

**WARRANTLESS SEARCH AND SEIZURE IN TERMS OF THE DRUGS AND DRUG
TRAFFICKING ACT, CRIMINAL PROCEDURE ACT AND SOUTH AFRICAN POLICE
SERVICES ACT: A COMPARATIVE ANALYSIS WITH CANADIAN LAW**

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CHAPTER 1

INTRODUCTION

1.1 General introduction

Search and seizure provisions are important tools designed to help the police carry out their constitutional mandate of, amongst others, preventing, combating, and investigating crime efficiently. In general a search and seizure must be conducted in terms of a warrant. A warrant is a legal tool which protects the individual against the abuse of state power by the relevant authorities. The requirement of a warrant ensures that the police do not invade private homes and residences for no particular reason or, even worse, to terrorise. The warrant guarantees that the State must justify and support intrusions upon individual's privacy under oath before an officer of the court prior to intrusion.¹

However, there are circumstances which justify deviation from conducting a search and seizure in terms of a warrant. In urgent circumstances it may be necessary to search and seize immediately when the procedure of obtaining a warrant will defeat the purpose of the search. In the course of employing these warrantless search and seizure provisions, the police inevitably interfere with fundamental rights of individuals.² Search and seizure in urgent circumstances should comply with the constitutional safeguards against abuse by state authorities.

Therefore, the purpose of this study is to analyse the South African law regulating search and seizure without a warrant in criminal matters. Furthermore, this study considers and compares the search and seizure provisions in criminal matters under Canadian and South African law and the circumstances under which the principles function in each system.

South Africa has an extensive legislative infrastructure authorising warrantless search and seizure in criminal matters. The Criminal Procedure Act³ and the South African Police Service Act⁴ authorise the police to conduct warrantless search and seizure. Section 22 of the CPA permits search and seizure without a warrant under exigent circumstances. Section 13 of the SAPS Act also makes provision for searches and seizures without a warrant.

¹ Du Toit, E "Search Warrants, Entering of Premises, etc" in Du Toit et al *Commentary on the Criminal Procedure Act* at 2-30B.

² *Minister of Safety and Security v Van der Merwe and Another v Nel and Others* [2006] 4 All SA 96 (C) para 35.

³ Act 51 of 1977, hereafter referred to as the CPA.

⁴ Act 68 of 1995, hereafter referred to as the SAPS Act.

The power of police officers to search and seize someone's property without a warrant from a judicial officer is a violation of the right to privacy protected in section 14 of the Constitution.⁵ It begs the question whether search and seizure provisions which do not contain a requirement of a warrant from a judicial officer can pass constitutional scrutiny.

Section 11(a) and (g) of the Drugs and Drug Trafficking Act⁶ was recently repealed by the Constitutional Court. Section 11(1)(a) and (g) of the Drugs Act granted police officials the power to conduct a warrantless search in any premises if there were reasonable grounds to suspect that an offence under the Drugs Act has or is about to be committed, as well as the power to seize anything that would result in an infringement of the Drugs Act.

The Constitutional Court has provided jurisprudential clarity on warrantless search and seizure procedures in the context of the regulatory sphere. Therefore, this study also considers the jurisprudence of the Constitutional Court in respect of warrantless searches and seizures in the context of the regulatory sphere. The Court considered whether the powers of entry, examination, search and seizure granted to inspectors by section 28 of the Medicines and Related Substances Control Act 101 of 1965⁷ infringed the right to privacy in section 13 of the Interim Constitution⁸ and whether the infringement was justifiable.⁹ The challenged provision granted inspectors the authority to enter into and inspect any premises, place, vehicle, vessel or aircraft where such inspectors reasonably believe there are medicines or other substances regulated by the Medicines Act.

The same Court has also considered whether section 65 of the North West Gambling Act,¹⁰ infringed the applicant's right to privacy protected in section 14 of the Constitution and whether the infringement was justifiable. Section 65 of the Gambling Act authorised gambling inspectors to conduct warrantless search and seizure operations at any licensed or unlicensed premises defined in the Gambling Act.¹¹

Finally, this study also considers the position of Canada in respect of warrantless search and seizure. Canada is appropriate for comparison because it has developed jurisprudence in protecting fundamental human rights in line with the constitutional requirements, when it comes to search and seizure. The Supreme Court of Canada has given considerable attention to the issue of warrantless searches and seizures. Cases from Canada have

⁵ Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).

⁶ Act 140 of 1992, hereafter referred to as the Drugs Act.

⁷ Act 101 of 1965, hereafter referred to as the Medicines Act.

⁸ Constitution of the Republic of South Africa, 1993 (hereafter referred to as the "Interim Constitution").

⁹ *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC).

¹⁰ Act 2 of 2001, hereafter referred to as the Gambling Act.

¹¹ *Magajane v Chairperson, North West Gambling Board* 2006 (2) SACR 447 (CC).

previously been cited by the Constitutional Court. In Canada there is a constitutionally mandated right to protection from unreasonable searches. In South Africa, the Constitution created the right to privacy which includes the right of an individual not to have their person, home or property searched or their possessions seized or have the privacy of their communications infringed. The limitation test and limitation clause in both countries bear resemblance. As in South Africa, the Canadian Charter of Rights and Freedoms in the Constitution¹² mandates a two-stage inquiry into challenges based on the right to privacy.

1.2 Research question

This study seeks to address the following research question: Whether the provisions regulating warrantless searches and seizures in criminal matters are consistent with the spirit, object, and purport of the Constitution. If not, to research whether these provisions should be repealed or whether exigent circumstances should be a requirement before a warrantless search and seizure could be conducted like it is the position under Canadian law. The aim of the study is to further research whether section 22 of the CPA alone is a sufficient tool for warrantless searches and seizures where criminal prosecution is intended. The study is done by considering and comparing the relevant principles regulating searches and seizures under Canadian and South African law and the circumstances under which the principles function in each system. It draws conclusions and makes proposals for the protection of the individual's right to privacy.

1.3 Methodology

The envisaged research involves a literature study of books, journal articles, legislation and case law. The study is primarily a critical analysis of the relevant South African and Canadian literature and case law as well as a comparison of warrantless search and seizure provisions in South Africa and Canada.

1.4 Structure

This research consists of seven Chapters. Chapter one provides an introduction. This chapter sets out the aim of the mini-dissertation. Chapter two examines warrantless search and seizure provisions in criminal matters under South African law. Chapter three illuminates the Constitutional Court jurisprudence in respect of warrantless search and seizure in the context of regulatory inspections. Chapter four investigates the constitutionality of warrantless search and seizure provisions in criminal matters. Chapter five examines

¹² Constitution Act, 1982, hereafter referred to as the Charter.

warrantless search and seizure under Canadian law and its effect on South African law. Chapter six compares warrantless search and seizure in South Africa and Canada. The research is concluded in Chapter seven which contains a conclusion and recommendations regarding measures that can be implemented to ensure that the warrantless search and seizure provisions encompass sufficient safeguards.

CHAPTER 2

WARRANTLESS SEARCH AND SEIZURE PROVISIONS IN CRIMINAL MATTERS UNDER SOUTH AFRICAN LAW

2.1 Introduction

In this chapter, the warrantless search and seizure provisions in criminal matters under South African law are examined. There are provisions that deal with warrantless search and seizure powers that are employed in the criminal justice system. Some of these provisions are well-defined while others are unrestricted. Unrestricted provisions show that the individual is far more vulnerable to the invasion of his/her rights at the present time than ever before.¹³

The warrantless search and seizure provisions are subject to the Constitution as the latter is the supreme law of South Africa.¹⁴ If a warrantless search and seizure provision infringes a right in the Constitution, it may be declared invalid unless the infringement is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁵

The Constitution requires that those who are innocent of wrongdoing be protected against arbitrary use of the powers of search and seizure by those responsible for the enforcement of criminal law. The main purpose of the Bill of Rights, entrenched in the Constitution, is to protect the fundamental rights of individuals against the actions of the organs of the state. The Bill of Rights places constraints on police, prosecutorial and judicial powers.¹⁶ Safeguards are, therefore, necessary to ameliorate the effect of intrusion of privacy by the organs of the state. Safeguards limit the extent to which rights may be impaired. The limitations may, in turn, be achieved by specifying a procedure, and reasonable requirements for conducting a warrantless search and seizure.¹⁷ The requirement of a warrant based on a showing of reasonable and probable grounds to believe that an offence

¹³ Swanepoel JP "Warrantless search and seizure in criminal procedure: A constitutional challenge" 1997 30 CILSA 340.

¹⁴ S 2 of the Constitution.

¹⁵ S 36 of the Constitution.

¹⁶ Steytler N *Constitutional Criminal Procedure* Butterworths Durban 1998 1.

¹⁷ *Minister of Safety and Security v Van der Merwe and Another v Nel and Others* [2006] 4 All SA 96 (C) para 36.

has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection.¹⁸

The focus of this dissertation is on the provisions of the Drugs Act, the CPA and the SAPS Act regulating warrantless searches and seizures.

2.2 Warrantless search and seizure in terms of the Drugs and Drug Trafficking Act

Section 11(1)(a) and (g) of the Drugs Act previously granted the police officials the power to conduct a warrantless search in any premises if there were reasonable grounds to suspect that an offence under the Drugs Act had been committed or was about to be committed, and the power to seize anything that would result in the proof of an infringement of the Drugs Act. In the matter of *Minister of Police and Others v Kunjana*,¹⁹ Ms Kunjana challenged the constitutionality of section 11 of the Drugs Act, as well as the constitutionality and lawfulness of the conduct of two searches by members of the South African Police Service. Ms Kunjana was charged for, amongst other things, illegal dealing in Mandrax and 'Tik' (Methamphetamine) found during the search and seizure operations conducted in terms of section 11(1)(a) and (g) of the Drugs Act. The Court held that the power, as provided by section 11(1)(a) and (g) of the Drugs Act was an infringement of the right to privacy protected by section 14 of the Constitution.²⁰

The Court then proceeded to assess whether the infringement of the rights to privacy and dignity was reasonable and justifiable in an open and democratic society by balancing five relevant factors. These factors are the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose of the search.

As to the nature of the right, the Court emphasised that the right to privacy guaranteed everyone the right to privacy, including the right not to have their person or home searched and an individual's right to privacy was bolstered by his or her right to dignity in section 10 of the Constitution. The Court held how closely one infringes on the "inner sanctum" of the home is a consideration that must be borne in mind when considering the extent to which a limitation of the right to privacy may be justified.²¹

¹⁸ *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 paras 507i-508d.

¹⁹ [2016] ZACC 21.

²⁰ Para 14. See n 19.

²¹ *Kunjana* paras 16 and 18. See n 19.

The Court held that section 11(1)(a) and (g) aimed to prevent and prosecute the commission of offences under the Drugs Act. These offences were conducted in a clandestine fashion, successful prosecution of which requires the limitation of the right to privacy. The lack of mandatory procedure to obtain a warrant allows police officers to conduct efficient inspections by facilitating the quick discovery of evidence that would otherwise be lost or destroyed. The Court held that the importance of this purpose diminishes the invasiveness of searches under the impugned provisions.²²

As to the nature and extent of the limitation, the Court held that the impugned provisions were overbroad. The Court held that section 11(1)(a) and (g) of the Drugs Act did not circumscribe the time, place nor manner in which the searches and seizures had to be conducted.²³ Furthermore, section 11(1)(a) granted police officers the power to search without a warrant at “any time” “any premises, vehicle, vessel or aircraft” and “any container” in which substances or drugs are suspected to be found. The premises which had to be searched included private homes where the expectation of privacy is greater.

