

SECRETARIAT FOR SAFETY AND SECURITY

Directorate: Policy Monitoring

RESEARCH REPORT

FOREWORD FROM THE SECRETARY

It is, no doubt, trite to say that SA is in the midst of a profound transformation. Decades of apartheid, to say nothing of the preceding centuries of colonialism, are giving way to a society founded on the democratic principles of liberty and equality. It is within this context - of the challenge of building a constitutional democracy in SA - that the Secretariat for Safety and Security was established. Our fundamental task is to assist the Minister in the development and assessment of policing policy.

It cannot be doubted that the transformation into democracy is difficult and, in many ways, dangerous. Perhaps the most obvious, and most frequently discussed dangers arise from crime and criminality, the roots of which are in our history and the challenges of which we are only beginning to confront. But there are other dangers. In particular, it is clear that, in some ways, our democracy is fragile. As a society, our understanding of the rights and dignity of fellow citizens is less than complete. Our sense of respect for the lives and property of others is weak. Our commitment to the importance of the principles of due process, and the other principles of natural justice, in our law is often subordinated to the exigencies of present levels of crime and violence.

The consequences of these weaknesses can, and will, affect the way our democracy is shaped. They also create some very difficult dilemmas for the role and function of the Secretariat.

In essence, the Secretariat exists to provide the Minister with civilian assistance in the formulation and assessment of policing policy. Naturally, we are as concerned as anyone else with issues of police effectiveness. We must, however, also recognise the fundamental importance of building a human rights culture in the Service. We regret that these impulses are often juxtaposed and

presented as contradictory. It is our firmly held belief that it is only a society founded on mutual respect and tolerance that will guarantee the safety and security of all citizens. Building such a society involves building state institutions whose conduct and activities exemplify the letter and spirit of the Constitution. Effective policing, even if such a notion had any meaning outside the parameters of the constitutionality of policing, will never be sustainable until citizens police themselves. And they will only do that if the rights and duties of individuals are manifestly protected and entrenched.

It is from this perspective that the Secretariat chose to undertake a review of the compliance of members of the SAPS with the requirements regarding the obtaining of warrants to search the premises of members of the community. Our hope is that, in examining this question, we will begin to demonstrate the importance that the Department of Safety and Security attaches to the letter and spirit of the Constitution, as well as the ways we are trying to improve our record in this regard. I am heartened by the fact that the SAPS management has received this report with a positive attitude and has demonstrated this by adopting remedial steps to deal with the problems highlighted. This is a welcome departure from the characteristic defensiveness and hostility that police institutions exhibit when criticised.

It is my intention that this report be the first of many and that the Secretariat will become a key player in the creation of a safe and secure society.

Azhar Cachalia
Secretary for Safety and Security

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INTRODUCTION

In democratic and accountable policing, a fine balance needs to be maintained between the demands of crime prevention and investigation and the requirements of individual fundamental rights. This is clearly a formidable challenge and responsibility – made more so by the current high levels of crime in South Africa and the public's demand for "something to be done" about law and order. Meeting the public's demands must be placed in the context of South Africa's policing history, which was often marked by a disregard for fundamental rights. A police force in a young democracy has perhaps a special responsibility to pay particular attention to the rights of the citizens it serves.

Section 205 of the Constitution specifies that the purpose of the police service is 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" (Act No.108 of 1996, section 205(3)). Undoubtedly, in order for the police service to achieve its purpose, police members will need to search persons and premises, seize articles, cordon areas off and set up roadblocks. The conditions and circumstances under which the police may perform these activities are clearly defined in various pieces of legislation.

Police powers around search and seizure should be considered against the provisions of Chapter 2 of the Constitution, which guarantee an individual's right to human dignity (section 10) and the "right to privacy, which includes the right

not to have their person or home searched, their property searched, their possessions seized or the privacy of their communications infringed" (section 14). Section 36 of the Constitution makes provision for the limitation of individual rights "by law of general application", but only if the limitation is reasonable and justifiable. Indeed, section 33 indicates that every person has the right to legal action when any of his or her rights have been affected or threatened. It is this provision specifically that has given rise to the increasing number of civil claims against the SAPS for infringements on the right to privacy, usually arising from search and seizure being carried out without the required warrant.

