

# Warrantless Search and Seizures by the South African Police Service: Weighing up the Right to Privacy versus the Prevention of Crime

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## Abstract

The constitutional right to privacy is enshrined in section 14 of the *Constitution of the Republic of South Africa*, 1996. It is premised on the notion that all persons should be protected from intrusions on their privacy by any person or institution. The Constitutional Court has also, on numerous occasions, held that the right to privacy is bolstered by its connection with the right to human dignity. It is undeniable that every person's right to privacy should be protected. However, a person's right to privacy is violated when police officials conduct warrantless search and seizure operations. Generally section 22 of the *Criminal Procedure Act* provides for warrantless search and seizure operations when a police official has a reasonable suspicion that a search warrant will be issued to him and that a delay in obtaining such a warrant would defeat the object of the search. Warrantless searches are important for the prevention of crime, but recent case law has suggested that there has been a progressive shift towards protecting the right to privacy of the individual subjected to warrantless searches, since there are a number of laws besides section 22 that regulate warrantless searches and which have been declared to be constitutionally invalid. This article seeks to demonstrate that the current regulatory framework for warrantless searches should be reviewed in order to protect the legitimacy of the police as well as the dignity and privacy of the citizens of South Africa.

## Keywords

Constitutionality; human dignity; invasive; police; prevention; privacy; property; Section 22 of the *Criminal Procedure Act*; warrantless searches; warrantless seizures.

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## 1 Introduction

South Africa is plagued by an exceptionally high crime rate.<sup>1</sup> Drug-related offences are also on a high,<sup>2</sup> which often requires the South African Police Service (hereafter SAPS or police) to enforce the law through warrantless search and seizures operations<sup>3</sup> where it is apparent that a delay in obtaining a warrant would defeat the object of the search.<sup>4</sup> Section 14 of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution), however, provides *inter alia* that every person has the right to privacy and not to have one's possessions seized and home or property searched.<sup>5</sup> That being said, no right is absolute<sup>6</sup> and section 36 of the Constitution provides for the limitation of constitutional rights. Devenish rightly notes that "[p]rivacy is undoubtedly a seminal right but certain limitations in regard to it may however be essential for the administration of justice and the reasonable maintenance of law and order."<sup>7</sup> One such limitation is that of a warrantless search and seizure.

The right to privacy has been at the forefront of many Constitutional Court cases and flows directly from the inherent right to human dignity.<sup>8</sup> The right to privacy was severely violated during the Apartheid regime and the Constitutional Court in particular thus plays a critical role in preventing similar violations from reoccurring by delivering important judgments on the matter.<sup>9</sup>

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<sup>1</sup> Crime Stats South Africa 2018 <http://www.crimestatssa.com/national.php>.

<sup>2</sup> 323 369 drug-related offences were committed in South Africa in 2018. See Crime Stats South Africa 2018 <http://www.crimestatssa.com/national.php>.

<sup>3</sup> The terms "search" and "seizure" are not clearly defined in the South African legal context. See Joubert, Sughrue and Alexander 2013 *De Jure* 119; *Minister of Safety and Security v Xaba* 2003 1 All SA 596 (D). For a comprehensive study of the definitions of "search" and "seizure" in South Africa, see Basdeo 2009 *PELJ* 310-315. Also see Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-30I, 2-30J, 2-30K.

<sup>4</sup> See Parpworth 2018 *Police J* 123.

<sup>5</sup> See s 14 the Constitution.

<sup>6</sup> See *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC) para 106; *Gaertner v Minister of Finance* 2014 1 SA 442 (CC) para 49 (hereafter the *Gaertner case*). Also see Amato *Understanding the New Constitution* 134-135.

<sup>7</sup> Devenish *South African Constitution* 86.

<sup>8</sup> See Basdeo, Geldenhuys and Karels "Search and Seizure" 177-178; Markesinis *et al* 2004 *Am J Comp L* 153; *Gaertner case* para 86; Devenish *South African Constitution* 80.

<sup>9</sup> See *Gaertner case* para 1. Also see Swanepoel 1997 *CILSA* 340.

In the *Gaertner* case the Constitutional Court importantly noted that during Apartheid:<sup>10</sup>

... many of the egregious searches were conducted at the dead of night: a time of relaxation; sleep; intimacy; reckless abandon even; and when some, if not most, would be flimsily dressed. The sense of violation and degradation that the victims must have experienced is manifest.

The horrors of the Apartheid regime are, however, still manifesting themselves in the post-democratic South Africa. The police are regularly faced with civil liability claims due to police brutality.<sup>11</sup> This abuse of power must be condemned as the Bill of Rights affords sufficient protection to those who find themselves in vulnerable positions. Section 12 of the Constitution provides for the right to bodily and psychological integrity and especially the right to freedom and security of the person of every citizen. Section 14 furthermore provides for the right to privacy of every citizen which includes suspected criminals, for example, where it is alleged that a person is committing criminal activities within his or her home or some other form of property.

The Constitutional Court in *The Minister of Police v Kunjana*<sup>12</sup> had to determine whether certain sections of the *Drugs and Drugs Trafficking Act* 140 of 1992 (*Drugs Act*) pertaining to the manner in which warrantless search and seizures were conducted in terms of the *Drugs Act* should be declared unconstitutional.<sup>13</sup> The *Drugs Act* permitted police officials to conduct warrantless search and seizure operations without the necessary safeguards, which violated the constitutional rights of the accused in this case. The Court declared various sections of the *Drugs Act* unconstitutional as they violated the dignity and privacy of the respondent.<sup>14</sup> There has been

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<sup>10</sup> *Gaertner* case para 1.

<sup>11</sup> A recent example to elucidate the point can be observed in *Mkhutyukelwa v Minister of Police* 2017 ZAECHMHC 34 (8 August 2017) (hereafter the *Mkhutyukelwa* case), where the applicant was shot in the arm for no apparent reason by a police officer, searched without a warrant, and detained for longer than 48 hours. He successfully claimed damages from the Minister of Police in the amount of R280 000. In general, the police noted that it will "review and align its spending priorities with those of government, including constructively addressing fruitless and wasteful expenditure and implementing measures to reduce civil claims and the cost of litigation". See SAPS 2020 [https://www.saps.gov.za/about/stratframework/strategic\\_plan/2020\\_2021/saps\\_ap\\_p\\_2020\\_2021.pdf](https://www.saps.gov.za/about/stratframework/strategic_plan/2020_2021/saps_ap_p_2020_2021.pdf) 9. For a comprehensive discussion of civil claims in SAPS, generally see Dereymaeker 2015 SACQ.