When it comes to the relation between the limitation and its purpose, the Court held that a rational connection must exist between the purpose of a law and the limitation it imposes. The Court found that a rational connection did not exist between the limitation of Ms Kunjana’s rights and the purpose of section 11(1)(a) and (g). The Court held that the prevention and prosecution of offences under the Drugs Act require search and seizure operations of the sort contemplated in the provisions. Intrinsic to such operations is an element of intrusion and the provisions must be construed in such context.²⁴

With regard to the question as to whether there were less restrictive means to achieve the purpose, the Court held that the fundamental problem in section 11(1)(a) and (g) was that it allowed police officials to escape the usual rigours of obtaining a warrant in all cases, including those cases where urgent action was not required and that the delay occasioned in obtaining a warrant would not result in the items or evidence sought being lost or destroyed.²⁵ The Court found that less restrictive measures existed to achieve the purpose of the Drugs Act and that 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.²⁶

²² *Kunjana* para 20. See n 19.

²³ *Kunjana* para 21. See n 19.

²⁴ *Kunjana* para 24. See n 19.

²⁵ *Kunjana* para 25. See n 19.

²⁶ *Kunjana* para 31. See n 19.

The balancing of these factors led the Court to conclude that the limitation of Ms Kunjana'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 concluded that section 11(1)(a) and (g) of the Drugs Act constituted an impermissible violation of the rights to privacy and dignity and was accordingly constitutionally invalid.²⁷

Although the objectives of the Drugs Act related to concerns that were pressing as drugs could pose a threat to an individual's psychological, financial and even physical health, section 11 could not pass constitutional muster as it lacked the constitutional safeguards. Section 11 had a single safeguard, namely, that the police official had to have reasonable grounds to suspect that an offence under the Drugs Act had been committed or was about to be committed. Section 11 lacked sufficient constitutional safeguards, namely, that the police official on reasonable grounds believed that a search warrant would be issued to him and that the delay in obtaining such warrant would defeat the object of the search.

The right to privacy in respect of private homes is strong and the level of expectation of privacy in respect of homes is high because the searches intrude into the person's private life. In the context of warrantless searches aimed at obtaining evidence for criminal prosecution, overbreadth creates an impermissible threat to the right to privacy.²⁸ Section 11 of the Drugs Act facilitated searches aimed at collecting evidence for criminal prosecution.

2.3 Warrantless search and seizure in terms of the Criminal Procedure Act

In general, the police when conducting a search and seizure without a warrant use the provisions of section 22 of the CPA. Section 22 of the CPA provides that a police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20:

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

Section 20 of the CPA authorises the state to seize anything, which is concerned or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic of South Africa or elsewhere, or may afford

²⁷ *Kunjana* para 32. See n 19.

²⁸ *Kunjna* para 88. See n 19.

evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere, or is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

In interpreting sections 20 and 22 of the CPA, the onus is on the police to prove, objectively viewed, the existence of ample facts upon which they based their reasonable belief at the time when they acted without a warrant that the article was concerned in the commission or suspected commission of an offence. The said facts must exist at the time when the police acted without a warrant, and not only at a later stage.²⁹ There is, in addition, another objective test as to whether a magistrate would have granted a warrant in the circumstances of the case.

2.4 Warrantless search and seizure in terms of the South African Police Service Act

The SAPS Act provides for various warrantless searches. In terms of section 13(6) of the SAPS Act a police officer may search without a warrant, any person, premises, other place, vehicle, vessel or aircraft or any receptacle, and seize any article that is found and may lawfully be seized. The search in terms of section 13(6) may be conducted at any place in South Africa within 10 kilometres, or any reasonable, distance from any border between South Africa and any foreign state, in the territorial waters of South Africa, inside South Africa within 10 kilometres or any reasonable distance from such territorial waters; or at any airport or within any reasonable distance from such airport. The aim of such a search is to exercise control over illegal movement of people or goods within the borders of South Africa.

Section 13(7)(c) of the SAPS Act provides for searches in an area cordoned off for purposes of public order or safety. The National or a Provincial Commissioner may, “where it is reasonable in the circumstances to restore public order or to ensure the safety of the public in a particular area”, authorise in writing that a particular area be cordoned off, specifying the period (which may not exceed 24 hours), the area and the object of the cordoning off. On the strength of the said authorisation, a police official may, in terms of section 13 (7)(c), “where it is reasonably necessary” to achieve the objective of the authorisation, conduct a search without a warrant (and, presumably without reasonable grounds) of any person, premises, vehicle or receptacle or any object of whatever nature and seize any article that may afford evidence of the commission of an offence.

²⁹ *Mnyungula v Minister of Safety and Security and Others* 2004 (1) SACR 219 para 12.

Section 13(8)(a) of the SAPS Act provides that the National or Provincial Commissioner may, “where it is reasonable in the circumstances in order to exercise a power or perform a function referred to in the Constitution”, in writing authorise a member under his or her command; to set up a roadblock or roadblocks on any public road in a particular area or to set up a checkpoint or checkpoints at any public place in a particular area.

Section 13(8)(c) of the SAPS Act allows a police officer to set up roadblocks upon receipt of the written authorisation referred to in section 13(8)(a). Section 13(8)(g)(i) of the SAPS Act allows any police officer, in the event of roadblock set up in accordance with the abovementioned authorisation, to search any person or a vehicle stopped at a roadblock and to seize any object that has been referred to in section 20 of the CPA.

In essence, on the strength of this authorisation, a police official may conduct a search without a warrant of any person, vehicle or any object of whatever nature and seize any article that may afford evidence of the commission of an offence.

The police may also use section 13(8)(g)(ii) read with section 13(8)(d) of the SAPS Act to conduct a warrantless search and seizure. Section 13(8)(g)(ii) authorises a police official in the event of a roadblock set up in accordance with section 13(8)(d) to search a vehicle or persons and seize any article referred to in section 20 of the CPA.

Section 13(8)(d) authorises a police official to set up a road block on a public road without authorisation. Section 13(8)(d) authorises a police officer who has reasonable suspicion that any object, which is concerned in the commission of an offence mentioned in Schedule 1 of the CPA or the person who has committed the offence mentioned in Schedule 1 of the CPA is being transported in a vehicle, to set up the roadblock in order to establish whether such a person or article is transported in such a vehicle. The said police officer must have reasonable belief that if he or she had applied for a search warrant in terms of section 21(1)(a) of the CPA, it would have been issued and that a delay in obtaining such a search warrant would defeat the object of holding a road block.

2.5 Conclusion

In South Africa, the Constitution protects the fundamental rights of individuals against the actions of the organs of the state, however, the latter are required to enforce a warrantless search and seizure within the framework of the Constitution. Unlawful searches and seizures include searches of individual persons, homes, an individual’s property and seizure of individual possessions. These types of searches and seizures may infringe the right to

privacy protected by section 14 of the Constitution as any intrusion of the protected sphere of privacy constitutes a *prima facie* violation of the right to privacy and the said searches may be found to be invalid if they lack necessary constitutional safeguards. The courts are usually faced with the question of whether such a violation is reasonable and justifiable under the circumstances of each case. The CPA authorises the police to search any person or any container or premises of the said person without a search warrant. A police officer can search a home without warrant if the police official on reasonable grounds believes that a search warrant will be issued to him and that the delay in obtaining such warrant would defeat the object of the search.

Sections 13(6), 13(7)(c) and 13(8)(g)(i) of the SAPS Act are much broader than section 22 of CPA as the said provisions authorise a police officer to stop and search, then seize any item. These sections authorise warrantless search and seizure even when the police officer initially had no reasonable grounds to believe that a search warrant will be issued to him and that the delay in obtaining such warrant would defeat the object of the search.

Therefore, it begs the question whether warrantless search and seizure in terms of the abovementioned provisions of the SAPS Act and the CPA are constitutional or not.

CHAPTER 3

CONSTITUTIONAL COURT JURISPRUDENCE IN RESPECT OF WARRANTLESS SEARCH AND SEIZURE IN THE CONTEXT OF REGULATORY INSPECTIONS

3.1 Introduction

The Constitutional Court has delivered several landmark judgments in respect of the protection of privacy against warrantless search and seizure operations in the context of regulatory inspections and in the process defined the concept of privacy. The Constitutional Court has established legal principles that must be considered by courts when evaluating whether a warrantless search provision infringe the right to privacy and whether an infringement of the right to privacy by a search without warrant is reasonable and justifiable in an open and democratic society in terms of section 36 of the Constitution. Therefore, purpose of this chapter is to elucidate how and why the Constitutional Court dealt with warrantless search and seizure provisions in the context of regulatory inspections.

In *Bernstein v Bester NO*,³⁰ Ackermann J stated that the concept of privacy is an amorphous and elusive one, which has been the subject of much scholarly debate. The scope of privacy is closely related to the concept of identity and it has been stated that rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity.³¹ The Court in *Bernstein* held that the scope of a person's privacy extends *a fortiori* only to those aspects to which a legitimate expectation of privacy can be harboured.³² Privacy is an individual condition of life characterised by seclusion from the public and publicity.³³

In *Magajane v Chairperson, North West Gambling Board*,³⁴ the Constitutional Court held that the right to privacy extends beyond the inner sanctum of the home.³⁵ McQuoid-Mason stated that privacy has a variety of connotations and described it as "an amorphous and elusive concept", which has been closely identified with the concept of identity.³⁶ In the matter of *Gaertner and Others v Minister of Finance and Others*,³⁷ the Court held that the right to

³⁰ 1996 (2) SA 751 (CC).

³¹ Para 65. See n 30.

³² Para 75. See n 30.

³³ Para 68. See n 30.

³⁴ 2006 (2) SACR 447 (CC).

³⁵ Para 42. See n 34.

³⁶ McQuoid-Mason, D "Privacy" in Woolman et al *Constitutional Law of South Africa* 2nd edition vol 3 (RS 5) 38-1; Para 65. See n 30.

³⁷ 2014 (1) SA 442 (CC).

privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life.³⁸

There is no South African legislation dealing specifically with the protection of the right to privacy. In South Africa, the right to privacy is protected by both our common law and the Constitution. In South African common law the right to privacy is recognised as an independent personality right which the courts have included within the concept of *dignitas*.³⁹ In *Financial Mail (Pty) Ltd v Sage Holdings Ltd*,⁴⁰ the Court held that a breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged "in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court."⁴¹

The Constitutional Court has emphasised the interdependency between common law and the constitutional right to privacy. Section 14 of the Constitution confers the right to privacy, including the right of an individual not to have their person, home or property searched or their possessions seized or have the privacy of their communications infringed. This section provides for a general right to privacy that prohibits unlawful entry and search. The general right to privacy extends to those aspects of a person's life in regard to which a legitimate expectation of privacy can be harboured. This requires that a person must have a subjective expectation of privacy that society accepts as objectively reasonable. Persons cannot legitimately complain about violation of privacy if they explicitly or implicitly consented to waive their rights in this regard.⁴² As a common law right of personality, it is necessarily limited by the legitimate interests of others and the public interest. As a fundamental right, it can be limited in accordance with section 36 of the Constitution. In each case, weighing up of the right to privacy and the opposing interests or rights will have to take place.