Besides the issue of the infringement of individual rights, searches and seizures that do not meet the legal requirements present another threat to the process of justice. Evidence that has been gathered in a manner that does not meet the legal requirements runs the risk of being inadmissible in court. This undoubtedly impedes the criminal justice process since cases may be discharged against offenders who would have been found guilty if the legal requirements around search and seizure had been complied with.

The Secretariat for Safety and Security considered it necessary to examine the legal provisions around search and seizure since the perception exists among certain members of the public that the legal requirements are in some instances not being met. A limited exploratory investigation was launched which would seek to gain an impression of police practice in this regard. This report presents the findings of this exploratory study.

AIMS OF THE INVESTIGATION

This exploratory investigation had the following aims:

- to gain an understanding of the legal requirements and provisions around (1) searches, (2) seizures, (3) roadblocks and (4) the cordoning off of areas for search, seizure and investigation.
- to become familiar with the SAPS's National Regulations and Standing Orders relating to search and seizure;
- to derive an impression of the extent to which the legal requirements and provisions are being met;
- to identify factors that contribute to compliance and noncompliance with requirements;
- to investigate the practicality of the execution of a lawful search; and
- to consider the criteria of a system that monitors the level of compliance with the legal requirements for search and seizure.

RESEARCH METHOD

The investigation was essentially qualitative in nature and used the following procedures:

- a limited review of the literature on search and seizure was undertaken;
- the most important legislation relating to search and seizure was studied in order to become acquainted with the legal provisions;
- the requirements for search warrants in other countries were examined to inform the review process;
- the relevant National Regulations and Standing Orders were considered to get a sense of the adequacy and comprehensiveness of the instructions available to the police officer during the executing of his duties;
- the following role players were interviewed to obtain their views on the practicality of complying with the requirements:

- Legal services

Dr Geldenhuys, Head: Legal Services, National Standards and Management Services.

Adv. Joubert, Legal Services, National Standards and Management Services.

Dr Jacobs, Head: Legal Services, Detective Services and Capt. Bosch, Legal Services, Detective Services.

Director Meyer, Head: Legal Services, Johannesburg region.

- Specialised units

Director Thoms, Head: Priority Crime, Gauteng and Capt. Leask, Special Investigations, Gauteng.

Capt. Booysen, Vehicle Crime, head office.

Supt. Delpont, Commercial Crime, head office.

Supt. Weyers, Diamond and Gold, head office.

Capt. Viljoen, Tracing Unit, Pretoria region.

Capt. Visser, Firearm Unit, Pretoria region.

Supt. Van Aarde and Capt. Colhoun, South African Narcotics Bureau (SANAB).

- Police stations

Supt. Venter, Head: Proactive Policing, Sunnyside.

Capt. Mellow, Head: Detective Services, Diepkloof.

Capt. Prince, Head: Detective Services, Orlando.

Supt. Swarts, Head: Proactive Policing, Orlando.

Supt. Jacobs, Head: Detective Services, Jeppe.

Supt. Annadale, Head: Proactive Policing, Jeppe.

- Magistrates' courts

Mr Jonker, Senior magistrate: Johannesburg magistrates' court.

Ms Loxton, Senior magistrate: Pretoria magistrates' court.

Ms Burdette, Senior prosecutor, Commercial Crime.

A THEORETICAL PERSPECTIVE

Introduction

By virtue of its nature, a country's constitution provides a set of broad limiting principles. In the area of policing, it also effectively becomes a code of police conduct. In all its *simplicity*, however, constitutional interpretation remains an area of immense debate throughout the world. After all, written in, and for, a given era, the original meaning and current understanding of the same policy framework might translate differently in practice. Constitutional interpretation has a significant impact in the domain of search and seizure. Weighing up police powers (with regard to search and seizure) against an individual's right to personal privacy is but one ongoing issue that demands closer scrutiny.

