CONSTITUTIONAL VALIDITY OF SECTION 11(1)(a) AND (g) OF THE DRUGS AND DRUG TRAFFICKING ACT

***Minister of Police v Kunjana* [2016] ZACC 21**

OPSOMMING

Grondwetlikheid van artikel 11(1)(a) en (g) van die Wet op Dwelmmiddels en Dwelmsmokkelary

Die Suid-Afrikaanse Polisiediens het ingevolge artikel 11(1)(a) en (g) twee eiendomme wat die respondent gehuur het sonder 'n lasbrief deursoek en op verbode dwelms beslag gelê. Die respondent is aangekla en het 'n aansoek by die Wes-Kaapse hoë hof gebring waarin sy versoek het dat die twee operasies onbestaanbaar met artikel 14 van die

Grondwet verklaar word en daarom ongeldig is. Die Hoë Hof het saamgestem. Die applikante het ingevolge artikel 172(2) van die Grondwet die Konstitusionele Hof vir bevestiging van die bevel van ongeldigheid genader.

Die Konstitusionele Hof het bevind dat die magte in artikel 11(1)(a) en (g) op artikel 14 inbreuk gemaak het en dat die inbreuk ingevolge artikel 36 van die Grondwet nie redelik en regverdigbaar in 'n oop demokratiese samelewing was nie. Die hof het beveel dat die bevel van ongeldigheid nie terugwerkend sal wees nie en dat die bevel van ongeldigheid ook nie opgeskort hoef te word nie.

Ek bespreek die aard van die beskermde belang(e) en die vereistes vir en beperkings op 'n geldige lasbrief. Ek verduidelik dat artikel 11(1)(a) en (g) ver te kort skiet en dat daar nooit 'n werklike kans was dat die bepalings grondwetlike betragting sou oorleef nie. Ek herinner dat dit nie beteken dat die getuienis wat ingevolge 'n onwettige ondersoek verkry is nie toegelaat kan word nie.

1 Facts

During March 2011, members of the South African Police Service (SAPS) received information from an informant that a large quantity of illegal drugs listed in Part III of Schedule 2 to the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) was kept at a Kenilworth premises and that these drugs would be moved during the course of that day. Information was also received that a large quantity of drugs was stored at a Wynberg premises. Both properties were leased by the respondent (para 2).

The SAPS conducted warrantless search and seizure operations at both premises. At the Kenilworth premises, the police found and seized a large amount of Mandrax tablets and at the Wynberg premises, they found and seized a large amount of Mandrax tablets and "Tik", as well as a large amount of cash with traces of Mandrax (paras 1 3).

The SAPS relied on section 11(1)(a) and (g) of the Drugs Act for their operation. In terms of this section:

> "A police official may –
> (a) if he has reasonable grounds to suspect that an offence under this Act has been or is about to be committed by means or in respect of any scheduled substance, drug or property, at any time –
> (i) enter or board and search any premises, vehicle, vessel or aircraft on or in which any such substance, drug or property is suspected to be found;
> (ii) search any container or other thing in which any such substance, drug or property is suspected to be found;
> . . .
> (g) seize anything which in his opinion is connected with, or may provide proof of, a contravention of a provision of this Act."

The respondent was arrested and charged with being in possession of, and dealing in, Mandrax and "Tik" in contravention of the Drugs Act. The criminal case against the respondent was pending in the Western Cape High Court at the time of the Constitutional Court judgment (para 4).

2 Proceedings before the Western Cape High Court

The respondent filed two applications against the Minister of Police and the Director of Public Prosecutions in the Western Cape, as well as the Minister of Justice and Correctional Services (first, second and third applicants respectively in the present case; para 6).

In the first application, she applied for a postponement of the trial pending the determination of the second application, where she sought an order declaring that the two warrantless search and seizure operations conducted pursuant to section 11 of the Drugs Act was inconsistent with section 14 of the South African Constitution, 1996 (the Constitution) and therefore invalid (*ibid*).

