminal Procedure Act.

¹²⁶Section 21(1)(a) of the Criminal Procedure Act.

¹²⁷Section 21(1)(b) of the Criminal Procedure Act.

¹²⁸*Smith, Tabata and Van Heerden v Minister of Law and Order* (n 105) 640.

the searched the ambit and sphere of the search it authorises.¹²⁹ A search warrant must be couched in clear and specific terms and law enforcement officers executing such warrants must operate within these terms.

The following specific submissions are made and where applicable recommendations are provided:

- (i) In South Africa the concepts 'search' and 'seizure' are often used interchangeably. They are however two separate and distinct concepts, having their own unique characteristics. Constitutional protection against unreasonableness extends to both concepts. In South African criminal procedure the concepts 'search' and 'seizure' are not defined comprehensively. It appears that each case should be assessed on its own merits. It is recommended that the Criminal Procedure Act should embrace a more comprehensive and clear definition of search and seizure respectively. In the light of section 14 of the Constitution, it is recommended that the term 'search' and the term 'seizure', for the purpose of Chapter 2 of the Criminal Procedure Act should be defined respectively as follows:

Search means a lawful invasion of a person's privacy by the state which society considers as reasonable. A search occurs when an expectation of privacy that society is prepared to consider as reasonable is lawfully infringed by the state.

Seizure means a lawful interference by the state with a person's possessory rights to property, and includes the subsequent detention of that property. A seizure occurs when a person's property is law fully taken away from him or her by the state.

A recognisable advantage of these recommended definitions is that it makes provision for searches and seizures of tangible as well as intangible items.

- (ii) 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 investigation of criminal cases. It provides that 'anything' may be seized. In addition, it states that 'anything' is referred to as 'an article' in chapter 2 of the Criminal Procedure Act. It is submitted that 'anything' is a very wide word and could include items such as documents, cheques and money, as is also

¹²⁹*Zuma v NDPP* (n 3) 127.

evident from section 33(3)(a) of the Criminal Procedure Act which provides *inter alia* for the handling of such items by the clerk of the court. It is therefore submitted that the term 'anything' should be interpreted restrictively. It is also submitted that in the light of technological developments and advances in search and seizure procedures the term 'anything' should be susceptible to an interpretation to also include the search and seizure of intangible information/evidence.

- (iii) The term 'concerned in' in section 20 of the Criminal Procedure Act is very wide. It is submitted that because a seizure infringes on the privacy of a person, the term 'concerned in' the commission of an offence should be interpreted restrictively. With regards to criminal investigations and criminal procedure it is submitted that the term 'concerned in' should embrace a meaning which displays for example that the article is concerned in the commission of an offence and which is reasonably necessary to prove the offence, or which would probably be forfeited to the state.
- (iv) Section 21 of the Criminal Procedure Act and also Chapter 2 of the said Act generally make reference only to an 'oath', unlike the Fourth Amendment of the United States where provision is made for an 'oath' as well as an 'affirmation'. The Criminal Procedure Act does not contain a definition of 'oath'. When cognisance is taken of the privacy clause in the Constitution, as well as section 15 of the Constitution which provides that 'everyone has the right to freedom of conscience, religion, thought, belief and opinion' the approach of the Criminal Procedure Act pertaining to the 'oath' becomes constitutionally questionable. An oath is defined as a solemn, formal declaration or promise to fulfil a pledge, often calling on God, a God or sacred object as witness.¹³⁰ In terms of the latter definition the requirement of an 'oath' in the Criminal Procedure Act poses a constitutional challenge. It is submitted that provision should also be made for persons who are averse to taking the oath, for religious, personal or whatever justifiable reason. Although it can be argued that South African courts make provision for an affirmation, it is submitted that the Criminal Procedure Act does not give expression to such practise.

¹³⁰*American heritage dictionary (2000).*

- (v) A search warrant may be issued by a magistrate or justice¹³¹ (a justice includes a justice of the peace¹³²). A commissioned police officer is a justice of the peace,¹³³ 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 questionable that a commissioned police officer who may have a direct interest in the case is empowered to issue a search warrant. It is recommended that such power should not be extended to persons who have a direct interest in a case and that the Criminal Procedure Act should specifically spell this out.
- (vi) Although section 21 of the Criminal Procedure Act does not require that the suspected offence should be set out in the warrant, it is recommended that the warrant should do so in order to facilitate the interpretation of the warrant. Failure to particularise the offence may present difficulties to the state, not only by reason of a declaration of invalidity which may result, but also where the person concerned applies to have the seized property restored to him. The state may not be able to establish an evidentiary nexus between the property and the infraction. It is a necessary incident of the right to privacy enshrined in section 14 of the Constitution that the information in the warrant alleges an offence in sufficient terms to reasonably inform the person subjected to the search of the nature of the offence and the object of the offence. It will be sufficient if the offence is stated in a manner that informs the parties of the nature of the offence.
- (vii) In terms of section 21(4) of the Criminal Procedure Act, a police official after executing a search warrant, must hand a copy of the warrant to any person whose rights were affected by the search and seizure, 'upon demand' of the person whose rights in respect of any search or article seized under the warrant have been affected. When cognisance is taken of the high premium the Constitution places on the protection of an individual's fundamental rights, it is questionable, why only 'upon demand' of a person whose rights are affected by a warrant, that a copy of the warrant is handed to such a person. Section 7(2) of the Constitution clearly spells out that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights'. It is submitted that 'respect' for a person's right to privacy as encapsulated in section 14 of

¹³¹Section 21 of the Criminal Procedure Act.

¹³²Section 1 of the Criminal Procedure Act.

¹³³Section 1 of the Criminal Procedure Act.

the Constitution entails affording that person reasons for the infringement of his right prior to and not after an infringement of his right. Providing the person a copy of the warrant prior to the search will not unduly affect the search. The police official should produce and exhibit the search warrant and permit inspection of it, so that the person being searched can satisfy himself that the search is indeed lawful. It is recommended that section 21 should be amended to specify that a copy of the warrant must be handed to the person whose rights are affected by the warrant prior to the search and seizure.

- (viii) In terms of section 25(b)(i) of the Criminal Procedure Act a police official may conduct such investigations and take such steps as the police official may 'consider necessary' for the preservation of the internal security of the Republic, or for the maintenance of law and order, or for the prevention of any offence. It is constitutionally questionable, namely, the fact that a police official may take such steps as he 'considers necessary' for the attainment of objectives that could well be legally irrelevant or of little importance. The police official is thus permitted a standard of conduct which is subjective, arbitrary, and constitutionally questionable in the light of individual fundamental rights enshrined in the South African Constitution, because it applies to that which the police official considers necessary and not to that which is necessarily objectively and legally justifiable. It is recommended that section 25(1)(b)(i) should read:

For carrying out such investigations and for taking such steps as are reasonably necessary for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of crime.

This enables the 'reasonable man/person test' to be applied to the actions of the police official, and it prevents the police official from acting arbitrarily.