The United States of America's long history of constitutional amendment offers a look into the search and seizure debate. For this reason, reference to the US constitution and particularly to the Fourth Amendment will frequently be made.

Privacy versus other public values

The US Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be searched (Maclin, 1994:2).

The Amendment can be viewed or interpreted in one of two ways: (1) as a statement of broad principle, it allows for a domain of individual privacy that is not subject to the common purposes of the community; and (2) it may be seen as prescribing a detailed set of rules and procedures that govern official invasions into the individual's life (Weinreb, 1991). The dilemma lies in the fact that little certainty exists as to which clause should predominate. Underpinning this dilemma or ambiguity is the fact that the circumstances in which the Fourth Amendment was written are different in crucial respects from those in which it is presently applied. For instance, the new *victimless* crimes, such as gambling and alcohol and drug abuse were not defined at the time the Fourth Amendment was written. The sophisticated informant networks and improved police technology were also not present at that time. All these factors facilitated intrusions (both necessary and unnecessary) upon privacy, and raised an increasing number of questions about the value of privacy as opposed to the value of some other public purpose (such as the maintenance of law and order).

This ambiguity is not unique to the US constitution. South Africa's Constitution reflects a conflict of interests between police powers and individual rights. On the one hand, section 205 of the Constitution accords to the SAPS the powers and functions of crime prevention; the investigation of any offence or alleged offence; the maintenance of law and order; and the preservation of national internal security. To exercise these powers and to perform these functions, the police will inevitably need to search persons and premises, seize articles, cordon areas off and set up roadblocks. On the other hand, chapter 2 of the Constitution guarantees an individual's right to human dignity (section 10) and the "right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communications infringed" (section 14). Which of these clauses then predominates in our very young human rights *culture*?

The operative question for scholars has been "when, in what circumstances and for what reasons, the values of privacy give way to another public purpose" (Weinreb, 1991:186). Two responses to this question, proceeding from different premises, have been articulated. From the normative perspective, intrusive official action is seen as undesirable and should, therefore, be avoided. All intrusions must require justification specific to the circumstances. Authorisation of a search and seizure should therefore permit the least intrusion that is practically feasible. The response proceeding from a more factual premise contends that the value of privacy should give way if the behaviour is not too unusual from an official conduct point of view. In other words, the constitution does not prohibit this kind of official action generally. While these two positions may seem distinct, the delineations remain vague since the very boundaries of issues like *private domain*, *intrusion* and *un/usual behaviour* are contested. Despite the contention

surrounding the search and seizure debate, we ought not to abandon efforts to find some accord between the two positions. Although a perfect formula cannot be expected, efforts have been made to work towards a common ground of understanding.

The issue of "reasonable grounds"

Police intrusion into civilian private life is a reality. Section 36 of the Constitution provides for the limitation of individual rights "by law of general application", but only if the limitation is reasonable, justifiable and necessary. This condition of "reasonable grounds" is intrinsically linked to any official incidence of police intrusion. Under general circumstances, a search warrant needs to be obtained from the appropriate official who issues it on the condition that **reasonable grounds** exist for the search of a person, property or premises and/or the seizure of any article. In special circumstances, where it is not practically feasible or possible to obtain a warrant prior to the intrusion, certain legislation provides for search and seizure activities to occur without a warrant. Even then, police conduct is governed by rules which require that **reasonable grounds** for believing the search and/or seizure to be necessary, exists.

Considered a directive for police behaviour, one might presume that it should be easy and clear to decide – within fairly broad limits – what constitutes "reasonable grounds", and what factors the person making the decision on the spot is entitled to take into account in reaching a decision (Stone, 1989). This clarity, however, has been constrained by the fact that changing circumstances have forced judges and other officials to determine, without much clear guidance from the past, which searches and seizures are unreasonable. The very meaning of the concept itself has evolved over the years; couched in various legislation and sometimes acquiring different names, it stands to reflect varying notions of "reasonable grounds". (Terms like "probable cause", "reasonable suspicion", and "reasonable belief" have been employed.) The Collection Act of 1789, for instance – the first US federal legislation to include a section concerning the techniques of search and seizure – equated "probable cause" with mere suspicion, that is, a warrant for search and seizure had to be issued on the basis of an affirmed suspicion. Certain cases that followed this period, particularly that of the 1806/7 Burr Conspiracy Case, "helped elevate Fourth Amendment 'probable cause' from some level of suspicion to a more factually grounded belief or conviction of wrong-doing" (Viator, 1991:177).