<sup>12</sup> *Minister of Police v Kunjana* 2016 2 SACR 473 (CC) (hereafter the *Kunjana* case). Also see a critical discussion of the case in Basdeo, Geldenhuys and Karels "Search and Seizure" 178, 184-185.

<sup>13</sup> *Kunjana* case para 47.

<sup>14</sup> *Kunjana* case para 32.

a shift towards protecting the right to the privacy of the victim in terms of warrantless searches.

Basdeo, Geldenhuys and Karels rightly note that: "At first glance the searching of persons and premises, seizure and related matters seem to go against the spirit and content of ss 12 and 14 of the Constitution."<sup>15</sup> Nonetheless, constitutional rights may be limited in terms of a law of general application, which was one of the legal questions that the judges in *Kunjana* had to grapple with.<sup>16</sup> The constitutionality of warrantless searches and seizures as conducted by the police is what this article primarily seeks to explore. An analysis of legislation regulating warrantless searches needs to be interpreted with reference to section 14 of the Constitution in order to determine the constitutional validity of the provisions insofar as they relate to the police.<sup>17</sup>

This paper is presented in three parts. First, section 14 of the Constitution is analysed to determine the importance of the right to privacy and selected other fundamental constitutional rights. Second, the paper looks at some of the most important jurisprudence concerning warrantless search and seizure operations in South Africa. Finally, the paper examines the pertinent sections of the *Criminal Procedure Act* 51 of 1977 (hereafter CPA) in order to analyse whether it will pass constitutional muster in the future.

## 2 The right to privacy and other important constitutional rights

South Africa has emerged from a dark history characterised by severe violations of human rights, but none more so than the right to privacy.<sup>18</sup> The new constitutional dispensation, firmly rooted in the supreme law of the State, the Constitution, has established "a society based on democratic values, social justice and fundamental human rights", which include the right to privacy.<sup>19</sup> In *Mistry v Interim Medical and Dental Council of South Africa*<sup>20</sup> the Constitutional Court held that the right to privacy provides safeguards to

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<sup>15</sup> Basdeo, Geldenhuys and Karels "Search and Seizure" 177. Also see Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-30I.

<sup>16</sup> See *Kunjana* case para 15.

<sup>17</sup> See Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-30I.

<sup>18</sup> For a comprehensive discussion of the historical development of the right to privacy in South African law, see Burchell 2009 *EJCL* 6-11. Also see generally Currie and De Waal *Bill of Rights Handbook* 295-297; *De Wet v Willers* 1953 4 SA 124 (T) 127BC; *Powell N v Van der Merwe* 2005 1 All SA 149 (SCA) para 50; Nortjé and Myburgh 2019 *PELJ* 5.

<sup>19</sup> See Preamble of the Constitution.

<sup>20</sup> *Mistry v Interim Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC) (hereafter the *Mistry* case).

regulate the search and seizure of the private sector by state officials, which clearly distinguishes a constitutional democracy from a police state.<sup>21</sup> The right to privacy is a core fundamental human right universally and has received renewed attention mainly due the concerns about the social media and the protection of data<sup>22</sup> as well as the right to freedom of speech.<sup>23</sup>

Section 14 of the Constitution provides:<sup>24</sup>

- Everyone has the right to privacy, which includes the right not to have -
- (a) their person or home searched;
  - (b) their property searched;
  - (c) their possessions seized; or
  - (d) the privacy of their communications infringed.

As are several other rights in the Bill of Rights, privacy is cherished by every individual,<sup>25</sup> but the section of the Constitution on the right to privacy is the only one to go into specific detail. The list of possible violations is methodical but not exhaustive. In *R v Dymont*<sup>26</sup> the Court reduced privacy to three basic categories, namely the privacy of a person's home, the privacy of a person's identity, and privacy in relation to information.<sup>27</sup> Also, in *Financial Mail (Pty) Ltd v Sage Holdings Ltd*<sup>28</sup> the Court decided that the invasion of a person's privacy could result in a violation by an unlawful disclosure of the private

<sup>21</sup> *Mistry* case para 25. Also see *Kunjana* case para 18; Price 2014 CCR 247.

<sup>22</sup> Article 17 of the *International Covenant on Civil and Political Rights* (1966) states that "(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks". Also see Steytler *Constitutional Criminal Procedure* 79.

<sup>23</sup> Generally see Altman 2018 *IDPL*; Sarikakis and Winter 2017 *Soc Media Soc*; Nyoni and Velempini 2015 *SAJIM*. For a discussion of data protection in South Africa, generally see the *Mistry* case. Also see Devenish *Commentary on the South African Constitution* 55; Price 2014 CCR 245-246.

<sup>24</sup> Whereas s 13 of the *Constitution of the Republic of South Africa Act* 200 of 1993 (*the Interim Constitution*) included the words "person" and "private", the 1996 Constitution deliberately omits these words in order to widen the application of the section. Steytler explains that "[i]nstead, the word 'their' qualifies both the seizure of possessions and the infringement of communications as well as the search of the person, home and property." See Steytler *Constitutional Criminal Procedure* 79.

<sup>25</sup> Devenish *Commentary on the South African Constitution* 55. The right to privacy can be suspended in terms of s 34(4) of the Constitution, as a result of a declaration of a state of emergency but only when it is necessary to restore peace and order in the country. Also see Devenish *South African Constitution* 86.

<sup>26</sup> *R v Dymont* (1988) 45 CCC (3d) 244 (SCC) (hereafter the *Dymont* case).

<sup>27</sup> *Dymont* case 259-260. Also see Finkelstein and Finkelstein *Constitutional Rights in the Investigative Process* 90; Rautenbach and Malherbe *Wat sê die Grondwet?* 16; Swanepoel 1997 *CILSA* 344. Also see Devenish *South African Constitution* 79, who states that "[s]ection 14 has two parts: the first guarantees a general rights to privacy, whereas the second protects against specific infringements of privacy".

<sup>28</sup> *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) para 426F.

facts of a person or by an unlawful intrusion upon the privacy of a person.<sup>29</sup> Section 14 includes these basic privacy rights, and they are regarded to be the most important privacy rights.

The importance of the right to human dignity also deserves special recognition whenever privacy is assessed.<sup>30</sup> A violation of any of the privacy rights automatically violates an individual's right to human dignity since human dignity and privacy are inextricably intertwined.<sup>31</sup> This occurs as the right to privacy flows directly from the right to human dignity.<sup>32</sup> Burchell explains:<sup>33</sup>

The argument for recognizing privacy as an independent right really only acquires significance where the concept of impairment of dignity is given a narrow focus, linked to insulting behaviour. If however, dignity is given its true human rights sweep, ranging beyond mere prevention of insulting conduct, then privacy can rightly find its place as part of the fundamental right to human dignity.