In terms of section 14 of the Constitution everyone has the right to privacy, including the right not to have their person or home searched, their property searched, their possessions seized, or the privacy of their communications infringed (see also para 1).

The applicants opposed the application to invalidate the searches. However, they later conceded that section 11(1)(a) and (g) infringed the right to privacy in section 14 of the Constitution and that the infringement was not justifiable in terms of section 36 of the Constitution (para 6).

The High Court held that the relief sought by the respondent was too broad and restricted the relief to section 11(1)(a) and (g) of the Drugs Act (para 7).

The High Court analysed the constitutionality of section 11(1)(a) and (g) and, relying on *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* [2014] ZACC 3 and *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 1 SA 442 (CC), concluded that the section infringed the right to privacy enshrined in section 14 of the Constitution and that the provisions were invalid. The court also held that the order of invalidity would not be retrospective but would have immediate effect as police officials had other remedies and investigating powers at their disposal (paras 8 9).

Pursuant to the High Court's decision, the applicants applied to the Constitutional Court in terms of section 172(2)(d) of the Constitution for confirmation of the order of invalidity. The respondent, in her notice, supported the application (paras 1 10).

3 Issues before the Constitutional Court

The issues were (a) whether subsections 11(1)(a) and (g) of the Drugs Act are constitutionally invalid; and (b) if the subsections were to be found unconstitutional and invalid, whether the declaration of invalidity should be retrospective or prospective.

4 Submissions by applicants and respondent to the Constitutional Court

The applicants supported the conclusion of the High Court and argued that the order declaring section 11(1)(a) and (g) of the Drugs Act constitutionally invalid should be confirmed, as it authorised warrantless searches even where there was no urgency. They also submitted that the order should operate prospectively so that searches and seizures undertaken prior to the date of the order will be unaffected, even if proceedings relating to them were yet to be finalised (para 11).

The respondent also supported the finding of the High Court and relying on *Estate Agency Affairs Board* para 33 fn 4 submitted that the case "require[d] no reinvention".

5 Judgment

5 1 Constitutionality of section 11(1)(a) and (g) of the Drugs Act

The Constitutional Court held that the powers to search and seize conferred on the SAPS by section 11(1)(a) and (g) were a violation of section 14 of the Constitution and confirmed that the right to privacy flowed from the value placed on human dignity (para 14; see also the earlier decisions by the same court in *Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2009 1 SA 1 (CC) paras 76–77 and *Investigating Directorate: Serious Economic Offences v Hyundai Motor distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 18).

The court then, by analysing and balancing the five factors in section 36 of the Constitution, assessed whether the infringement of the rights to privacy and dignity were reasonable and justifiable in an open and democratic society (para 15).

In terms of section 36:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

5 1 1 Nature of the right

The court confirmed that an individual's right to privacy in section 14 was bolstered by his right to dignity in section 10 of the Constitution (para 16; see *Thint* para 77 fn 11 and *Hyundai* para 18 fn 11) but also pointed out that privacy, like all rights, was not absolute (para 17). As authority that rights were not absolute, the court referred to *Bernstein v Bester* 1996 2 SA 751 (CC) where the court held as follows:

> "The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community" (para 17).

The court also referred (para 18) to *Mistry v Interim National Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC) and *Gaertner*. In *Mistry* para 25, the court emphasised the sanctity of the right to privacy and said that the existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens was one of the features that distinguished a constitutional democracy from a police state. In *Gaertner* para 47 fn 5, the court held that the right to privacy embraced the right to be free from intrusions and interference by the state and others in one's personal life.

In conclusion, the court in the case under discussion reiterated that how closely one infringed on the inner sanctum of the home was a consideration that had

to be borne in mind when considering the extent to which a limitation of the right to privacy may be justified (para 18).