3.2 Constitutional Court Jurisprudence

The Constitutional Court has dealt with the constitutionality of warrantless search and seizure provisions in the context of regulatory inspections on several occasions. In the matter of *Magajane*, the Court dealt with the issue of whether section 65 of the Gambling Act, violated the applicant's right to privacy protected in section 14 of the Constitution. Section 65 of the Gambling Act authorised gambling inspectors to conduct search and

³⁸ Para 47. See n 37.

³⁹ *Bernstein* para 68. See n 30.

⁴⁰ 1993 2 SA 451 (A) 462G.

⁴¹ *Bernstein* para 68. See n 30.

⁴² *Basdeo V* (2009) "A constitutional perspective of police powers of search and seizure in the Criminal Justice System" unpublished LLM dissertation, University of South Africa at 41.

seizure operations at any licensed or unlicensed premises, which are occupied or being used for the purposes of any gambling activities or any other premises on which it is suspected (i) that a casino or any other gambling activity is being conducted without the authority of a licence, and (ii) that persons are being allowed to play or participate in any gambling game or other gambling activities or to play any gambling machine, or that any gambling machine or any equipment, device, object, book, record, note, recording or other document used or capable of being used in connection with the conducting of gambling games or any other gambling activity may be found.⁴³

The Court in *Magajane* held that an analysis of the application of section 14 to regulatory inspections and searches of private commercial property was required when evaluating whether search and seizure provision in section 65 violated the right to privacy.⁴⁴ Furthermore, the Constitutional Court held that when considering constitutional challenges to search and seizure provisions, a court had to assess the justifiability of any limitations of the constitutional right to privacy. The Court stressed the importance of the right to privacy by reiterating that the existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features which distinguish a constitutional democracy from a police state.⁴⁵

As to the importance of the purpose of the limitation, the Court held it should carefully review public interest served by the statutory provision and determine the weight that this purpose should carry.⁴⁶ It held that section 65 of the Gambling Act served a beneficial public purpose as gambling is an activity that could pose a threat to psychological, financial and even physical health.⁴⁷

Concerning the nature and extent of the limitation, the Court held that in the context of a regulatory inspection of commercial private property, there are at least three issues that will have a bearing on the nature and extent of the limitations, namely, (1) the level of the reasonable expectation of privacy, (2) the degree to which the statutory provision resembles criminal law, and (3) the breadth of the provision.⁴⁸ The Court held that participants in licensed industries like the gambling industry must be taken to expect regular inspections and must be taken generally to have a low expectation as far as the protection of privacy is concerned, as the inspection will occur well outside their inner sanctum.⁴⁹

⁴³ *Magajane* para 4. See n 34.

⁴⁴ Para 33. See n 34.

⁴⁵ *Magajane* paras 63-64. See n 34.

⁴⁶ *Magajane* para 65, read with para 81. See n 34.

⁴⁷ *Magajane* paras 81-82. See n 34.

⁴⁸ *Magajane* para 66. See n 34.

⁴⁹ *Magajane* para 82, read with paras 67-68. See n 34.

The Court held that the Gambling Act contained provisions, which aimed at criminal prosecution for illegal gambling activities and the provisions aimed at criminal prosecution constituted a significantly greater intrusion of privacy than a routine regulatory inspection aimed at compliance.⁵⁰ This is because an owner has a greater expectation of privacy regarding the risk of criminal prosecution, even in the context of commercial private property.⁵¹ The court found the breadth of the provision to be an important determinant of the extent of the limitation. The provision must be sufficiently circumscribed so as to limit the discretion of the inspector as to the time, place and scope of the search. Overbreadth may cause at least three problems. Firstly, an overbroad provision may fail to inform the occupier of the limits of the inspection. Secondly, it may even leave the inspector without sufficient guidelines with which to conduct the inspection within legal limits. Thirdly, it permits greater privacy intrusions, extending beyond circumstances in which the reasonable expectation of privacy is low to situations in which the reasonable expectation of privacy is at its apex.⁵²

The Court held that section 65 was overbroad for three reasons: It required a suspicion rather than a reasonable suspicion; it contained a wide definition of “premises”; and the phrase, “used or capable of being used” in relation to the items listed meant they need not in fact have been used for gambling provided they were capable of being so used.⁵³ In the context of warrantless searches aimed at obtaining evidence for criminal prosecution, the Court held the overbreadth created an impermissible threat to the right to privacy. The Court explained that section 65 did not narrowly target only those premises whose owners possess a low reasonable expectation of privacy as the statute permits inspectors to reach into a person's inner sanctum. The section failed to guide inspectors as how to conduct searches within legal limits, and it left property owners unaware of the proper limits to the invasion of their privacy. The boundaries of a permissible search of unlicensed premises could be delineated and protected by a warrant.⁵⁴

With regard to the limitation and its purpose, the Court held that legislation providing for regulatory inspections in the public interest must have a strong relationship to the limitation of the privacy right because the inspection aims at protecting public interest.⁵⁵ The Court pointed out that the breadth of section 65 made enforcement searches less targeted, which presumably would not only be more intrusive to privacy interests, but also less effective in achieving the purposes of enforcement inspections.⁵⁶ With regard to the issue whether less

⁵⁰ *Magajane* paras 83-86. See n 34.

⁵¹ *Magajane* para 69. See n 34.

⁵² *Magajane* para 71. See n 34.

⁵³ *Magajane* para 87. See n 34.

⁵⁴ *Magajane* para 88. See n 34.

⁵⁵ *Magajane* para 72. See n 34.

⁵⁶ *Magajane* para 89. See n 34.

restrictive means to achieve the purpose of section 65 were available, the Court said that a highly relevant question would be whether the provision could have achieved its purpose even if it required a warrant prior to the search.⁵⁷ The Court held that the respondents failed to show why section 65 of the Act could not have achieved its purpose while requiring that inspectors obtain a warrant before searching unlicensed premises.⁵⁸ The Constitutional Court consequently held that section 65 was unconstitutional and invalid.

The question in the matter of *Mistry v Interim Medical and Dental Council of South Africa and Others*⁵⁹ was whether the powers of entry, examination, search and seizure granted to inspectors by section 28(1) of the Medicines Act violated the right to privacy.⁶⁰ The challenged provision granted inspectors the authority to enter into and inspect any premises, place, vehicle, vessel or aircraft where such inspectors reasonably believe there are medicines or other substances regulated by the Medicines Act.

The Court held that while periodic regulatory inspections are necessary to maintain professional standards and to protect the citizenry at large, the section authorising these inspections went too far. The Court held that section 28(1) was wide and unrestricted, and effectively authorised any inspector to enter any person's private home based simply on the suspicion that aspirins or cough mixtures were present.⁶¹ It permitted warrantless entry into private homes and the search of intimate possessions so long as there was a reasonable suspicion of any medicine being found there even though medicine is commonly found in most homes. The Court held that the section could have achieved its ends through other means less damaging to the right to privacy; namely, the requirement of a warrant.⁶² While a warrant requirement might be nonsensical if the statute had provided only for periodic regulatory inspection of the premises of health professionals, as a prior warrant could frustrate the objectives behind the search, there was no reason not to require a warrant for searches that could extend to a private home. The Court emphasised that it would be incongruous to require police officers, who are trained to search homes, to obtain warrants, but not to require the same from inspectors, who are not so trained. In addition, the statute does not provide sufficient guidance to inspectors to know the precise framework to carry out their functions.⁶³

⁵⁷ *Magajane* para 73. See n 34.

⁵⁸ *Magajane* para 90. See n 34.

⁵⁹ 1998 (4) SA 1127 (CC).

⁶⁰ Para 8. See n 59.

⁶¹ *Mistry* para 28. See n 59.

⁶² *Mistry* para 29. See n 59.

⁶³ *Ibid.*

The impugned provision was found to be wide and unrestricted in its reach and to be invalid. Although, the Court declared the offending section of the Medicines Act invalid, it limited the retrospectivity of its effect so as not to affect searches conducted before the date of the judgment. The Court denied Dr Mistry's request for the return of the items seized on the grounds that the search was conducted according to a law that had not been invalidated at the time and the doctor had failed to establish alternative grounds for invalidating the search.

The Constitutional Court in the matter of *Gaertner*⁶⁴ confirmed a declaration of invalidity made by the Western Cape High Court declaring provisions of section 4 of the Customs and Excise Act ("the customs Act") unconstitutional. The provisions of section 4 authorised officials of the South African Revenue Service (SARS) to conduct a search at the premises; the said provisions did not require SARS officials to obtain a warrant before a search is conducted. These authorised warrantless searches of any premises at any time allowed inspectors to demand books, documents or things from any person believed to have them or control over them, and to do so at any time and at any place, permitted them to break open doors, windows, walls or flooring of any premises at any time in order to search, and authorised them to open, in any manner, any room or safe if it was locked and the keys were not produced on demand. The only qualification on the exercise of these powers, the Court noted, "if a qualification at all", was that premises could be entered only "for the purposes of" the statute.⁶⁵ Beyond this, the provisions gave officials far-reaching powers that could "be exercised anywhere, at whatever time and in relation to whomsoever, with no need for the existence of a reasonable suspicion, irrespective of the type of search."

The provisions' enormous sweep extended not only to the homes and places of business of those operating in the customs and excise industry, but also to the homes of their clients, associates, employees and relatives. The absence of any requirement, as a precondition to a search, that there be suspicion, let alone a reasonable suspicion, and the unbounded manner in which searches were licensed, led the Court to conclude that the provisions unjustifiably limited the right to privacy.⁶⁶ Hence, even though customs and excise controls were important, and there was a rational connection between tight regulation and the searches authorised, the blanket authorisation of warrantless searches was not justified. The Court found that the provisions limited the right to privacy and the said provisions could not be justified in terms of section 36.⁶⁷

⁶⁴ See n 37.

⁶⁵ *Gaertner* para 38. See n 37.

⁶⁶ *Ibid.*

⁶⁷ *Gaertner* para 78. See n 37.

3.3 Conclusion

The judgments in the cases discussed show that these warrantless searches have been found to infringe the right to privacy in section 14 of the Constitution. As the exercise of search and seizure powers amount to an infringement of the right to privacy, the pertinent constitutional question is, therefore, whether the infringement is reasonable and justifiable in an open and democratic society in terms of section 36 of the Constitution. Section 36 enjoins a court to balance all relevant to justification, namely: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

The Court found that searches aimed at obtaining evidence for criminal prosecution created an impermissible threat to the right to privacy. The level of expectation of privacy in respect of the premises is high because the searches intrude into the person's private life. There will be limited circumstances in which the need for the state to protect public interest compels an exception to the warrant requirement. The empowering statute containing warrantless search and seizure provisions must provide a constitutionally adequate substitute for a warrant. Warrantless search and seizure provisions, which required a suspicion rather than a reasonable grounds are unrestricted and overbroad. In a nutshell, warrantless search and seizure provisions must have safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens. The absence of safeguards as precondition to a search and the unrestricted manner in which searches are authorised, would lead to the conclusion that that the said authorising provisions unjustifiably infringe on the right to privacy.