Needless to say, a person's right to privacy as well as that person's right to human dignity, for example, will be violated when a police official performs an unlawful arrest as well as when a police official enters a person's home without a warrant and an explanation for doing so.<sup>34</sup> However, a person's right to privacy will not be violated when a person consents to a warrantless search.<sup>35</sup> The right to privacy is focussed on the violation of the person's privacy and not so much where the violation occurs.<sup>36</sup> That being said, the right to inner core privacy (in a person's home) does carry more weight than

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<sup>29</sup> Devenish *South African Constitution* 81.

<sup>30</sup> The importance of human dignity has been comprehensively emphasised by the Constitutional Court in a number of watershed cases including *S v Makwanyane* 1995 2 SACR 1 (CC) (hereafter the *Makwanyane* case); *Ferreira v Levin*; *Vryenhoek v Powell* 1996 1 SA 984 (CC); and *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC). De Vos and Freedman note that "each human being has incalculable human worth, regardless of circumstances, and should be treated accordingly." De Vos and Freedman *South African Constitutional Law* 457. See also generally Steinmann 2016 *PELJ*.

<sup>31</sup> See Devenish *Commentary on the South African Constitution* 55.

<sup>32</sup> See, for example, Currie and De Waal *Bill of Rights Handbook* 302; Devenish *Commentary on the South African Constitution* 55; Burchell 2009 *EJCL* 3; Basdeo, Geldenhuys and Karels "Search and Seizure" 177-178.

<sup>33</sup> Burchell 2009 *EJCL* 3. Also see the discussion in Devenish *Commentary on the South African Constitution* 55.

<sup>34</sup> Generally, also see *S v Jordan* 2002 6 SA 642 (CC), where the Constitutional Court had to determine to what extent the right to privacy was violated in commercial sex cases.

<sup>35</sup> Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-301; Currie and De Waal *Bill of Rights Handbook* 298. Generally see *Nombembe v Minister of Safety and Security* 1998 2 SACR 160 (Tk); *Ngamlana v The MEC for Safety and Security* (Tk) (unreported) case number 2007/95 of 20 May 1998).

<sup>36</sup> *Mistry* case para 28. Also see Currie and De Waal *Bill of Rights Handbook* 304.

business core privacy (in a person's car).<sup>37</sup> "[T]he more public the undertaking and the more closely regulated the industry, the more attenuated the right to privacy and the less intense any possible invasion."<sup>38</sup> The types of privacy as well as the importance of the right were initially analysed in *Bernstein*. The Constitutional Court's treatment of the right to privacy in this case remains the most comprehensive analysis of the right.<sup>39</sup>

The Court held that "[t]he concept of privacy is an amorphous and elusive one ... and that the scope of privacy is closely related to the concept of identity."<sup>40</sup> A person's right to privacy will be recognised if there is a legitimate expectation that such a right exists.<sup>41</sup> The Court further contended that "[t]he 'reasonable expectation of privacy' test comprises two questions. Firstly there must at least be a subjective expectation of privacy and, secondly, the expectation must be recognised as reasonable by society".<sup>42</sup> The applicant challenged the constitutional validity of certain sections of the *Companies Act* 61 of 1973 which required him to appear as a witness at an enquiry, since he argued that "a witness's privacy is clearly invaded when he is forced to disclose his books and documents that he wants to keep confidential and to reveal information that he wants to keep to himself."<sup>43</sup> The Constitutional Court, however, ruled that the expectation of the right to privacy by the applicant was subjectively reasonable but not objectively reasonable in terms of society as "[t]he establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter."<sup>44</sup>

Also relevant to this paper, a warrantless search by the police at the house of a suspect may violate the right to privacy of the suspect (the subjective right) as well as the views of the community (the objective right) regarding the intrusive conduct of the police. This is the topical matter that is at the heart of this paper.

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<sup>37</sup> *Bernstein v Bester* 1996 4 BCLR 449 (CC) para 67 (hereafter the *Bernstein* case); Currie and De Waal *Bill of Rights Handbook* 298. See also *R v Silveira* (1995) 97 CCC (3d) 450 (SCC) para 140; *R v Grunwald* 2010 BCCA 288 (Canll) paras 36-45; *Du Toit v Provincial Minister of Environmental Affairs and Development Planning: Western Cape* 2019 1 SACR 311 (WCC) paras 54, 57 (hereafter the *Du Toit* case); Steytler *Constitutional Criminal Procedure* 99.

<sup>38</sup> See the *Gaertner* case para 58; *Mistry* case para 27.

<sup>39</sup> See Currie and De Waal *Bill of Rights Handbook* 297.

<sup>40</sup> *Bernstein* case para 65. Also see Steytler *Constitutional Criminal Procedure* 83.

<sup>41</sup> *Bernstein* case para 75. Also see Swanepoel 1997 *CILSA* 343; Currie and De Waal *Bill of Rights Handbook* 297-298.

<sup>42</sup> *Bernstein* case para 76. Also see *R v Wong* (1987) 41 CCC (3d) 163 (OntCA).

<sup>43</sup> *Bernstein* case para 56. Also see Currie and De Waal *Bill of Rights Handbook* 298-299.

<sup>44</sup> *Bernstein* case para 76. Also see Currie and De Waal *Bill of Rights Handbook* 299.

Apart from the rights to privacy and human dignity which this paper focusses on, various other rights might also be violated during a warrantless search and seizure operation. Section 12 of the Constitution, which provides for the freedom and security of the person, might also be violated.<sup>45</sup> The rights of children who might be involved in warrantless searches by the police should also be protected. Section 3(2) of the *National Instruction 2 of 2010: Children in Conflict with the Law* provides that the dignity and privacy of children should be protected and that discussions with the child and his/her guardian are to be conducted in private and not in the presence of others.<sup>46</sup>

Warrantless search and seizure operations should be conducted only if they are in line with the Constitution, and in particular, if they do not severely violate the right to privacy. Our courts therefore play an important role in guarding our constitutional rights and ensuring that the Executive and particularly the police do not abuse their powers. Moreover, the Judiciary plays a pivotal role in declaring legislation which regulates warrantless search and seizures invalid if such regulations are unconstitutional, a discussion on which topic follows below.

### 3 Recent jurisprudence and the right to privacy

Over the last decade the Constitutional Court has made a number of significant judgments on the right to privacy, in particular whether the specific law of general application which allow for warrantless search and seizure operations should be regarded as a reasonable limitation of the right to privacy. The Court in *Tinto v Minister of Police*<sup>47</sup> noted that "[i]n determining whether an individual's right to privacy has been infringed a balance must be struck between the protection of that right on the one hand and the State's constitutionally mandated task of prosecuting crime on the other." Three cases will be analysed to determine the significance of the

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<sup>45</sup> Section 12 of the Constitution provides: "(1) Everyone has the right to freedom and security of the person, which includes the right—(a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources;(d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way. (2) Everyone has the right to bodily and psychological integrity, which includes the right—(a) to make decisions concerning reproduction;(b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent".