5 1 2 Importance of the purpose of the limitation

The court referred to *Magajane v Chairperson, North West Gambling Board* 2006 5 SA 250 (CC) para 65 fn 9 where it was held that the importance of the purpose of the limitation was crucial to the analysis, as it was clear that the Constitution did not regard the limitation of a constitutional right as justified unless there was a substantial state interest requiring the limitation (para 19).

The court explained that section 11(1)(a) and (g) aimed to prevent and prosecute the commission of offences under the Drugs Act. These offences, like other offences, were conducted in a clandestine fashion, the successful prosecution of which required the limitation of the right to privacy. The absence of having to obtain a warrant allowed police officers to conduct efficient inspections by facilitating the quick discovery of evidence that would otherwise be lost or destroyed. Drug-related offences were commonplace and their successful prosecution necessitated that the integrity of evidentiary material was preserved, which the impugned provisions ostensibly purported to achieve. The importance of this purpose therefore diminished the invasiveness of searches under the impugned provisions (para 20).

5 1 3 Nature and extent of the limitation

The court found the impugned provisions to be overbroad, indicating that section 11(1)(a) and (g) did not circumscribe the time, place nor manner in which the searches and seizures could be conducted. In this, the court relied on a passage from *Magajane* para 74 where it was held as follows:

> "[The warrant] governs the time, place and scope of the search, limiting the privacy intrusion, guiding the State in the conduct of the inspection and informing the subject of the legality and limits of the search. Our history provides much evidence for the need to adhere strictly to the warrant requirement" (para 21).

Section 11(1)(a) further granted the SAPS the power to search without a warrant at any time, with regard to any premises, vehicle, vessel or aircraft, as well as any container in which prohibited substances or drugs are suspected to be (para 22). Hence, the premises which may be searched included private homes where the expectation of privacy was greater (a place regarded to be the "inner sanctum" of a person; *ibid*).

Section 11(1)(g) also allowed the SAPS to seize anything connected with a contravention of a provision of the Drugs Act. This power derived from the power of the SAPS to engage in a warrantless search (*ibid*).

This left the SAPS without sufficient guidelines with which to conduct the search within legal limits. A warrantless search did not benefit from the guidelines with regard to the time, place and scope of a search provided for in a warrant. It was therefore desirable that the statutory provision authorising a warrantless search be crafted so as to limit the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances (para 23).

5 1 4 Relation between the limitation and its purpose

The court restated that a rational connection had to exist between the purpose of a law and the limitation it imposed (see *Magajane* paras 72–73 and *Gaertner* para 67 fn 5) and found that a rational connection indeed existed between the

purpose of section 11(1)(a) and (g) and the limitation of the respondent's rights (para 24).

The court explained that illicit and harmful drugs constituted a serious scourge to public safety and well-being which required search and seizure operations of the sort contemplated in the provisions. Intrinsic to such operations was an element of intrusion, and the provisions had to be construed in such context (para 24).

5 1 5 Are there less restrictive means to achieve the purpose?

The court held that (1) the fundamental problem with subsections 11(1)(a) and (g) was that they allowed the SAPS "to escape the usual rigours of obtaining a warrant in all cases", including those cases where urgent action was not required, and where the delay caused by obtaining a warrant would not result in the items or evidence sought being lost or destroyed; and that (2) the SAPS could prevent and prosecute offences under the Drugs Act "in a less restrictive fashion" than what was contemplated in these sections (para 25).

The court reiterated that a private home could be searched without obtaining a warrant in terms of section 11(1)(a). The more a search intruded into the "inner sanctum" of a person (such as the person's home) the more the search infringed the person's right to privacy (referring to *Bernstein* para 67 fn 14 and *Magajane* para 82 fn 9). The provisions were also problematic as they did not preclude the possibility of a greater limitation of the right to privacy than what was necessitated by the circumstances, with the result that the SAPS could intrude in instances where an individual's reasonable expectation of privacy was at its highest (para 26).