CHAPTER 4

CONSTITUTIONALITY OF WARRANTLESS SEARCH AND SEIZURE PROVISIONS IN CRIMINAL MATTERS

4.1 Introduction

In this chapter, the question of whether warrantless search and seizure provisions in terms of section 22 of the CPA and section 13 of the SAPS Act are inconsistent with the Constitution is examined. The question whether section 22 should be utilised as the sole tool to conduct searches without a warrant is also examined.

In order to establish an infringement of the constitutional right to privacy, an individual will have to show that he or she had a subjective expectation of privacy, which was objectively reasonable. Except in the case of privacy rights going to the inner sanctum of a person, an individual's expectation of privacy must be weighed against "the conflicting rights of the community".⁶⁸ Section 36(1) of the Constitution sets out the criteria for acceptable restrictions on basic rights and the factors to be taken into account when evaluating, *inter alia*, executive acts and intervention. The criteria applied are those of reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom.⁶⁹ Section 36 of the Constitution provides a structure for the analysis of the search and seizure in situations in which constitutional rights may be limited. The limitation analysis in terms of section 36 involves a proportionality review.⁷⁰ The Constitutional Court held in *S v Makwanyane and Another*⁷¹ that the limitation analysis involved proportionality and that there was no absolute standard for determining reasonableness and justifiability. The Court held that principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis.

4.2 Constitutionality of section 22 of the Criminal Procedure Act

Although the Constitutional Court has not directly dealt with the constitutionality of warrantless search and seizure in terms of Section 22 of the CPA, the Court in *Magajane* said there may be instances where warrantless searches are justified, such as those provided for in section 22 of the CPA.⁷² The Constitutional Court found in *Ngqukumba v*

⁶⁸ McQuoid-Mason, D "Privacy" in Woolman et al *Constitutional Law of South Africa* 2 edvol 3 (RS 5) at 38-21.

⁶⁹ Swanepoel JP "Warrantless search and seizure in criminal procedure: A constitutional challenge" 1997 30 *CILSA* 347.

⁷⁰ *Magajane* para 50. See n 34.

⁷¹ 1995 (3) SA 391 (CC) 104.

⁷² Para 76. See n 34.

Minister of Safety and Security and Others,⁷³ 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, was inconsistent with the right to privacy and dignity. The Court held that in the face of the privacy right and also the right to dignity, which are closely linked, it was not excessively 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 CPA. Strict compliance with the Constitution and the law will not hamper police efforts in stemming the scourge of crime.⁷⁴

The Constitutional Court in *Gaertner* stated that there is no cogent reason for not providing for warrants in respect of searches of people's homes, with exceptions similar to those provided for in section 22 of the CPA. Section 22 of the CPA is an acceptable exception to the general requirement of warrants for searches of people's homes.⁷⁵ The High Court in *S v Madiba*,⁷⁶ endorsed search and seizure in exigent circumstances and held that the invasion of the right to privacy as result of search and seizure is justifiable. It was maintained that where exigent circumstances are present, the interests of law enforcement override the need for judicious consideration of privacy rights. These exigent circumstances include the imminent danger of the loss, removal, destruction or disappearance of evidence if the search should be delayed to obtain prior authorisation. This principle is also contained in section 22 of the CPA in that the police may dispense with a warrant where the obtaining of authorisation would defeat the object of the search. Such a search will be lawful and constitutional if the police official can show objectively reasonable grounds for a belief that (a) a warrant would have been issued had it been applied for, and (b) the delay caused by the application would have defeated the objective of the search.⁷⁷

The Constitutional Court in the matter of *Kunjana*, held that there was no reason to suspend the declaration of invalidity. A *lacuna* was avoided in that the search procedure contemplated by the Drugs Act was already covered by section 22 of the CPA, which provided for a constitutionally sound warrantless search procedure. It followed that police officials seeking to prevent and prosecute offences contemplated by the Drugs Act may rely on section 22 of the CPA, should the need for a warrantless search and seizure procedure arise.⁷⁸

⁷³ 2014 (5) SA 112 (CC).

⁷⁴ Para 19. See n 73.

⁷⁵ Para 73. See n 37.

⁷⁶ 1998 (1) BCLR 38 (D).

⁷⁷ Basdeo V (2009) "A constitutional perspective of police powers of search and seizure in the Criminal Justice System" unpublished LLM dissertation, University of South Africa 111.

⁷⁸ Para 29. See n 19.

The search in terms of section 22 of the CPA without a warrant is a reasonable and justifiable limitation on the right to privacy as it permits searches in circumstances where there are reasonable grounds to believe that a warrant would have been granted and the delay occasioned by applying for a warrant would result in the evidence which is sought being lost or destroyed.

Therefore, the police should utilise the provisions of section 22 of the CPA where the criminal prosecution is envisioned and urgent action is required.

4.3 Constitutionality of Section 13(6) of the South African Police Service Act

Section 13(6) of the SAPS Act aims to prevent illegal movement within the borders of South Africa by authorising searches without a warrant within a corridor of ten kilometres or any reasonable distance from any border with a foreign state or in the South African territorial waters.

The Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation. Section 13(6) aims to prevent illegal movement within the borders of South Africa and the importance of this purpose diminishes the invasiveness of searches under the said provision. Searches without reasonable grounds in places next to foreign borders would be a reasonable limitation on the right to privacy as there is substantial state interest in protecting the nation's borders and the border search is a crucial exercise of the right of the sovereign to self-protection.⁷⁹ It is commonly accepted that sovereign states have the right to control their boundaries and determine who is allowed to enter the country. For the general welfare of the nation the state is expected to perform this role. People do not expect to be able to cross international borders free from scrutiny and as a result they have a diminished expectation of privacy. A diminished expectation of privacy is likely to reduce constitutional protections. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function.

Therefore, in view of the substantial state interest involved and the fact that searches are aimed at exercising control over the illegal movement of people or goods across the borders of South Africa, searches without reasonable grounds within a corridor of ten kilometres or any reasonable distance from any border with a foreign state or in the South African

⁷⁹ Steytler N *Constitutional Criminal Procedure* Butterworths Durban 1998 90.

territorial waters would be a reasonable limitation on the right to privacy and are consistent with the Constitution except for searches of premises.

Section 13(6) circumscribes the place at which the searches may be conducted and the search may also be conducted on premises within 10 kilometres, or any reasonable, distance from any border between South Africa and any foreign state.

Section 13(6) is broad in as far as it authorises a search of premises. Premises include private homes where the expectation of privacy is greater, being regarded as the “inner sanctum” of a person. The fundamental problem is that it allows police officials to escape the usual rigours of obtaining a warrant including in cases where urgent action is not required in respect of private homes. Section 13(6) does not contemplate instances where evidence sought will be lost or destroyed as a result of the delay occasioned when applying for a warrant. Section 13(6) is problematic as far as it does not preclude the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances, with the result that police officials may intrude in instances where an individual’s reasonable expectation of privacy is at its apex in respect of private homes. Less restrictive measures do exist to achieve the purpose of the Act in respect of private homes. The provision could achieve its purpose even if it requires a warrant prior to the search of premises.

Therefore, section 13(6) of the SAPS Act is inconsistent with section 14 of the Constitution in as far as it authorises searches of private homes. The courts are likely to sever the invalid part in the event of a constitutional challenge of the section 13(6). Therefore, section 13 (6) must be amended so as to preclude the possibility of a greater limitation of the right to privacy in respect of private homes.

4.4 Constitutionality of Section 13(7)(c) of the South African Police Service Act

Section 13(7)(c) of the SAPS Act provides for searches without a warrant in an area cordoned off for purposes of public order or safety. A police official may, in terms of section 13(7)(c), “where it is reasonably necessary” to achieve the objective of the authorisation by the National or a Provincial Commissioner, conduct a search without a warrant (and, presumably without reasonable grounds) of any person, premises, vehicle or receptacle or any object of whatever nature and seize any article that may afford evidence of the commission of an offence.

Section 13(7)(c) aims to maintain public order and safety of the public. Therefore, the importance of this purpose diminishes the invasiveness of searches under the said

provision. However, the scope of section 13(7)(c) search is broad as it grants police officers the power to search, without a warrant, any person, premises or vehicle, or any receptacle or any object of whatever nature. Section 13(7)(c) is problematic as far as it does not preclude the possibility of a greater limitation of the right to privacy, with the result that police officials may intrude in instances where an individual's reasonable expectation of privacy is at its apex. "Premises" include private homes where the expectation of privacy is greater, being regarded as the "inner sanctum" of a person. This provision allows police officials to escape the process of obtaining a warrant in all cases, including those cases where urgent action is not required. The section does not contemplate instances where evidence sought will be lost or destroyed as a result of the delay occasioned when applying for a warrant.

The cordoning off of a particular area should be based on reasonable grounds.⁸⁰ As indicated earlier, whether a search is for criminal evidence is an important measure of the extent of the limitation. A warrantless search aimed at criminal prosecution will constitute a greater intrusion and an owner has a greater expectation of privacy regarding the risk of criminal prosecution. Section 13(7)(c) of the SAPS Act facilitate searches aimed at collecting evidence for criminal prosecution and the subjects of the search require the protection of warrants as embodied in Chapter 2 of the CPA. There are insufficient reasons to depart from the principle that an independent and impartial person should be the final arbiter before such a drastic measure is taken. Although the National Commissioner or a Provincial Commissioner occupy the most senior positions in the police service, this does not detach or separate them from the search, which unfortunately makes the independence of the discretion they exercise very questionable. A judicial officer would be in a better position to decide whether the public order or safety has been threatened or disturbed, and whether the search to be conducted will help remedy the situation. The objectives and purpose of the search will not be defeated by obtaining prior judicial authorisation, since the decision to cordon off an area is rarely made instantaneously.⁸¹ The police can also use section 22 of the CPA to search where urgent action is required. Therefore, section 13(7)(c) is inconsistent with the right to privacy guaranteed in the Constitution.

4.5 Constitutionality of section 13(8)(g)(i) of the South African Police Service Act

Section 13(8)(g)(i) provides for searches of vehicles or any person in the event of roadblock set up in accordance with the authorisation by the commissioner and seizure of any object that has been referred to in section 20 of the CPA.

⁸⁰ *Idem* 95.

⁸¹ *Ibid.*

A person's vehicle is also subject to expectation of privacy and there is no doubt that the subjective expectation of privacy in respect of a vehicle is objectively reasonable. Any blanket search of any person or vehicle in terms of section 13(8)(g)(i) of the SAPS Act would constitute a violation of the person's right to privacy. Therefore, it begs the question whether the limitation of the right to privacy by section 13(8)(g)(i) is justifiable in terms of section 36 of the Constitution. The application of the relevant factors in terms of section 36 of the Constitution to section 13(8)(g)(i) of the SAPS Act is thus examined.

4.5.1 The nature of the right

The first factor which must be considered when determining whether the limitation is reasonable and justifiable is the nature of the right. At the outset, it places emphasis on the importance of the right the state seeks to limit. It focuses the courts on the purpose of the right, the context that resulted in the right being enshrined in the Constitution and the seriousness of limiting the right.⁸² The right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life.⁸³ The nature of the right to privacy affects the justification required for limitation. Therefore, the level of justifying intrusion into the private space of citizens is high.