<sup>46</sup> Section 3(2) of the *National Instruction 2 of 2010: Children in Conflict with the Law* (GN 759 in GG 33508 of 2 September 2010) provides that police officers must also treat the child with care and not intimidate or humiliate the child. Badenhorst notes that "[t]he purpose of the National Instruction is to ensure that members of the South African Police Service treat children in conflict with the law appropriately and in accordance with the provisions of the Act and the *Constitution*". See Badenhorst 2011 <http://www.childjustice.org.za/publications/ImplementationCJA.pdf> 10-11.

<sup>47</sup> *Tinto v Minister of Police* 2014 1 SACR 267 (ECG) para 50 (hereafter the *Tinto* case).



right to privacy *vis-a-vis* the prevention of crime in South Africa. A special emphasis will be placed on the discussion of *Kunjana* due to its importance in relation to warrantless search and seizures by the police.

### 3.1 *Gaertner* case

In the *Gaertner* case the Constitutional Court confirmed the decision of the Western Cape High Court by declaring unconstitutional sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the *Customs and Excise Act* 91 of 1964.<sup>48</sup>

In this case, South African Revenue Service (SARS) officers conducted a warrantless search and seizure on the business premises on one of the applicants, Orion Cold Storage (Pty) Ltd (OCS), an importer of frozen foods.<sup>49</sup> The search and seizure was conducted after SARS received information from one of the clients of OCS that OCS was allegedly involved in fraudulent activities.<sup>50</sup> SARS moreover conducted a warrantless search and seizure at the personal residence of one of the applicants, Mr Gaertner.<sup>51</sup> SARS diligently searched the applicant's home, which operation included gaining access to his personal computer as well as his children's computers.<sup>52</sup> They also took photographs while they were at his residence.<sup>53</sup>

The Constitutional Court had to determine whether the applicant's right to privacy could be limited by the provisions of the *Customs and Excise Act*. In doing so, the Court applied the section 36 limitation analysis to the facts. A cursory reading of the Court's analysis emphasises the importance of the right to privacy in terms of warrantless search and seizure proceedings.<sup>54</sup> The Court distinguished between business privacy and inner core privacy and held that there can be no expectation of a "wholesome [sic.] right to privacy" in terms of business privacy.<sup>55</sup> In effect, the Court focussed its attention on the warrantless searches at the home of the applicant instead of the business premises. The Court contended that: "it is necessary that the right to privacy with regard to the homes of individuals and their private possessions is protected. In this context the expectation of privacy is higher

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<sup>48</sup> See discussion in Basdeo, Geldenhuys and Karels "Search and Seizure" 185.

<sup>49</sup> *Gaertner* case para 4.

<sup>50</sup> *Gaertner* case para 7.

<sup>51</sup> *Gaertner* case para 11.

<sup>52</sup> *Gaertner* case para 11.

<sup>53</sup> *Gaertner* case para 11.

<sup>54</sup> *Gaertner* case paras 47-49.

<sup>55</sup> *Gaertner* case para 62. Also see *Magajane v Chairperson, North West Gambling Board* 2006 10 BCLR 1133 (CC) para 68 (hereafter the *Magajane* case).

and, at the very least, entry and searches conducted there have to be authorised by warrants."<sup>56</sup>

It is submitted that the Court duly noted the importance of the right to privacy, in particular when a person's inner sanctum privacy is violated, as was the case with the applicant at his home. However, the Court could have shed more light on the importance of warrantless searches in terms of businesses.<sup>57</sup> That being said, it rightfully passed this duty to the Legislature "to formulate the inner and outer reaches of the search power."<sup>58</sup>

### **3.2 *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd***<sup>59</sup>

In *Estate Agency* the applicant attempted to use its warrantless search powers in terms of the *Financial Intelligence Centre Act* 38 of 2001 (FICA) and the *Estate Agency Affairs Act* 112 of 1976 to search the business premises of Auction Alliance.<sup>60</sup> The search was conducted after the founder of Auction Alliance was implicated in violations of certain sections of FICA and the *Estate Agency Affairs Act*.<sup>61</sup> As a result of the statutory designations of both the Estate Agency Board and Auction Alliance, the former was authorised in terms of the above-mentioned legislation to conduct warrantless search and seizure operations on the premises of Auction Alliance.<sup>62</sup>

The Western Cape High Court declared the warrantless search regulations of both the *Estate Agency Affairs Act* as well as FICA unconstitutional, which the Constitutional Court confirmed.<sup>63</sup> Section 32A of the *Estate Agency Affairs Act* was declared to be overbroad since it even allowed for the search of the homes of estate agents and their clients.<sup>64</sup> The section presents a clear intrusion on the right to privacy of estate agents. It was also held that there was "little evidence that requiring a warrant for targeted searches would hinder the Board's work."<sup>65</sup> It is therefore clear that the Board should have rather obtained a warrant instead of surprising the respondent and violating his right to privacy. Section 45B of FICA on the other hand was less intrusive but the Court nevertheless held that section 45B was too wide

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<sup>56</sup> *Gaertner* case para 86. Generally also see *Magajane* case para 53.

<sup>57</sup> For a comprehensive discussion of business privacy see *Magajane* case paras 50-53.

<sup>58</sup> *Gaertner* case para 75.

<sup>59</sup> *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* 2014 3 SA 106 (CC) (hereafter the *Estate Agency* case).

<sup>60</sup> *Estate Agency* para 1.

<sup>61</sup> *Estate Agency* para 8.

<sup>62</sup> *Estate Agency* para 6.

<sup>63</sup> *Estate Agency* para 73.

<sup>64</sup> *Estate Agency* case paras 14, 22.

<sup>65</sup> *Estate Agency* case para 15.

in that it did not provide for the possibility of obtaining a warrant for searches.<sup>66</sup> Less restrictive measures, like obtaining a warrant, were available. In confirming the constitutional invalidity of the impugned sections, the Court relied *inter alia* on the judgment in the *Gaertner* case and focussed on the importance of obtaining a warrant when a search is conducted.