The court also affirmed that exceptions to the warrant requirement should not become the rule and referred to *Gaertner* and *Estate Agency Affairs Board*, as well as *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC) where different provisions that provided for a warrantless search were found to be unjustifiably in conflict with the constitutional right to privacy (para 27).

In *Gaertner* the court found provisions in the Customs and Excise Act 91 of 1964 to be unconstitutional. The court held that a warrant was not a mere formality. It was a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guaranteed that the State had to be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer. It furthermore governed the time, place and scope of the search. This softened the intrusion on the right to privacy, guided the conduct of the inspection, and informed the individual of the legality and limits of the search. Lastly, the court held that South African history provided evidence of the need to adhere strictly to the warrant requirement unless there were clear and justifiable reasons to deviate (para 69 fn 5; *Kunjana* para 27)).

In *Estate Agency Affairs Board* the court found section 32A of the Estate Agency Affairs Act 112 of 1976 and section 45B of the Financial Intelligence Centre Act 38 of 2001 to be unconstitutional in their present form. The fundamental reason in each case was their initiating premise, namely that all the searches they authorised required no warrant. The court held that in this, the provisions afforded no differentiation as to the nature of the search, or the nature of the premises searched. The result was that the provisions went too far in

authorising warrantless searches in circumstances where no justification could exist for not requiring that a warrant be obtained (para 40 fn 4; *Kunjana* para 28).

In *Ngqukumba* the court found that the retention of a motor vehicle by the police without having obtained a search and seizure warrant, or having acted pursuant to a lawful warrantless search procedure, to be inconsistent with the right to privacy and dignity. The court held as follows:

> In the face of the privacy right and also the right to dignity, which are closely linked, it is not overly restrictive to require of police to comply strictly with search-warrant requirements. Where there is a need for swift action, the police can always invoke section 22 of the Criminal Procedure Act. Strict compliance with the Constitution and the law will not hamper police efforts in stemming the scourge of crime (para 19; *Kunjana* para 29).

The court while referring to *Magajane* para 77 fn 9 and *Gaertner* paras 71–72 fn 5 held that "constitutionally adequate safeguards ha[d] to exist to justify circumstances where legislation allow[ed] for warrantless searches". An example of such safeguards could be found in section 22 of the Criminal Procedure Act 51 of 1977 (the CPA) which provides as follows:

> "A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 –
> (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
> (b) if he on reasonable grounds believes –
> (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
> (ii) that the delay in obtaining such warrant would defeat the object of the search" (*Kunjana* para 30)

Less restrictive measures did therefore exist to achieve the purpose of the Drugs Act and there was no readily discernible reason for section 11(1)(a) and (g)

> "not contemplating such less restrictive means, which would prevent the possibility of a greater limitation of the right to privacy than was necessitated by the circumstances. Furthermore, the provisions d[id] not contemplate instances where evidence sought w[ould] be lost or destroyed as a result of the delay occasioned when applying for a warrant" (para 31).

The court concluded that the limitation of the respondent's constitutional rights to privacy and dignity by section 11(1)(a) and (g) could not be justified in terms of section 36 of the Constitution, and that the section was accordingly invalid (para 32).

5 2 Must the declaration of invalidity be retrospective or prospective?

The court held that a confirmation of constitutional invalidity would have retrospective effect unless the court making the declaration ordered otherwise for reasons pertaining to justice and equity, and added that an order of prospective invalidity would mean that the respondent might not gain any effective relief during her trial.

However, during the hearing and on appeal both parties supported the view that an order of prospective invalidity would be the most appropriate in this instance. This was also the finding by the High Court *a quo* (paras 33–34).

The court indicated that the reason why an order of prospective invalidity is made was also of importance. In *S v Zuma* 1995 2 SA 642 (CC) para 43, the court held that the ability to limit the retrospective effect of orders of invalidity

could be used "to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute". The court also held that "the interests of individuals [had to] be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new" (*Kunjana* para 35).