Section 13(8)(g)(i) authorises the police to search any person or vehicle in the event of roadblock. The Constitution created the right to privacy which includes the right of an individual not to have their person or property searched. Section 13(8)(g)(i) of the SAPS Act does not provide any persuasive grounds of justifying limitation of the right to privacy in the absence of constitutional minimum requirements. Although, the need to suppress crime is a pressing one, the importance of the right to privacy cannot be eroded by disregarding constitutional minimum requirements when there are no grounds to do so.

4.5.2 The importance of the limitation

The second factor, which is crucial to the analysis, is the importance of the purpose of the limitation. It is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation. The Court must carefully review the public interest served by the statutory provision and determine the weight that this purpose should carry in the proportionality review.⁸⁴

Section 13(8)(g)(i) provides for searches of vehicles or any person in the event of roadblock set up in accordance with the authorisation which was granted for purposes of exercising a

⁸² *Ibid.*

⁸³ *Gaertner* para 47. See n 37.

⁸⁴ *Magajane* para 65. See n 34.

power or performing any function referred to in the Constitution. The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.⁸⁵ Therefore, the importance of the purpose of section 13(8)(g)(i) diminishes the invasiveness of searches under the said provision.

4.5.3 The nature and extent of the limitation.

The third factor is the nature and extent of the limitation. There are at least three issues that will have a bearing on the nature and extent of the limitation: (1) the level of the reasonable expectation of privacy; (2) the degree to which the statutory provision resembles criminal law; and (3) the breadth of the provision.⁸⁶ The individual's expectation of privacy will vary, based on the particular context of the statutory provision, the information obtained and the premises and objects searched.⁸⁷ The right to privacy in respect of private vehicles is strong. The level of expectation of privacy in respect of vehicles is high because the searches intrude into the person's private life. A vehicle is also subject to privacy as the purpose of the right to privacy is to safeguard personal privacy and not to protect private property. There can be no doubt that certain spaces are normally reserved for the most private of activities and these spaces include vehicles. Whether a search is aimed at criminal prosecution is an important measure of the extent of the limitation. In the context of warrantless searches aimed at obtaining evidence for criminal prosecution, without further checks and balances, overbreadth creates an impermissible threat to the right to privacy.⁸⁸

Section 13 (g)(i) of the SAPS Act facilitate searches aimed at collecting evidence for criminal prosecution and the subjects of the search require the protection of warrants as embodied in Chapter 2 of the CPA. The search in terms of section 13(8)(g)(i) of the SAPS Act constitutes a significantly greater intrusion.⁸⁹ This is because the courts have held that an owner has a greater expectation of privacy regarding the risk of criminal prosecution.⁹⁰

The discretion of the police in terms of section 13(8)(g)(i) of the SAPS Act as to the scope of the search is not limited. Police, like any other persons exercising power on behalf of the state, are as entitled as the public to know the precise framework within which they can lawfully and effectively carry out their functions. The section gives hardly any guidance. Searches at roadblocks ought to be conducted only for reasons related to driving a car such

⁸⁵ Section 205(3) of the Constitution.

⁸⁶ *Magajane* para 66. See n 34.

⁸⁷ *Magajane* para 67. See n 34.

⁸⁸ *Magajane* para 88. See n 34.

⁸⁹ *Magajane* paras 83-86. See n 34.

⁹⁰ *Magajane* para 69. See n 34.

as checking the driver's licence, the sobriety of the driver and the mechanical fitness of the vehicle. Any further, more intrusive procedures should only be undertaken based upon reasonable and probable grounds.

4.5.4 The relationship between the limitation and its purpose

There must be a rational connection between the purpose of the search provision and the limitation imposed by it.⁹¹ Legislation providing for search and seizure in the public interest must have a strong relationship to the limitation of the privacy right because the search and seizure aims at protecting the public interest. It is difficult to see how the achievement of the basic purpose of the SAPS Act requires the police to conduct blanket searches of persons or vehicles without necessary safeguards such as a warrant and the presence of exigent circumstances.

4.5.5 Less restrictive means to achieve the purpose

In determining whether the limitation of the right to privacy caused by the search is proportionate to the purpose of the legislative provision, a court is required to enquire whether there exists a less restrictive means to achieve the purpose.⁹² The relevant question would be whether the provision could have achieved its purpose even if it required a warrant prior to the search. The law recognises that there will be limited circumstances in which the need for the state to protect public interest compels an exception to the warrant requirement.

The Constitutional Court⁹³ has held that exceptions to the warrant requirement should not become a rule. A warrant is a mechanism employed to balance an individual's right to privacy with the public interest. It guarantees that the state must be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer. Furthermore, a warrant governs the time, place and scope of the search. This moderates the intrusion regarding the right to privacy, guides the conduct of the search, and informs the individual of the legality and limits of the search.⁹⁴ In the context of searches aimed at criminal prosecution, the state will be hard-pressed to show the need for provisions authorising warrantless searches.⁹⁵

Section 13(8)(g)(i) allows warrantless searches during roadblocks including situations where urgent action is not required and without reasonable grounds to believe that the delay occasioned in obtaining a warrant will result in the items or evidence sought being lost or

⁹¹ *Gaertner* para 67. See n 37.

⁹² *Magajane* para 73. See n 37.

⁹³ *Ibid.*

⁹⁴ *Magajane* para 74. See n 34

⁹⁵ *Magajane* para 76. See n 34.

destroyed. The purpose of the search will not be defeated by obtaining prior judicial authorisation as the decision to set up a roadblock is rarely made instantly. As these searches aim to collect evidence for criminal prosecution, an owner has a greater expectation of privacy regarding the risk of criminal prosecution and requires the protection of warrants by judicial officers. There are no sufficient reasons to depart from the principle that an independent and impartial person should be the final arbiter before such a drastic measure is taken.

A general crime preventive roadblock grants the police unstructured search powers which are open to abuse and arbitrary action, while a limited objective would confine police actions.⁹⁶ Section 13(8)(g)(i) can achieve its purpose while requiring the police obtain a warrant before searching vehicles or the police can use the provisions of section 22 of the CPA to search where urgent action is required. Lastly, the police may search vehicles at roadblocks for reasons related to driving a car mentioned earlier. Therefore, section 13(8)(g)(i) of the SAPS is inconsistent with the Constitution.

4.6 Constitutionality of section 13(8)(g)(ii) of the South African Police Service Act

Section 13(8)(g)(ii) authorises a police official in the event of a roadblock set up in accordance with section 13(8)(d) to search a vehicle or persons and seize any article referred to in section 20 of the CPA.

Section 13(8)(d) authorises a police officer who has reasonable suspicion that any object, which is concerned in the commission of an offence mentioned in Schedule 1 of the CPA or the person who has committed the offence mentioned in Schedule 1 of the CPA is being transported in a vehicle, to set up the roadblock in order to establish whether such a person or article is transported in such a vehicle. The said police officer must have reasonable belief that if he or she had applied for a search warrant in terms of section 21(1)(a) of the CPA, it would have been issued and that a delay in obtaining such a search warrant would defeat the object of holding a roadblock.

Section 13(8)(g)(ii) of the SAPS Act has constitutional safeguards contained in section 22 of the CPA. The search is only allowed if the police officer has reasonable belief that if he or she had applied for a search warrant in terms of section 21(1)(a) of the CPA, it would have been issued and that a delay in obtaining such a search warrant would defeat the object of holding a roadblock. Therefore, an infringement of the right to privacy in this regard is reasonable and justifiable.

⁹⁶ Steytler N *Constitutional Criminal Procedure* Butterworths Durban 1998 102.

4.7 Conclusion

A provision is unlikely to survive constitutional scrutiny if it permits a search without a warrant in circumstances where there are no reasonable grounds to believe that a warrant would have been granted and the delay occasioned by applying for a warrant would result in the evidence which is sought being lost or destroyed.

Although, there hasn't been any formal constitutional challenge of warrantless search and seizure provisions in terms of section 22 of the CPA, the Constitutional Court has found the said provisions to be constitutionally sound as section 22 has constitutional safeguards. The Court found that section 22 of the CPA is an acceptable exception to the general requirement of warrants for searches of people's homes. Therefore, section 22 of the CPA should be utilised by the police where the criminal prosecution is envisioned.

Section 13(6) of the SAPS act aims to prevent illegal movement within the borders of South Africa. The importance of this purpose diminishes the invasiveness of searches under the said provisions. Searches without reasonable grounds within the borders of South Africa would be a reasonable limitation on the right to privacy except for searches of premises. Section 13(6) of the SAPS Act is inconsistent with the Constitution in as far as it authorises warrantless searches of premises.

Section 13(7)(c) of the SAPS Act is inconsistent with the Constitution as the discretion of the police regarding to the scope of the search is not limited and the scope of section 13(7)(c) search is broad in that it grants police officers the power to search, without a warrant, "any person" and "premises". Premises include private homes where the expectation of privacy is greater. Section 13(7)(c) of the SAPS Act facilitate searches aimed at collecting evidence for criminal prosecution and as a result the search creates an impermissible threat to the right to privacy. The objectives and purpose of the search will not be defeated by obtaining prior judicial authorisation, since the decision to cordon off an area is rarely made instantaneously.⁹⁷ The police can also use section 22 of the CPA to search where urgent action is required.

Section 13(8)(g)(i) of the SAPS Act infringes the right to privacy and such infringement cannot be reasonable and justifiable as the provision does not have sufficient constitutional safeguards. The search is conducted in terms of the authorisation of the commissioner. The authorisation of the commissioner cannot be equated to a judicial authorisation. The objectives and purpose of the search will not be defeated by obtaining prior judicial

⁹⁷ *Idem* 95.

authorisation since the decision to set up roadblock is not made instantaneously. A general crime prevention roadblock grants police officers unstructured search powers, which are open to abuse and arbitrary action, while a limited objective, such as the search related to driving a car, would focus and confine police actions.⁹⁸

The search and seizure provisions in section 13(8)(g)(ii) of the SAPS Act have constitutional safeguards of section 22 of the CPA. The search is only allowed if the conditions for obtaining a warrant exist and it is not practical to obtain one. Section 13(8)(g)(ii) has the required safeguards and therefore, the limitation in terms of the said section is reasonable and justifiable.

⁹⁸ *Idem* 102.

CHAPTER 5

WARRANTLESS SEARCH AND SEIZURE UNDER CANADIAN LAW AND ITS EFFECT ON SOUTH AFRICAN LAW

5.1 Introduction

Prior to 1982, the law of search and seizure in Canada was a combination of statutory provisions and common law rules. The harsh reality was that evidence obtained through illegality or impropriety by the authorities was nonetheless admissible in criminal proceedings.⁹⁹

Canada is now an excellent example of a society where the society's values are based on openness, democracy, human dignity, equality and freedom. The Charter introduced major changes in the content and protection of individual rights. The legal rights are contained in sections 7 to 14 of the Charter. Section 8 of the Charter stipulates that everyone has the right to be secure against unreasonable search and seizure. The Charter does not specifically provide for the protection of personal privacy, the issue arises in connection with the protection of persons against unreasonable search and seizure.¹⁰⁰

In general search and seizure in Canada is regulated by the Criminal Code of Canada.¹⁰¹ The powers to search and seize without a search warrant in terms of the Criminal Code are restricted to certain stipulated offences. The search powers conferred by the Criminal Code are often limited to peace officers, which include police, correctional guards, custom officers and mayors, as defined in section 2 of the Criminal Code. Before its repeal in 1985, section 10(1) of the Narcotic Control Act of Canada¹⁰² authorised a warrantless search of a place except a dwelling-house, if a peace officer had reasonable grounds to believe that the place contained narcotics by means of or in respect of which an offence under the Act had been committed. Section 10(1) and (3) of the Combines Investigation Act¹⁰³ permitted the Director of Investigation under the Act, or any representative authorised by him, to enter any premises in which he believed there might be evidence relevant to the subject of an inquiry under the Act.