The Court furthermore suspended the declaration of invalidity for 24 months to allow the Legislature to make the necessary amendments.<sup>67</sup> It also read in various amendments in both the *Estate Agency Affairs Act* as well as FICA, which limited the wide-ranging powers of the officials who conducted warrantless searches.<sup>68</sup>

### 3.3 *Kunjana case*

On 14 March 2011 SAPS received information from an informant that a substantial amount of mandrax<sup>69</sup> was being kept at a residential property in Kenilworth, Cape Town.<sup>70</sup> They were also informed that the drugs would be moved to another location on the same day.<sup>71</sup> The informant also reported that a large quantity of drugs was being stored at a residential property in Wynberg, Cape Town.<sup>72</sup> The properties were being leased by Kunjana, the respondent.<sup>73</sup>

Consequently, SAPS conducted warrantless search and seizure operations at both properties.<sup>74</sup> Upon searching the premises, large quantities of mandrax were seized at both properties and a cash amount to the value of R1 823 200 was seized at the Wynberg premises.<sup>75</sup> The respondent was arrested by the police and charged with being in possession of and dealing in "Tik" and Mandrax, in terms of the *Drugs Act*.<sup>76</sup>

In conducting the warrantless search and seizures SAPS relied exclusively on section 11(1)(a) and (g) of the *Drugs Act*.<sup>77</sup> The respondent averred that

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<sup>66</sup> *Estate Agency case* para 43.

<sup>67</sup> *Estate Agency case* para 73.

<sup>68</sup> *Estate Agency case* para 73.

<sup>69</sup> Mandrax is a substance listed in Part III of Schedule 2 to the *Drugs and Drug Trafficking Act* 140 of 1992 (the *Drugs Act*).

<sup>70</sup> *Kunjana case* para 2.

<sup>71</sup> *Kunjana case* para 2.

<sup>72</sup> *Kunjana case* para 2.

<sup>73</sup> *Kunjana case* para 2.

<sup>74</sup> *Kunjana case* para 3.

<sup>75</sup> *Kunjana case* para 3.

<sup>76</sup> *Kunjana case* para 4. The pending criminal case against the respondent will not be analysed in this paper.

<sup>77</sup> Sections 11(1)(a) and (g) of the *Drugs Act* provide that "[a] police official may-(a) if he has reasonable grounds to suspect that an offence under this Act has been or is

her right to privacy had been violated when the police entered her premises without a warrant. This intrusion had been a violation of her "inner sanctum" privacy.<sup>78</sup> Subsequently, the respondent applied to the Western Cape High Court, whereafter the matter was referred to the Constitutional Court.

The respondent applied to declare the entire section 11 of the *Drugs Act* unconstitutional.<sup>79</sup> She argued that the searches and seizures in terms of section 11 of the *Drugs Act* were unconstitutional.<sup>80</sup> She contended that the warrantless conduct in terms of section 11 of the *Drugs Act* was inconsistent with the Constitution, unlawful, and violated her right to privacy.<sup>81</sup> The applicants, who included the Minister of Police *inter alia*, opposed the application. Nevertheless, they eventually acknowledged that section 11(1)(a) and (g) violated the right to privacy and could not be justified in terms of section 36 of the Constitution.<sup>82</sup>

The Western Cape High Court held that the specific sections of the *Drugs Act* violated section 14 of the Constitution. The Constitutional Court thus had to confirm whether these sections of the *Drugs Act* that permitted warrantless search and seizure operations were constitutionally invalid. The Court had to determine whether the right to privacy of the respondent could be limited in terms of the sections of the *Drugs Act*.

No right is absolute and constitutional rights may be limited in terms of a law of general application, in this case, the impugned sections of the *Drugs Act*.<sup>83</sup> In general, the limitation must also be "reasonable and justifiable in

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about to be committed by means or in respect of any scheduled substance, drug or property, at any time-(i) enter or board and search any premises, vehicle, vessel or aircraft on or in which any such substance, drug or property is suspected to be found; (ii) search any container or other thing in which any such substance, drug or property is suspected to be found; ... (g) seize anything which in his opinion is connected with, or may provide proof of, a contravention of a provision of this Act."

<sup>78</sup> See the *Kunjana* case paras 18, 22; *Bernstein* case para 67.

<sup>79</sup> *Kunjana* case para 6.

<sup>80</sup> *Kunjana* case para 6.

<sup>81</sup> *Kunjana* case para 6.

<sup>82</sup> *Kunjana* case para 6.

<sup>83</sup> Section 36 of the Constitution provides: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the *Constitution*, no law may limit any right entrenched in the Bill of Rights."

an open and democratic society based on human dignity, equality and freedom."<sup>84</sup>

Section 36 of the Constitution requires a balancing exercise between competing interests: a proportionality test.<sup>85</sup> The Constitutional Court in *Makwanyane* noted that "[a] full conceptualisation of the right to life will have to await examination of a multitude of complex issues, each of which has its own contextual setting and particularities. In contrast to capital punishment, there are circumstances relating to the right to life where proportionality could well play an important role in balancing out competing interests."<sup>86</sup> Two competing interests can be identified here. First, the respondent's right to privacy was unambiguously violated. Second, the police acted in terms of a law of general application when they entered the residence of the respondent and prevented the drugs and money from being concealed or destroyed.<sup>87</sup>

These interests were then subject to the proportionality test and the Court applied five factors in section 36(1)(a)-(e) of the Constitution, but this paper will briefly analyse only three of these factors, since these were the factors that were discussed in most detail by the Court. They are (b) the importance of the purpose of the specific limitation; (c) the nature and extent of the limitation; and (e) less restrictive means to achieve the purpose. In terms of (b) above, the Court held that:

[t]he absence of having 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. Drug related offences are commonplace and their successful prosecution necessitates that the integrity of evidentiary material is preserved; which the impugned provisions ostensibly purport to achieve. The importance of this purpose diminishes the invasiveness of searches under the impugned provisions.<sup>88</sup>

The Court explained that even though warrantless searches are invasive and unsettling, the main purpose of these warrantless searches is to prevent crime before the evidence could possibly be destroyed.<sup>89</sup> In *National Director of Public Prosecutions v Starplex 47 CC; National Director of Public Prosecutions v Mamadou*<sup>90</sup> the Court provided that the conduct of police

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<sup>84</sup> Section 36(1) of the Constitution. Also see *Magobodi v Minister of Safety and Security* 2009 1 SACR 355 (Tk) para 7 (hereafter the *Magobodi* case); Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-301.

<sup>85</sup> *Makwanyane* case paras 135, 355. Also see Terblanche "The Sentence" 384.

<sup>86</sup> *Makwanyane* case para 355.

<sup>87</sup> *Kunjana* case para 20.

<sup>88</sup> *Kunjana* case para 20.

<sup>89</sup> *Kunjana* case para 20.