In *Mistry supra* para 42 the court rejected the idea of reaching back into the past to aid a single litigant and deny the same benefits to others in similar situations. The court held that its order would apply prospectively and refused to cause the order to apply to the applicant who launched the constitutional litigation (*Kunjana* para 36).

Similarly, the court found that it would be inappropriate in this case to single out the respondent, and not to give other litigants who were in her position in the past, the same benefit (*Kunjana* para 36).

The court proceeded to consider the respondent's interests and noted that when the property of the respondent was searched, there was only one Constitutional Court judgment (*Magajane*) that provided jurisprudential clarity on warrantless search and seizure procedures. It was therefore difficult to sustain the respondent's contention that, at that stage, the impugned provisions were "clearly inconsistent [with] the Constitution of South Africa, 1996 and invalid" (para 37).

There was furthermore no earlier challenge to the constitutional validity of section 11(1)(a) and (g), and the respondent, having been searched in compliance with what was then binding legislation, could not aver that it would be unjust for the court to make a prospective order (*ibid*).

The respondent was also without doubt aware that legislation existed to prevent and combat drug related offences, and her institution of proceedings to challenge such legislation approximately two and a half years after the searches and seizures in question were made, did not entitle her to an exemption from their application. The respondent could in any event challenge the validity of the searches during her trial (*ibid*).

In concluding this issue, the court held that the offences prosecuted under the Drugs Act were serious and that retrospective application could cause criminals who have contravened the Drugs Act to go free, and that this would undermine the administration of justice. Retrospective application could furthermore result in delictual claims by persons subject to searches and seizures, further burdening the SAPS (para 38).

The court found the case to be similar to *Gaertner* and *Estate Agency Affairs Board* and saw no reason to depart from the approach adopted in those decisions where the declaration of invalidity was ordered to operate prospectively. It was further found to be in the interests of justice and equity that the operation be prospective (paras 38 39).

The court further, in view of the circumstances of the case, did not think that there was any reason to suspend the declaration of validity. A *lacuna* was not left by the declaration of invalidity as the offences provided for by the Drugs Act were already covered by section 22 of the CPA, which provided for a constitutionally sound warrantless search procedure (para 40).

6 Discussion

At the outset, it should be kept in mind that this case came before the Constitutional Court as confirmation proceedings concerning the constitutional validity of a statutory provision which authorised warrantless search and seizures. It did not concern the circumstances and manner in which the search and seizures were carried out, and whether the evidence obtained by the search and seizures had to be excluded in terms of section 35(5) of the Constitution. Accordingly, the attention was not directed at the conduct of the SAPS, but rather the legislation under which they acted.

The case is important firstly in that it confirmed, applied and expanded the principles with regard to warrantless searches that had been developing by way of *Magajane*, *Gaertner*, *Estate Agency Affairs Board* and *Ngqukumba* referred to *supra*. It is furthermore important as these principles have obvious and significant consequences for any warrantless search and seizure provision in a South African statute.

At the heart of the discussion is the nature of the protected interests of the individual to be searched, and the type of conduct it proscribes. In this regard, section 14 of the Constitution is the most instructive. It protects the right to privacy at least as far as state intrusion is concerned, and its purpose is to prevent unjustified search and seizures. This purpose requires measures to prevent unjustified search and seizures happening in the first place. It is not merely a yardstick to determine *ex post facto* whether a search or seizure should have occurred.

Because of the preventative purpose of section 14, prior authorisation by way of a warrant must be obtained when feasible. Section 21 of the CPA confirms this principle in that it provides that seizures shall only be executed by warrant, subject to certain exceptions (see the further discussion of s 21 below; see also *Park-Ross v Director: Office for serious Economic Offences* 1995 2 SA 148 (C) 172 and Joubert *Criminal procedure handbook* (2014) 152 para 3.1). This requires the state to demonstrate to the issuer of the warrant that its interest in fighting crime is superior to the individual's right to privacy.