A variety of court decisions have dealt with the question of whether searches are or are not reasonable in various situations and the ancillary question of whether evidence obtained

⁹⁹ Quigley T "The impact of the Charter on the law of search and seizure" 2008 40 *SCLR* (2d) 117.

¹⁰⁰ *Bernstein* para 86. See n 30.

¹⁰¹ RSC 1985, c. C-46, hereafter referred to as the Criminal Code.

¹⁰² RSC 1985, c. N-1, hereafter referred to as the Narcotic Control Act.

¹⁰³ RSC 1970, c. C-23.

during the searches can be adduced at a trial.¹⁰⁴ The Supreme Court of Canada in the matter of *Hunter v Southam Inc*¹⁰⁵ laid down the requirements of what constitute a reasonable search. There must be some authorisation for the search, whether in legislation or pursuant to the common law as set out by the courts. This means that even if the search is legal, it may be unconstitutional if the courts find that the statute violates the Charter by authorising an unreasonable search. Conversely, an illegal search does not automatically mean that it is unreasonable although this will usually be the case. The party seeking to justify a warrantless search bears the onus of rebutting the presumption of unreasonableness. A requirement of prior authorization, usually in the form of a valid warrant, puts the onus on the state to demonstrate the superiority of its interest to that of the individual.

5.2 Constitutionality of warrantless search and seizure in Canada

The issue of the constitutionality of warrantless search and seizure in Canada was dealt first by the Supreme Court of Canada in the matter of *Hunter*. The Supreme Court of Canada in the matter of *Hunter* found that warrantless searches are *prima facie* unreasonable under section 8 of the Charter.¹⁰⁶

The Supreme Court of Canada was faced with a consideration of the constitutional validity of sections 10(1) and (3) of the Combines Investigation Act.¹⁰⁷ The Court determined that section 8 of the Charter was applicable to the search and seizure sections of the Combines Investigation Act. The Court held that the procedures established by section 10(3) are constitutionally defective in two respects.¹⁰⁸ First, for the authorisation procedure to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. Second, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard consistent with section 8 of the Charter for authorising searches and seizures. The Court held that subsections 10(1) and 10(3) of the Combines Investigation Act do not embody such a requirement. They do not, therefore, measure up to the standard imposed by section 8 of the Charter. Thus, the Court concluded that the search

¹⁰⁴ Pilon M "Search, seizure, arrest and detention under the Charter"
<<http://publications.gc.ca/Collection-R/LoPBdP/CIR/917-e.htm>> (accessed on 20 August 2015).

¹⁰⁵ [1984] 2 SCR 145.

¹⁰⁶ *Hunter* at 146e. See n 105.

¹⁰⁷ RSC 1970, c. C-23.

¹⁰⁸ *Hunter* at 146g. See n 105.

and seizure sections of the Combines Investigation Act were inconsistent with the Charter and therefore, of no force or effect.¹⁰⁹

The Court established the rules that a valid search requires (i) a prior authorisation, (ii) granted by an independent person acting judicially, (iii) based upon reasonable and probable grounds for believing in the prior existence of facts justifying the search, and (iv) sworn to under oath by the person seeking the authorisation. The case did not strike down all searches not conforming to these minimum standards, but would require that any departure from them be demonstrably justified in the circumstances.¹¹⁰

Thus, the general rule for a valid search in Canada is that the police will require prior authorisation to conduct the search, and reasonable and probable grounds must exist to justify the search. Once these requirements are satisfied, state intrusion on privacy would be justified. These requirements apply where there is a reasonable expectation of privacy, and protections accorded by section 8 of the Charter vary depending on the context.¹¹¹ Section 8 of the Charter protects a person's reasonable expectation of privacy from state intrusions. Thus, where there is no reasonable expectation of privacy, section 8 of the Charter does not apply. In addition, a diminished expectation of privacy (for example, in prisons or at border crossings) will lower the standard of reasonableness. A person's home is where there would be the greatest expectation of privacy and thus a greater degree of constitutional protection.

In the matter of *R v Grant*,¹¹² the search and seizure concerned the constitutional validity of the warrantless search of a place other than a dwelling house in terms section 10 of the Narcotic Control Act. As previously indicated, section 10 authorised police officers to undertake a warrantless search of a place other than a dwelling house if they had reasonable grounds to believe that it contained a narcotic by means of, or in respect of which, an offence contrary to the Narcotic Control Act had been committed.¹¹³ The Court held that to the extent that section 10 purports to authorise searches and seizures on a wider basis, it is in breach of section 8 of the Charter and inoperable.¹¹⁴ Furthermore, the Court held that section 10 of the Narcotic Control Act should be read down to restrict its availability to situations in which exigent circumstances make it impracticable to obtain a warrant.¹¹⁵ Exigent circumstances will generally

¹⁰⁹ *Ibid.*

¹¹⁰ Lafrenière G "Police powers and drug-related offences" (2001) <<http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/powers-e.htm>> (accessed on 22 September 2015).

¹¹¹ *Ibid.*

¹¹² [1993] 3 SCR 223.

¹¹³ *Grant* at 224. See n 112.

¹¹⁴ *Ibid.*

¹¹⁵ *Grant* at 243. See n 112.

be held to exist if there is an imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed.

The Court held that the three criteria identified in *Hunter v Southam Inc* had to be met in order to find that section 10 of the Narcotic Control Act is reasonable within the meaning of section 8 of the Charter.¹¹⁶

5.3 Warrantless search and seizure in terms of the Criminal Code

In Canada the general power to issue a search warrant is conferred upon a justice of the peace. Under section 2 of the Criminal Code, a justice is defined as either a justice of the peace or a provincial court judge. The most common search warrant is issued in terms of section 487 of the Criminal Code.¹¹⁷ It is a general search warrant since it may be used in relation to any Criminal Code offence or an offence under any other federal Act, even if that Act contains its own search and seizure provisions. Before a warrant may be issued, there must be compliance with the provisions of section 487.1 of the Criminal Code. A justice may issue a warrant authorising the search of a building, receptacle or place and seizure of anything if there are reasonable grounds to believe that there is in a building anything in respect of which any offence against the Criminal Code or any other Act of Parliament has been or is suspected to have been committed; anything that will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against the Criminal Code or any other Act of Parliament; anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant; or any offence-related property.¹¹⁸ Although a search warrant applies to a building, receptacle or place, it does not cover persons. Thus, in executing a search warrant under section 487.1, the police do not have the authority to search people found on the premises.¹¹⁹

Section 487.11 of the Criminal Code authorises a peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of the Criminal Code or any other Act of Parliament, may, in the course of his or her duties, exercise any of the powers described in subsection

¹¹⁶ *Grant* at 240. See n 112.

¹¹⁷ Lafrenière G “Police powers and drug-related offences” (2001) <<http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/powers-e.htm>> (accessed on 22 September 2015).

¹¹⁸ S 487.1 of the Criminal Code of Canada.

¹¹⁹ Lafrenière G “Police powers and drug-related offences” (2001). <<http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/powers-e.htm>> (accessed on 22 September 2015).

487(1) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.

The Criminal Code also contains specific powers of search and seizure for certain offences. Section 117.02(1) of the Criminal Code authorises a search without warrant of a person, vehicle or place, other than a dwelling-house, if the police officer believes on reasonable grounds that a weapon was used in the commission of an offence or a weapons offence is being or has been committed. Such a search is only allowed if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it is not practical to obtain one. This search power is limited to the specific offences listed and is permitted only if the conditions set out in the legislation are satisfied.¹²⁰

The Criminal Code further authorises a police officer to obtain such a search warrant from a judicial officer by telephone or other telecommunication (telewarrant) where he or she believes that an indictable offence has been committed and it would be impractical to obtain a search warrant personally.

5.4 Warrantless Search and Seizure in terms of the Controlled Drugs and Substances Act

The Controlled Drugs and Substances Act¹²¹ repealed the Narcotic Control Act. The CDSA establishes a comprehensive search and seizure scheme for drug-related offences. These provisions are similar to the search and seizure provisions in the Criminal Code.¹²² Section 11(1) of the CDSA allows a justice to issue a search warrant if he or she is satisfied by information on oath that there are reasonable grounds to believe that specific items are in a place. These items are a controlled substance or precursor in respect of which the CDSA has been contravened; anything in which a controlled substance is contained or concealed; offence-related property; or anything that will afford evidence in respect of an offence under the CDSA. Based on this power, there is no longer a reason for the investigator to use a Criminal Code warrant, as was the case in certain circumstances under the old legislation. The CDSA authorises a search "at any time."¹²³ Thus, there is no requirement to obtain authorisation to search at night as in the case of a search under the Criminal Code. As with the Criminal Code, telewarrants are available under the CDSA. Section 7 of the Criminal Code stipulates that a peace officer may exercise any of the

¹²⁰ *Ibid*

¹²¹ S.C. 1996, c. 19, hereafter referred to as the CDSA.

¹²² Lafrenière G "Police powers and drug-related offences" (2001) <<http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/powers-e.htm>> (accessed on 22 September 2015).

¹²³ *Ibid*.

powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one. This provision differs from section 10(1) of the Narcotic Control Act in that it incorporates the presence of exigent circumstances requirement. Section 11(2) of the CDSA stipulates that for the purposes of section 11(2), information may be submitted by telephone or other means of telecommunication in accordance with section 487.1 of the Criminal Code, with such modifications as the circumstances require. In a nutshell the CDSA authorises warrantless search and seizure in exigent circumstances as well as search and seizure by telewarrant.

5.5 The influence of Canadian jurisprudence on South African law

The courts in South Africa have since the introduction of the fundamental rights provisions, treated the Charter jurisprudence as perhaps the most authoritative guidance from abroad when dealing with fundamental rights issues. The Charter was an important source of reference when the fundamental rights provisions in the South African Constitution were constructed.

The general limitation clause in the Interim Constitution was adopted predominantly from Canadian law. This determined the structure of fundamental rights analysis and is, therefore, on its own an important influence. Many even regard the role of the Charter when the Bill of Rights was drafted as so pivotal that they consider the South African Bill of Rights to be largely based on the Charter.¹²⁴ The limitation clause in the Constitution bears resemblance to the Canadian limitation clause. The South African Parliament incorporated the elements of the Oakes test merely as factors to be taken into account when determining whether the limitation of an individual's fundamental right is reasonable and justifiable.¹²⁵

Although South African courts have never followed the fairly stringent test laid down by the Canadian Supreme Court in *R v Oakes*,¹²⁶ the South African jurisprudence has developed along similar lines. Limitations analysis under the Charter and the Bill of Rights possess common features. These common features include a threshold requirement that a limitation must take the form of a general application; a threshold requirement that the objective of the impugned law must be sufficiently pressing and of substantial import to warrant overriding a constitutionally protected right; a proportionality assessment that demands, at a minimum,

¹²⁴ De Villiers W (2000) "*Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform*" unpublished LLD thesis, University of Pretoria at P 8.