<sup>90</sup> *National Director of Public Prosecutions v Starplex 47 CC; National Director of Public Prosecutions v Mamadou* 2009 1 SACR 68 (C) (hereafter the *Starplex* case).

officials who confiscated large sums of money without a warrant authorising such conduct was justified in terms of section 22 of the CPA since the money could easily have been moved to another location if the police were required first to obtain a warrant.<sup>91</sup>

In terms of (c) above, the nature and extent of the limitation refers to the severity of the limitation. Does the limitation affect the constitutional right only slightly or severely? In this case the warrantless search in terms of the *Drugs Act* severely affected the privacy of the respondent while at her residence where the expectation of privacy was higher.<sup>92</sup> The impugned provisions of the *Drugs Act* were declared to be too broad.<sup>93</sup>

In terms of (e) above, the Court had to determine whether the police had any other measures available besides section 11(a) and (g) of the *Drugs Act*. Put otherwise, may the police conduct a warrantless search in terms of another Act or should the police rather obtain a warrant? The Court held that "police officials can prevent and prosecute offences under the *Drugs Act* in a less restrictive fashion than what is contemplated in this section."<sup>94</sup> The Court furthermore contended that "[i]t should not be forgotten that exceptions to the warrant requirement should not become the rule."<sup>95</sup> In this regard, the High Court as well as the Constitutional Court relied heavily on the relevant dicta in the cases of *Gaertner* and *Estate Agency*. The Court importantly noted that "[c]onstitutionally adequate safeguards must exist to justify circumstances where legislation allows for warrantless searches."<sup>96</sup> There were less restrictive measures, such as those in section 22 of the CPA, to achieve the purposes of the *Drugs Act*, which measures will be discussed below.<sup>97</sup>

After applying the proportionality test, the Court contended that the right to privacy outweighed the right of the police to take action to prevent the drug crimes without a warrant, and declared the relevant sections of the *Drugs Act* constitutionally invalid.<sup>98</sup> This case serves as a strict reminder to police officers that the constitutional rights of individuals should be protected even when there is a reasonable suspicion that the individual is harbouring illegal goods or is committing an offence inside his or her residence.

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<sup>91</sup> *Starplex* case para 19.

<sup>92</sup> *Kunjana* case para 22.

<sup>93</sup> *Kunjana* case para 21.

<sup>94</sup> *Kunjana* case para 25.

<sup>95</sup> *Kunjana* case para 27.

<sup>96</sup> *Kunjana* case para 30. Also see Price 2014 CCR 247.

<sup>97</sup> *Kunjana* case para 30.

<sup>98</sup> *Kunjana* case para 47.

#### 4 The constitutional validity of warrantless search and seizure operations in terms of the CPA

In the new constitutional dispensation, search and seizure in terms of the law must be conducted with a warrant.<sup>99</sup> Price notes that "[i]n general, there is no justification for foregoing the need to obtain a warrant issued by an independent authority in advance of the invasion of another's private sphere."<sup>100</sup> "A warrant 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."<sup>101</sup> A warrant is an important mechanism to balance the right to privacy of an individual with the State's interest in compliance with law and order.<sup>102</sup>

There are, however, situations where it is in the interests of justice for the police to act swiftly and without a warrant in order to prevent crime.<sup>103</sup> Obtaining a warrant takes time, as it needs to be issued by a presiding officer.<sup>104</sup> The law therefore provides an exception to the general rule that a warrant is required when a police official searches a premise and/or seizes an item.<sup>105</sup>

Section 39(3) of the Constitution states that "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."<sup>106</sup> This means that although warrantless search and seizure regulations violate the right to privacy of individuals, this intrusive limitation on the right to privacy may be justified, which is also in accordance with section 36 of the Constitution.

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<sup>99</sup> See Currie and De Waal *Bill of Rights Handbook* 304; Basdeo, Geldenhuys and Karels "Search and Seizure" 182.

<sup>100</sup> Price 2014 *CCR* 247.

<sup>101</sup> *Gaertner* case para 69.

<sup>102</sup> *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 12 BCLR 1197 (CC) para 78 (hereafter the *Thint* case). In the *Thint* case the Constitutional Court considered the appropriateness and lawfulness of search and seizure warrants issued in terms of s 29 of the *National Prosecuting Authority Act* 32 of 1998. See further Price 2014 *CCR* 255. Also see the *Gaertner* case para 69.

<sup>103</sup> See Basdeo, Geldenhuys and Karels "Search and Seizure" 185.

<sup>104</sup> Section 21 of the *Criminal Procedure Act* 51 of 1977 (the CPA).

<sup>105</sup> See the *Gaertner* case para 70.

<sup>106</sup> See *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 881D-E. Also see Burchell *Principles of Criminal Law* 13; Neethling 2011 *THRHR* 664. Furthermore, s 8(1) of the Constitution states "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." See Currie and De Waal *Bill of Rights Handbook* 41; Steytler *Constitutional Criminal Procedure* 15.

Various acts provide for warrantless search and seizure procedures to be conducted. Swanepoel notes that there are roughly 39 statutes in South Africa that deal with search and seizures in terms of criminal and non-criminal regulation.<sup>107</sup> Arguably, the most important of these statutes in terms of the regulation of warrantless search and seizures by SAPS is the CPA.<sup>108</sup> The purpose of this section of this paper is to analyse the constitutional validity of the applicable regulations of the CPA and to determine whether the Legislature should amend some of the provisions, or whether other measures are required.

#### **4.1 Section 22 of the CPA**

Section 22 of the CPA provides:

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

The section does not distinguish between private dwellings and businesses as the general term "premises" is used, which according to section 1 of the CPA "includes land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft."<sup>109</sup> Section 22 furthermore provides for three circumstances under which searches and seizures without a warrant are lawful. First, if a person consents to a search and seizure then the requirement of a warrant is dispensed with.<sup>110</sup> There are also various requirements for the type of consent that should be given.<sup>111</sup> The consent should be of a particular quality. Thus, prior to giving the consent, the person must be informed of the purposes of the proposed search, and the person

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<sup>107</sup> Swanepoel 1997 *CILSA* 340-341. For a comprehensive discussion of warrantless tax inspections and searches, generally see Moosa 2019 *PELJ*.

<sup>108</sup> In terms of police officials, s 13 of the *South African Police Services Act* 68 of 1995 also provides for various warrantless searches and seizures operations in relation to the illegal movement of people or goods across South African borders, as well as the search of any vehicles at designated roadblocks. See also Basdeo 2009 *PELJ* 317; Steytler *Constitutional Criminal Procedure* 95; Basdeo, Geldenhuys and Karels "Search and Seizure" 183.

<sup>109</sup> See Swanepoel 1997 *CILSA* 350.