For the authorisation to be meaningful, the person issuing the warrant must further be able to assess and weigh the conflicting interests of the state and the individual in a neutral and impartial manner. It follows that the person who decides on the issuing of a search warrant need not be a magistrate or a judge but he must be able to act judicially.

In a case like this, the requirements in terms of section 21(1)(a) of the CPA for a search warrant are that a magistrate or justice of the peace may issue a warrant if it appears to such person from information on oath, that there are reasonable grounds for believing that a section 20 article (of the CPA) "is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction". As far as the ability of the issuing officer to act judicially is concerned, it accordingly appears that section 21 is satisfactory.

Case law has furthermore set limits to protect the individual against excessive interference by the state when a warrant is issued. The *locus classicus* in this regard is *Minister of Safety and Security v Van der Merwe* 2011 2 SACR 301 (CC) where it was held that the warrant must in a reasonably intelligible manner state the statutory provision in terms of which the warrant is issued; identify the searcher; clearly mention the authority it confers upon the searcher; describe the

person, container or premises to be searched; describe with sufficient particularity the article to be searched for and seized (with regard to this aspect, it has long been held that a court will find that the judicial officer did not apply his mind properly whether there had been sufficient reason to interfere with the liberty of the individual, if the warrant only specifies the articles to be seized in broad and general terms: *Smith, Tabata & Van Heerden v Minister of Law and Order* 1989 3 SA 627 (E)); specify the offence which triggered the criminal investigation and name the suspected offender (para 55).

The court in *Van der Merwe* in addition set guidelines to be observed by a court when considering the validity of a warrant. The guidelines include the following: the person issuing the warrant must have authority and jurisdiction; the person authorising the warrant must satisfy himself that the affidavit contains sufficient information on the existence of the jurisdictional facts; the terms of the warrant must be neither vague or overbroad; the warrant must be reasonably intelligible to both the searcher and the searched person; the court must always consider the validity of a warrant with jealous regard for the searched person's constitutional rights; and the terms of the warrant must be construed with reasonable strictness (*Kunjana* para 56; see also *Goqwana v Minister of Safety* [2016] 1 All SA 629 (SCA) where it was held that the affidavit upon which the search warrant was based must accompany the warrant when executed).

Section 21(3)(a) of the CPA also sets a limit to the infringement of the privacy rights of an individual in that it provides that a search warrant must be executed by day, unless the issuing judicial officer gives written authorisation that it can be executed at night. (S 488 of the Criminal Code of Canada (CCC; RSC 1985 c C-46, (as amended) provides for a similar principle under Canadian law. S 8 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11 and ss 487–488 of the CCC also provide for the protection of privacy (and dignity) rights when a search warrant is issued. Of course, the reference to foreign law will not be a safe guide unless the principles of comparative law are followed. A discussion of the principles fall outside the scope of this case note. Suffice to say that the comparisons made in this case note are extremely apposite.)

It is clear from these requirements that when a warrant for search and seizure is issued jealous regard must be had to the constitutional rights of the person to be searched. It is furthermore clear that the requirements in section 11(1)(a) and (g) of the Drugs Act fall far short of these minimum standards. In terms of section 11(1)(a) and (g) any police official who has "reasonable grounds to suspect that an offence has been committed" may search where any scheduled substance "is suspected to be found" and "seize anything which in his opinion is connected with . . . a contravention of this Act". The reasonable grounds to suspect that an offence has been committed, or where any scheduled substance is suspected to be found, or which in his opinion is connected with a contravention of the Act, do therefore not have to be established by a neutral and impartial person acting judicially. Neither does the information upon which the grounds are established, have to be supplied on oath.