¹²⁵ Steytler N *Constitutional Criminal Procedure* Butterworths Durban 1998 21.

¹²⁶ *R v Oakes* [1986] 1 SCR 103.

that a rational connection exists between the means employed and the objective sought, that the means employed impair the right as little as possible; and that the burden imposed on those whose rights are impaired does not outweigh the benefits to society.¹²⁷ The Constitutional Court has imported some of the balancing enquiry factors in Canada when balancing all relevant factors for purposes of determining whether the limitation is reasonable and justifiable. The Constitutional Court acknowledged that it is not surprising that the importance of the limitation is a key aspect of the balancing inquiry in Canada. The importance of the purpose of the limitation is crucial to the analysis as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation.¹²⁸

The Constitutional Court has cited the Canadian judgments with approval in a number of cases pertaining to warrantless search and seizure in the regulatory sphere. The Constitutional Court in the matter of *Magajane* considered the Supreme Court of Canada's considerable attention to the issue of regulatory inspections of commercial premises and noted that the Charter mandates a two-stage inquiry into challenges based on the right to privacy.¹²⁹ Furthermore, the Constitutional Court considered Canada's approach and the scope of the right to privacy. The Constitutional Court noted how in *Hunter*, the Supreme Court of Canada articulated the nature of the interests protected by section 8, the standard of reasonableness under that section and the importance of a warrant in the protection of privacy interests. In *Bernstein*, the Constitutional Court remarked and acknowledged that the Charter does not specifically provide for the protection of personal privacy. The issue arises in connection with the protection of persons against unreasonable search and seizure, which in Canada is afforded by section 8 of the Charter.¹³⁰

5.6 Warrantless vehicle searches

In Canada, the courts have set out the minimum constitutional requirements for the warrantless search and seizure of a vehicle, namely, the officer conducting the search must have reasonable and probable grounds to believe that an offence has been, is being or is about to be committed and that a search will disclose evidence relevant to that offence; that exigent circumstances such as imminent loss, removal or destruction of the evidence do not make it feasible to obtain a warrant and lastly, that the scope of the search itself bears a

¹²⁷ Woolman S and Botha H, "Limitations" in Woolman et al *Constitutional Law of South Africa* 2nd edition vol 2 at P 34-13.

¹²⁸ *Magajane* para 36. See n 34.

¹²⁹ *Magajane* para 30. See n 34.

¹³⁰ *Magajane* para 86. See n 30.

reasonable relationship to the offence suspected and the evidence sought.¹³¹ The police have a duty to ensure that the existence of reasonable and probable grounds, even in exigent circumstances, before conducting a warrantless search of a vehicle.¹³²

In *R v Ladouceur*,¹³³ the Court dealt with the issue of vehicle searches pursuant to a random stop and held that any intrusive searches following a vehicle stop would probably be subject to a section 8 inquiry.¹³⁴ The Court held that random routine checks should not severely encroach on the individual's right so as to outweigh the legislative objective. Officers can stop persons only for reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds.¹³⁵

In the matter of *R v Mellenthin*,¹³⁶ the Court held that the police questions pertaining to the appellant's gym bag, and the search of the bag and the appellant's vehicle were all elements of a search, which was made without the requisite foundation of reasonable and probable grounds.¹³⁷ The Court further held that a check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted.¹³⁸ The search was found to be unreasonable and in contravention of section 8 of the Charter.

5.7 Conclusion

The pre-Charter law on search and seizure was not lacking legal standards but was lacking of meaningful remedies. The introduction of the Charter provided for remedies, including the striking down of legislation that is not in compliance with Charter requirements.¹³⁹ The framework established by the courts earlier in the Charter was sound and led to other improvements in protecting privacy. The courts in Canada require the provisions of search

¹³¹ Tanovich DM "The constitutionality of searches incident to vehicle stops" 35 *Criminal Law Quarterly* 1992-1993 at 325.

¹³² Fontana JA *The Law of Search and Seizure in Canada* 4thed Butterworths Toronto (1997) 403.
¹³³ 1990] 1 SCR 1257.

¹³⁴ Tanovich DM "The constitutionality of searches incident to vehicle stops" 35 *Criminal Law Quarterly* 1992- 1993 at 324.

¹³⁵ [1990] 1 SCR 1257 at P 1259.

¹³⁶ [1992] 3 SCR 615.

¹³⁷ *Mellenthin* at 617. See n 136.

¹³⁸ *Ibid.*

¹³⁹ Quigley T "The impact of the Charter on the law of search and seizure" 2008 40 *SCLR* (2d)142.

and seizure to include appropriate safeguards that comply with the Charter's requirements. The purpose of section 8 of the Charter is to protect individuals from unjustified state intrusions upon their privacy.¹⁴⁰ To enable section 8 to accomplish its purpose, a method of prior authorisation of searches and seizures was established by the courts. Where search and seizure is conducted without a warrant, there is presumption of unreasonableness.¹⁴¹ The party seeking to justify a warrantless search bears the onus of rebutting the presumption of unreasonableness. The courts have restricted the warrantless searches to situations in which exigent circumstances make it impracticable to obtain a warrant. The goal apparently is to reach an appropriate balance between a person's right to be free from state intrusion and the state's interest in protecting society. The courts continue to closely scrutinise police activity so as to ensure that their conduct does not arbitrarily intrude the individual's privacy rights.¹⁴²

¹⁴⁰ Fontana JA *The Law of Search and Seizure in Canada* 4thed Butterworths Toronto (1997) 346.

¹⁴¹ *Idem* 347.

¹⁴² Lafrenière G "Police powers and drug-related offences" (2001)
<<http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/powers-e.htm>> (accessed on 22 September 2015).

CHAPTER 6

COMPARATIVE STUDY OF WARRANTLESS SEARCH AND SEIZURE IN SOUTH AFRICA AND CANADA.

6.1 Introduction

In South Africa, the Constitution permits a court, when interpreting the Bill of Rights, to consider foreign law. The jurisprudence of foreign jurisdictions is an important source in that it provides a guide to the practice of human rights. The Canadian constitutional jurisprudence is of particular importance because of its extensive influence in South African courts.¹⁴³

The Constitution of South Africa places immense value on the rights pertaining to the security of the human person and human dignity. As a fundamental personality right deserving of protection as part of human dignity, the right to privacy is entrenched in the Constitution.¹⁴⁴ Both the Constitution of South Africa and the Charter protect the individual's right to privacy. This right to privacy is guaranteed and protected from the government's arbitrary intrusion and abuse of police power. If the police intend to search a home, a warrant is required. The protection of privacy is based on the assumption that no one can take it upon him or herself to gain access to or to put into the public domain objects, matters or information, which the individual reasonably regards as personal and sacred for his or her private purposes.¹⁴⁵

As indicated earlier, section 14 of the Constitution confers the right to privacy including the right of an individual not to have their person, home or property searched or their possessions seized while section 8 of the Charter guarantees a general right to be secure from unreasonable searches and seizures. The guarantee of security from unreasonable search and seizure in terms of section 8 only protects a reasonable expectation. The party seeking to justify a warrantless search bears the onus of rebutting the presumption of unreasonableness.¹⁴⁶ In South Africa, a party that seeks to uphold the constitutionality or conduct which conflicts with a right, bears the burden of legal persuasion regarding the justifiability of the limitation.¹⁴⁷ Therefore, the state in both countries bears the onus to validate an infringement of the right to privacy.

¹⁴³ Steytler N Constitutional Criminal Procedure Butterworths Durban 1998 23.

¹⁴⁴ Okpaluba C "Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure" (2015) *AJ* 407.

¹⁴⁵ Okpaluba C "Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure" (2015) *AJ* 408.

¹⁴⁶ *Hunter* at 146f. See n 105.

¹⁴⁷ Steytler N Constitutional Criminal Procedure Butterworths Durban 1998 18.

The protection in terms of section 8 is limited in the sense that it is only a "reasonable expectation" of privacy which is protected. The courts in Canada have relied on the lack of such expectation to deny section 8 protection in a number of cases. Since an enquiry into privacy constitutes an important component in determining the scope of an unreasonable search or seizure, the courts have had to develop a test to determine the scope and content of the right to privacy.¹⁴⁸ The existence of reasonable expectation of a privacy test is determined on the basis of the totality of the circumstances, having regard for the presence of the accused at the time of the search, possession or control of the place being searched, ownership of the place, historical use of the property, ability to regulate access, existence of any subjective expectation of privacy and objective reasonableness of such expectation.¹⁴⁹

In South Africa, the courts assess the justifiability of any limitations of the constitutional right to privacy when considering constitutional validity of search and seizure provisions. With all relevant factors taken into account, the courts then apply a proportionality test that entails striking a balance between the competing interests of an individual and society. Had a qualification of unreasonable search been introduced in section 14, it would have necessitated an immediate need to balance private rights against public interest at the definitional and not the justificatory stage. This would have left a difficult question as to whether there was scope for further balancing of interests at the section 36 stage; in other words, whether an unreasonable search and seizure could ever be reasonable and justifiable.¹⁵⁰

6.2 What constitutes a search and seizure in South Africa and Canada

The concepts, "search" and "seizure" are construed in a similar way in Canada and South Africa and accordingly, South African authors draw from Canadian jurisprudence in attempting to explain these concepts appropriately. Like South Africa, Canada views the concepts of search and seizure as separate. Therefore, it is possible to have a search without a seizure or vice versa even though both commonly occur together.¹⁵¹ South African law requires a police official before conducting a search to obtain a search warrant based on reasonable grounds and probable cause respectively, supported by oath or affirmation. In Canada, the basic rule existed for many years that, except where otherwise expressly authorised by legislation, all searches of private premises were to be conducted under the power of a search warrant or similar authorisation.¹⁵²

¹⁴⁸ *Bernstein* para 88. See n 30.

¹⁴⁹ Fontana JA *The Law of Search and Seizure in Canada* 4thed Butterworths Toronto (1997) 11.

¹⁵⁰ *Mistry* above n 60 para 23.

¹⁵¹ Basdeo V (2009) "A constitutional perspective of police powers of search and seizure in the Criminal Justice System" unpublished LLM dissertation, University of South Africa at 36.

¹⁵² Fontana JA *The Law of Search and Seizure in Canada* 4thed Butterworths Toronto (1997) 341.