<sup>110</sup> Swanepoel 1997 *CILSA* 351. See also Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-301.

<sup>111</sup> Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-301.



must have the capacity to give or refuse the said consent.<sup>112</sup> It is submitted that these requirements for consent, developed by our courts over the years, should be read in to section 22.

Second, a warrantless search may be carried out if a police officer has reason to believe that a warrant would have been issued if he or she applied for a warrant in accordance with section 21 of the CPA.<sup>113</sup> In the *Mkhutyukelwa* case the Court held that "section 22(b)(i) of the CPA does not only require a police official's belief to be there but it requires that belief to be on reasonable grounds."<sup>114</sup> The condition of "reasonable grounds" is an objective question based on the facts placed before the court.<sup>115</sup> The police officer must show that reasonable grounds existed at the time when he or she decided to execute the warrantless search.<sup>116</sup> The officer must also indicate that there were reasonable grounds to believe that criminal conduct was or was about to occur at the property and that any articles seized could be used against the accused as evidence in court.<sup>117</sup> It is submitted that the requirement of "reasonable grounds" is rather vague and presents difficulties to police officers who must act swiftly and often subjectively, while in fact section 22 requires an objective assessment of the requirement of reasonable grounds. Ironically, the subjective nature of the police officer's actions are mentioned in section 27(2) of the CPA, which determines the conditions under which he can use excessive force: "where the police official concerned is on reasonable grounds of the opinion that any article which is the subject of the search may be destroyed or disposed of."<sup>118</sup> The word "opinion" clearly indicates an element of subjectivity, thus leaving the police officer in a difficult situation in having to decide whether to violate the privacy of the individual by asking politely to enter the premises, or to enter the premises forcefully.<sup>119</sup>

Third, a warrantless search and seizure will also be legitimate if a delay in acquiring a warrant will ultimately defeat the purpose of the search. In *Starplex* the Court held that if the authorities had left the premises to obtain

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<sup>112</sup> See *Magobodi* case paras 13-14; *S v Lachman* 2010 2 SACR 52 (SCA) paras 36-37; Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-30I.

<sup>113</sup> Section 21 of the CPA determines the conditions under which a presiding officer can issue a search warrant.

<sup>114</sup> *Mkhutyukelwa* case para 19.

<sup>115</sup> See *Ndabeni v Minister of Law and Order* 1984 3 SA 500 (D). Also see Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-30I; Basdeo 2009 *PELJ* 315.

<sup>116</sup> See *Alex Cartage (Pty) Ltd v Minister of Transport* 1986 2 SA 838 (E); *LSD Ltd v Vachell* 1918 WLD 127; Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-30I.

<sup>117</sup> See Basdeo 2009 *PELJ* 315.

<sup>118</sup> See s 27(2) of the CPA. Also see the discussion in Swanepoel 1997 *CILSA* 351.

<sup>119</sup> See Swanepoel 1997 *CILSA* 351.

a warrant, the money hidden on the premises would have disappeared in all likelihood.<sup>120</sup> This requirement stated in section 22(b)(ii) is crucial in advocating the constitutional validity of a warrantless search, in that it remains critical for the police to collect the necessary evidence at the crime scene and to prevent further crime.<sup>121</sup> A delay by the police in order to obtain a warrant might be all that a criminal needs in order to be able to destroy or move the evidence. For example, it has been held that "[m]oney is inherently capable of quick flight and can be difficult to trace."<sup>122</sup> The same could be said of various illegal substances such as "Tik" and Mandrax, which could easily be flushed down the drain.

Section 22 clearly justifies the legality of a warrantless search and seizure in our law. However, can it truly be said that it contains the necessary constitutionally adequate safeguards to prevent an individual's right to privacy from being severely violated? The Court in *Kunjana* held that section 22 does contain these safeguards and that the police should apply it during warrantless search and seizures.<sup>123</sup> It is unfortunate that the Constitutional Court did not elaborate on the safeguards embedded in section 22. The Constitutional Court made it clear in the cases of *Gaertner*, *Estate Agency* and *Kunjana* that the respective warrantless searches were too broad. In *Kunjana* the Court decided that the impugned provisions of the *Drugs Act* left:<sup>124</sup>

... police officials without sufficient guidelines with which to conduct the inspection within legal limits. A warrantless search procedure implies the absence of a warrant providing guidance as to the time, place and scope of a search and it is therefore desirable that the statutory provision authorising a warrantless search procedure be crafted so as to limit the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances, which the warrant requirement would otherwise do.

Section 22 does contain the safeguards which the above section of the *Drugs Act* omitted.<sup>125</sup> Most importantly it includes firstly the criterion that the police official must believe on reasonable grounds that he or she would be issued a warrant, and secondly that a delay in obtaining a warrant would render the search futile. While these safeguards and the section as a whole provide guidelines for police officials in terms of warrantless searches, it has been argued in this paper that certain aspects of the section should provide further guidance. The criterion of "reasonable grounds" could provide problems in the future, as what is "reasonable" is not clearly defined. It must

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<sup>120</sup> *Starplex* case paras 18-19. Also see Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-301.

<sup>121</sup> See, for example, *Starplex* case para 17.

<sup>122</sup> *Starplex* case para 19.

<sup>123</sup> See *Kunjana* case para 30.

<sup>124</sup> *Kunjana* case para 23.

<sup>125</sup> See *Kunjana* case para 30.

be established on a case-by-case basis.<sup>126</sup> It is unfortunate that our courts have not provided clear guidance by establishing a list of factors that would be regarded as reasonable grounds for executing a warrantless search. One such ground is urgency.<sup>127</sup> In *Estate Agency* the Court briefly mentioned that "apart from urgent cases, warrantless suspicion-based searches – even where the suspicion is based on generalised risk factors, rather than an individualised suspicion – in a regulated field like estate agency are necessarily unconstitutional."<sup>128</sup> Instead of discussing what these factors were, the Court said that it is the duty of the Legislature to formulate a statutory basis on which warrantless searches may be triggered. It is submitted that urgency has to be one of these triggers and should be read into section 22. Another factor that could be included is that there exist reasonable grounds to believe that the search will result in the prevention of crimes such as kidnapping, human trafficking, murder and other serious offences. This and the factor of urgency may provide clarity to the "reasonable grounds" requirement.

Lastly, informants play an important role in providing the police with information related to criminal activities. The word "informant" does not appear in the CPA, and police officials are therefore left to determine whether the information of an informant is reasonable. Du Toit explains that "such information has to contain sufficient detail to ensure that it is based on more than mere rumour or gossip."<sup>129</sup> For example, in *Tinto*, upon receiving a rumour about a criminal activity, the police officer investigated because he knew that the specific area was a crime hotspot and since the area was renowned for associated bank robberies.<sup>130</sup>

It is hoped that the Legislature will prioritise this matter and amend section 22 to include sufficient guidelines to protect both the police officials and the individuals who are subjected to warrantless searches.