It is submitted that the stipulations "is suspected to be found" and "which in his opinion is connected with" are not proper standards for securing the right to be free from unjustified search and seizures. These are very low standards which validate an intrusion on the basis of a mere suspicion or opinion without more,

and may result in fishing expeditions. It accordingly tips the balance in favour of the state, and limits the right of the individual to resist.

Foreign jurisdictions which provide good examples of societies based on democracy, human dignity, equality and freedom confirm the appropriateness of a higher standard in this context. Section 487.01 of the CCC authorises a warrant only where there has been information upon oath that there are "reasonable grounds to believe" that an offence has been committed and that there is information concerning the offence at the place to be searched. Under American law, the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation". It appears that in these examples the state interest in fighting crime begins to prevail over the individual's interest in his privacy at the point where credibly-based probability replaces suspicion or opinion.

One would also expect there to be a consistent standard for identifying the point at which the interests of the state prevails over the privacy interests of the person to be searched. It is therefore submitted that the "reasonable grounds" standard established upon oath should also have been applied by the legislature with regard to the belief that there is evidence to be found at the place of the search, and that the item "is connected with, or may provide proof of, a contravention of a provision of this Act" in section 11(a) and (g).

Apart from these issues, a search and seizure in terms of section 11(a) and (g) is not limited by the guidelines set by the case law with regard to search warrants and the search may also be executed at any time.

On these shortcomings alone, I conclude that section 11(1)(a) and (g) is inadequate to satisfy the interests in section 14 of the Constitution. The sections will also not be saved by the limitation clause in section 36.

The Constitutional Court has further shown that it will not read the appropriate standard into this kind of provision. It is accordingly for the legislator to enact legislation which complies with the Bill of Rights (see *Canada (Director of Investigation & Research, Combined Investigation Branch v Southam Inc* [1984] 2 SCR 145 where a similar approach was taken under Canadian law).

Against this background, it is clear that there was never a real possibility that section 11(a) and (g) would survive constitutional scrutiny. It is also clear that a warrantless search, be it for drugs or with regard to other crimes, can only be justified in very limited circumstances. Section 22 of the CPA is a good example of such limited circumstances where a police official may search without a warrant if the person to be searched consents to the search and the seizure, or if the official on reasonable grounds believes that a search warrant will be issued to him in terms of section 21(1)(a) if he applies for such warrant, and that the delay in obtaining such warrant would defeat the object of the search.

In concluding, I would emphasise that the order of invalidity of section 11(1)(a) and (g) was made prospective. Accordingly, accused persons in other cases where searches and seizures were conducted in terms of section 11(1)(a) and (g) before the date of the decision, cannot argue that the searches and seizures were illegal.

I would also reiterate that if the provision under which a search is executed is illegal, this would not mean that the evidence may not be admitted as evidence. In terms of section 35(5) of the Constitution, evidence obtained in a manner that violates any right in the Bill of Rights must only be excluded if the admission of

that evidence would render the trial unfair, or otherwise be detrimental to the administration of justice. (A similar approach is taken under Canadian law. See s 24(2) of the CCC and *R v Hape* [2007] 2 SCR 292 para 108ff; *R v Brown* [2008] 1 SCR 456 para 43; *R v Grant* 2009 SCC 32; and *R v Saeed* 2016 SCC 24 para 95ff.)

A breach of a right in the Bill of Rights may be mitigated by exigent circumstances, for example the urgency of the search (the drugs at the Kenilworth premises were going to be moved during the course of the day on which the search was conducted), the serious nature of the crime, the trivial nature of the infringement or the good faith of the police (Schwikkard *Principles of evidence* (2016) 240 para 12.9ff. A similar approach is taken under Canadian law. See *R v Silveira* [1995] 2 SCR 297; *R v Belnavis* [1997] 3 SCR 341; *R v Saeed* 2016 SCC 24). Factors such as these may therefore favour the admission of the evidence. However, evidence obtained in future in terms of section 11(a) and (g) is highly unlikely to be admitted in evidence, as the police would be unable to establish good faith.

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