The term “search” is not clearly defined in the relevant South African legislation. The question of what conduct constitutes a search is left to common sense and case by case decisions. The element of physical intrusion concerning a person or property is necessary to establish a search.¹⁵³ The concept is also not defined in the CPA and SAPS Act. In the matter of *Minister of Safety and Security V Xaba*,¹⁵⁴ the Court considered the meaning of “search” and concluded that “search” when used in relation to a person had to be given its ordinary meaning in the context of the relevant provisions of the CPA. The Court then referred to the ordinary meaning of the word in terms of the second edition of the Oxford English Dictionary, which where the verb relates to a person is as follows: “ 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”. In Canada, the term “search” was defined by the court in the matter of *R v Edwards*¹⁵⁵ as a form of examination by the state, but only where there is a reasonable expectation of privacy that is determined in this property-oriented manner.¹⁵⁶ In considering whether or not search and seizure within the meaning of section 8 of the Charter has occurred, the pivotal test of “reasonable expectation of privacy” must be considered.¹⁵⁷ The Court in the matter of *R v Evans*,¹⁵⁸ defined the word “search” as looking for things to be used as evidence of a crime and the word “things” include words spoken.¹⁵⁹

There is no definition of seizure in the CPA and the SAPS Act. In the matter of *Ntoyakhe v Minister of Safety and Security*,¹⁶⁰ the Court held that the word “seize” encompassed both the act of taking possession of the article and the subsequent detention thereof. In Canada, the Court in *R v Dymont*,¹⁶¹ defined seizure under section 8 of the Charter as the taking of a thing from a person by a public authority without that person's consent. In the matter of *Thompson Newspapers v Canada*,¹⁶² the Court defined seizure as the taking hold by a public authority of a thing belonging to a person against that person's will. The Court characterised section 17 of the Combines Investigation Act, which provided for an order to

¹⁵³ Swanepoel JP “Warrantless search and seizure in criminal procedure: A constitutional challenge” 1997 30 *CILSA* 343.

¹⁵⁴ *Minister of Safety and Security v Xaba* [2003] 1 All SA 596 (D).

¹⁵⁵ [1996] 1 SCR 128.

¹⁵⁶ Quigley T “The impact of the Charter on the law of search and seizure” (2008), 40 *SCLR* 135.

¹⁵⁷ Fontana JA *The Law of Search and Seizure in Canada* 4thed Butterworths Toronto (1997) at P 4.

¹⁵⁸ (1994), 45 CCC (3d) 130 (BCCA) at 153.

¹⁵⁹ Fontana JA *The Law of Search and Seizure in Canada* 4thed Butterworths Toronto (1997) 4.

¹⁶⁰ *Ntoyakhe v Minister of Safety* 2000 (1) SA 257 (ECD).

¹⁶¹ [1988] 2 SCR 417.

¹⁶² [1990] 1 SCR 425.

produce documents, as not constituting seizure, but rather more akin to a subpoena *duces tecum*.¹⁶³

6.3 Search of private premises

In South Africa, the CPA allows the police to search the “premises” while the Narcotic Control Act authorised the police to search a “place other than a dwelling house”. Section 1 of the CPA defines the term “premises” to include land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft...” There was no definition of a “place other than a dwelling house” in the Narcotic Control Act. Section 117.02(1) of the Criminal Code authorises a search without warrant of a person, vehicle or place, other than a dwelling-house. There is no doubt that the term “premises” includes a private home while the term “place other than a dwelling house” excludes a private home.

6.4 Warrantless search and seizure in South Africa and Canada

It is now a well-established principle in South Africa that statutes authorising warrantless entry into private homes and rifling through private possessions are in breach of the right to privacy.¹⁶⁴ In Canada, warrantless searches are *prima facie* unreasonable under section 8 of the Charter. The courts in both Canada and South Africa require the provisions of search and seizure to include appropriate safeguards that comply with constitutional requirements. Warrantless searches and seizures in Canada are restricted to situations in which exigent circumstances make it impracticable to obtain a warrant. Exigent circumstances in Canada include the imminent danger of the loss, removal, destruction or disappearance of evidence in the event the search is delayed for purposes of obtaining a warrant. Similar safeguards are also contained in the CPA as the police may dispense with a warrant if the police official can show objectively reasonable grounds for a belief that (a) a warrant would have been issued had it been applied for and (b) the delay caused by the application would have defeated the objective of the search.

Unlike the CPA and the SAPS Act, both the Criminal Code and CDSA allows a police officer to obtain search warrant from a judicial officer by telephone or other telecommunication (telewarrant) where he or she believes that an indictable offence has been committed and it would be impractical to obtain a search warrant personally.

¹⁶³ Fontana JA *The Law of Search and Seizure in Canada* 4thed Butterworths Toronto (1997) 6.

¹⁶⁴ Okpaluba C “Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure” (2015) *AJ* 408.

In Canada, the courts have set out the minimum constitutional requirements for the warrantless search and seizure of a vehicle, namely, officers can stop persons only for reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped, the only questions that may justifiably be asked are those related to driving offences. In South Africa, the jurisprudence on the constitutionality of searches of vehicles remains a grey area. Section 13(8)(g)(i) of the SAPS Act does not have constitutional requirements similar to those of Canada. However, section 13(8)(g)(ii) of the SAPS Act has constitutional requirements similar to those of section 22 of the CPA. Section 13(8)(g)(ii) of the SAPS Act authorises the police to search and seize if the conditions for obtaining a warrant exist, but by reason of exigent circumstances, it is not practical to obtain one.

6.5 Conclusion

In both South Africa and Canada, search and seizure law must comply with the constitutional right to privacy. In Canada, any government conduct that intrudes on a justified expectation of privacy is considered a search and seizure and ought to pass constitutional scrutiny. In South Africa, it is accepted that an activity that penetrates a protected sphere of privacy constitutes *prima facie* violation of the right in the Bill of Rights while warrantless searches are *prima facie* unreasonable under section 8 of the Charter.

Section 8 of the Charter introduced a constitutional threshold of reasonableness. The reasonableness of a search is determined by balancing the interests of the state against those of the individual. The search regime itself must, at least to a point, prevent the occurrence of unreasonable search or seizure. This involves balancing the interests of the state against those of a person to be searched at some point before the search may be carried out against his will.¹⁶⁵ In South Africa, section 14 embraces the right to be free from intrusions and interference by the State and others in one's personal life while the Charter does not specifically provide for the protection of personal privacy, but for the protection of persons against unreasonable search and seizure. The protection of privacy in Canada is restricted in that it is only a reasonable expectation of privacy, which is protected. When determining the extent of the constitutional validity of the impugned warrantless search provisions, the courts in South Africa consider reasonable expectation as a factor at the justificatory stage while the courts in Canada consider whether there is reasonable

¹⁶⁵ Reid A D and Young A H "Administrative search and seizure under the Charter"
1984- 1985 10 *Queen's LJ* 402.

expectation of privacy at the definitional stage. Both South Africa and Canada allow warrantless search and seizure procedure that complies with constitutional safeguards.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

The South African law regulating search and seizure without a warrant in criminal matters was examined in comparison with that of Canada. Warrantless searches and seizures in both South Africa and Canada constitute a breach of the right to privacy. In South Africa, a statute that authorises warrantless searches violates the right to privacy and must be justified under the limitation clause of the Constitution. However, in Canada warrantless searches are *prima facie* unreasonable and the party seeking to justify a warrantless search bears the onus of rebutting the presumption of unreasonableness.

It is compulsory in both countries for warrantless search and seizure provisions to contain constitutional safeguards that protect the right to privacy of individuals and that protect citizens against abuse in order to pass a constitutional muster. In Canada, the courts have restricted the warrantless searches to situations in which exigent circumstances make it impracticable to obtain a warrant. In South Africa, the Constitutional Court has accepted section 22 of the CPA as an appropriate provision to conduct warrantless search and seizure. Section 22 of the CPA authorises a search without a warrant if the police official has reasonable grounds to believe that a search warrant will be issued to him and that the delay in obtaining such warrant would defeat the object of the search. The Constitutional Court held that where there is a need for urgent action, the police can invoke section 22 of the CPA.

Section 13(6) of the SAPS Act aims to prevent illegal movement within the borders of South Africa by authorising searches without a warrant within a corridor of ten kilometres or any reasonable distance from any border with a foreign state or in the South African territorial waters. The importance of this purpose diminishes the invasiveness of searches under the said provisions. Searches without reasonable grounds within the aforementioned borders would be a reasonable limitation on the right to privacy and are consistent with the Constitution except for searches of premises. Section 13(6) of the SAPS Act is inconsistent with the Constitution in as far as it authorises searches of private homes.

Section 13(7)(c) of the SAPS provides for searches without a warrant in an area cordoned off for purposes of public order or safety. The said provision is inconsistent with the Constitution as the discretion of the police regarding the scope of the search is not limited. The scope of section 13(7)(c) search is also broad in that it grants police officers the power

to search, without a warrant, any person, premises or vehicle, or receptacle or any object of whatever nature. Premises include private homes where the expectation of privacy is greater. The cordoning off of a particular area is not based on reasonable grounds. Section 13(7)(c) of the SAPS Act facilitate searches aimed at collecting evidence for criminal prosecution. A warrantless search aimed at criminal prosecution constitutes a greater intrusion and an owner has a greater expectation of privacy regarding the risk of criminal prosecution. The objectives and purpose of the search will not be defeated by obtaining prior judicial authorisation, since the decision to cordon off an area is rarely made instantly. The police can also use section 22 of the CPA to search where urgent action is required.

The functions of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. Section 13(8)(g)(i) provides for searches without a warrant during roadblock set up for purposes of exercising any function mentioned above. Although, the importance of the purpose of section 13(8)(g)(i) diminishes the invasiveness of searches, a general crime preventive roadblock grants the police unstructured search powers which are open to abuse and arbitrary action. A person's vehicle is subject to the expectation of privacy and there is no doubt that the subjective expectation of privacy in respect of a vehicle is objectively reasonable. Any blanket search of a vehicle constitutes a violation of the person's right to privacy. A limited objective would confine police actions. Therefore, this provision lacks sufficient constitutional safeguards and it is inconsistent with the Constitution.

The search and seizure provisions in section 13(8)(g)(ii) of the SAPS Act have constitutional safeguards of section 22 of the CPA. The search is only allowed if the conditions for obtaining a warrant exist and it is not practical to obtain a warrant. Therefore, the limitation in terms of the said provision is reasonable and justifiable.

7.2 Recommendations

The Supreme Court of Canada when dealing with warrantless searches resorted to reading down the impugned provision to restrict its availability to situations in which exigent circumstances make it impracticable to obtain a warrant. In South Africa, the Constitutional Court has not shown a desire to reading down as it encroach separation of powers between the judicial and executive and legislative. Therefore, the Constitutional Court is likely to declare the provisions which are inconsistent with the Constitution to be invalid.

Section 22 of the CPA is a sufficient tool to conduct search and seizure without a warrant where criminal prosecution is intended as the Constitutional Court held that section 22 of the

CPA provides for a constitutionally sound warrantless search procedure. Therefore, police should use section 22 of the CPA to conduct searches without a warrant where criminal prosecution is envisaged and where urgent action is required.

Section 13(6) of the SAPS Act should be amended so as to limit the possibility of a greater limitation of the right to privacy in respect of private homes. Section 13(7)(c) of the SAPS Act should be repealed as it is inconsistent with the Constitution.

Section 13(8)(g)(i) of the SAPS Act should also be repealed because it is inconsistent with the Constitution. The statutory provision authorising a warrantless search related to driving a car such as checking the driver's licence, the sobriety of the driver and the mechanical fitness of the vehicle, should be introduced. Section 13(8)(g)(ii) can be retained as it encompasses safeguards contained in section 22 of the CPA.

South Africa should also consider incorporating telewarrant provisions in the CPA similar to those of Canada as telewarrant legislation provides a process to obtain a search warrant in those situations in which exigent circumstances make it impracticable to obtain a warrant. The telewarrant has advantages as the applicant need not go to the Magistrate and the warrant can be issued urgently. This would lessen court challenges of warrantless searches brought by accused before the criminal trial could proceed as the search warrant would have been approved by a judicial officer telephonically.

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