#### **4.2 A single legislative package for warrantless searches?**

In 1997, Swanepoel argued "that Parliament should adopt a single legislative package for searches and seizures in all criminal investigative and procedural laws."<sup>131</sup> There is merit in this statement - even more so today, considering the recent jurisprudence of our courts in terms of the

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<sup>126</sup> See Basdeo 2009 *PELJ* 310.

<sup>127</sup> Price 2014 *CCR* 247. Also see *R v Paterson* 2017 *SCC* 15 paras 32-33.

<sup>128</sup> *Estate Agency* case para 62.

<sup>129</sup> Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-30K.

<sup>130</sup> *Tinto* case para 33. Also see Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-30K, 2-30L.

<sup>131</sup> Swanepoel 1997 *CILSA* 363.

constitutional invalidity of some of our warrantless search laws.<sup>132</sup> However, such a far-reaching overhaul might be complicated due to the non-criminal nature of some of these laws. The CPA strictly regulates criminal procedure whereas the *Estate Agency Affairs Act* regulates estates agencies. It might be more practical to base the various warrantless searches and seizure laws on the model in terms of section 22 of the CPA, especially with regard to the current safeguards contained therein.<sup>133</sup> However, prior to this, section 22 should also be amended to include further guidelines.

In fact, an example of how other laws can be modelled on section 22 is already being developed. In *Du Toit* the warrantless search and seizure provisions of the *Nature Conservation Ordinance*<sup>134</sup> were analysed. The respondent acknowledged that the warrantless search regulations were unconstitutional and informed the Court that the *Draft Western Cape Biodiversity Bill*<sup>135</sup> was being revised by Parliament.<sup>136</sup> Section 66(3) of the Bill states that:

(3) If a nature conservation officer or nature conservation ranger has reasonable grounds to suspect that an offence is being committed on or by means of any premises in contravention of the law for which he or she has been designated, he or she may enter and search those premises, without a warrant, but only if— (a) he or she explains the purpose of the investigation and the person in control of the premises consents to the entry and search, after being informed that there is no obligation to admit the officer or ranger in the absence of a warrant; or (b) there are reasonable grounds to believe that a warrant would on application be issued, but that the delay that may be caused by applying for a warrant would defeat the object of obtaining the warrant.

This section mirrors section 22, and the Legislature must be commended for their work with the Bill to ensure that it is line with recent jurisprudence. Also, section 66(3) includes the words "he or she explains the purpose of the investigation", a safeguard which the Legislature should consider including in section 22.

## 5 Conclusion

In cases where a search warrant could have been obtained by a police official, the resulting warrantless search will inevitably severely violate the constitutional right to privacy.<sup>137</sup> In the *Mkhutyukelwa* case the Court

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<sup>132</sup> See Parpworth 2018 *Police J* 136.

<sup>133</sup> Parpworth 2018 *Police J* 136.

<sup>134</sup> *Nature Conservation Ordinance* 19 of 1974 (as amended by the *Western Cape Nature Conservation Laws Amendment Act* 3 of 2000).

<sup>135</sup> *Draft Western Cape Biodiversity Bill*, 2019 (PN 60 in PG 8094 of 7 May 2019)

<sup>136</sup> The *Du Toit* case para 64.

<sup>137</sup> See *S v Motloutsi* 1996 1 SACR 78 (C); Swanepoel 1997 *CILSA* 350-351; Parpworth 2018 *Police J* 134.

explained that the police should not embark on fishing expeditions in violation of the rights to privacy in unjustifiable circumstances.<sup>138</sup> That being said, the prevention of crime in a country like South Africa is paramount to providing some sense of stability and faith in the State.

This article has demonstrated the delicate balance between protecting human dignity and the privacy rights of individuals as opposed to the rigorous nature of warrantless searches and seizures by the police. Recent case law offers a glance at how the Constitutional Court is dealing with cases where the right to privacy was severely violated by warrantless searches. As a result, police officials are now more than ever caught between a rock and a hard place when they must make an objective decision to conduct a warrantless search. However, the author has argued that this decision is usually subjective and arbitrary and leaves the police official with a conundrum: to prevent a crime or possibly to irreparably violate the privacy of an individual.

Warrantless searches should not become a norm in our society.<sup>139</sup> There rests a significant burden on the police to ensure that these operations are conducted in a manner that respects the rights of the individual. The purpose of this paper has been not to condemn the existence of warrantless operations but merely to cast light on the fact that the laws that provide for it must be in line with the Constitution and provide as much guidance as possible. Future civil claims against SAPS could have a crippling effect on their ability to fight crime.<sup>140</sup> The Legislature therefore plays an important proactive role in safeguarding the rights of individuals as well as the legitimacy of the police. It is submitted that the Legislature should review all regulations that allow for warrantless search and seizures. At the same time, even while the Legislature is reviewing and amending some of the laws, it remains the duty of the police to enforce the law in accordance with the Constitution. It is further submitted that the Minister of Police should give serious attention to the training of police officers with a renewed emphasis on their duty not only to serve the citizens of the country, but also to safeguard their constitutional rights.

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<sup>138</sup> *Mkhutyukelwa* case para 25; Du Toit *et al Commentary on the Criminal Procedure Act* [Service 60, 2018], 2-301.

<sup>139</sup> Basdeo, Geldenhuys and Karels "Search and Seizure" 185.

<sup>140</sup> See, for example, the *Mkhutyukelwa* case.

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## List of Abbreviations

|               |  |
|---------------|--|
| Am J Comp L   | American Journal of Comparative Law                      |
| CCR           | Constitutional Court Review                              |
| CILSA         | Comparative International Law Journal of Southern Africa |
| CPA           | Criminal Procedure Act 51 of 1977                        |
| EJCL          | Electronic Journal of Comparative Law                    |
| FICA          | Financial Intelligence Centre Act 38 of 2001             |
| IDPL          | International Data Privacy Law                           |
| OCS           | Orion Cold Storage (Pty) Ltd                             |
| PELJ          | Potchefstroom Electronic Law Journal                     |
| Police J      | Police Journal: Theory, Practice and Principles          |
| SACQ          | South African Crime Quarterly                            |
| SAJIM         | South African Journal of Information Management          |
| SAPS          | South African Police Service                             |
| SARS          | South African Revenue Service                            |
| Soc Media Soc | Social Media and Society                                 |
| THRHR         | Tydskrif vir die Hedendaagse Romeinse-Hollandse Reg      |