In Canadian criminal law, an acceptable definition for "reasonable grounds" refers to "a set of facts and circumstances which would cause a person of ordinary and prudent judgement to believe beyond a mere suspicion" (Arcaro, 1993:5). Reflection on this definition immediately reveals the abstract nature of the term and the absence of concrete or objective guidelines:

- "facts or circumstances" may be equated with evidence, yet the volume of evidence required to fulfill reasonable grounds is not stipulated – the only yardstick is that it must be "beyond a mere suspicion";
- for a belief to be beyond a mere suspicion, the evidence must satisfy an "ordinary and prudent person"; such a person's qualities are in themselves vague and assuming;
- a belief "beyond a mere suspicion" does not demand absolute knowledge; rather, it requires a belief which has a degree of certainty that is solidly based on corroborating evidence.

None of these phrases do much for a clear and objective definition of "reasonable grounds". The formulation of "reasonable grounds" is not a simple and straightforward task. Nonetheless, making sure that there are reasonable grounds is crucial in the criminal justice system.

Remedies for an imperfect system

Unnecessary and illegal searches and seizures do occur. In other words, there are times when police intrude on civilian private life and/or seize *evidence* without following the requisite procedures. When this happens, the question of civilian compensation enters the debate. The most obvious remedy for an unlawful dispossession of property is the return of that property. But a return of tangible property can hardly remedy an invasion of privacy (Alschuler, 1991). To limit the effects of illegal searches and/or seizures, the courts have sought to forbid the use of wrongfully obtained information or evidence; to reject or disclose as inadmissible, evidence obtained in an unlawful manner.

Critics of this view have questioned the price that we pay for preserving our freedom from unreasonable searches and seizures. Besides incurring substantial law enforcement costs, forbidding the use of wrongfully obtained – yet crucial – information could result in the failure to punish serious offenders, including murderers. While many officers perceive this sentiment as a hindrance to effective policing, the counter-argument objects to the use of improperly obtained evidence on grounds that it is a form of "unjust government enrichment" (Alschuler, 1991:200).

Around 1886 the United States formally introduced this sentiment into its Constitution, known as the Fourth Amendment's "exclusionary rule". Today it is considered by many as the Fourth Amendment's most important constitutional privilege. The rule is primarily seen as serving a deterrent function; namely, to prevent illegal searches and seizures by the police. Many US studies show that the exclusionary rule has in fact helped to control police misconduct and has encouraged the emergence of a more professional service (Alschuler, 1991). However, on its own, this rule and sentiments of a similar nature do not entirely do justice to the deterrence rationale. Evidence being declared inadmissible in

court is not the same as imposing a punishment. Unless there is a managerial or organisational response, an officer who has violated the law is left in no better or worse position than if he had obeyed it. It will not necessarily, therefore, deter improper police conduct. Nonetheless, any rule that excludes the use of unlawfully obtained information removes at least one incentive to disregard the law. Accompanied by other (disciplinary) measures, forbidding the use of wrongfully obtained information may very well deter.

Conclusion

What has been described is hardly exhaustive of the *search and seizure* debate. Questions of consent and particularly of informed consent continuously arise in the daily search activities of police work. Whether or not to allow a search on the ground that it is incidental to performance of another official function, is another such issue.

Fulfilling the legal requirements for obtaining a search warrant is not always simple and straightforward. The guidelines on search and seizure which have been drafted by SAPS Legal Services will at least make these requirements available to police members. The legal requirements relating to search, seizure, roadblocks, checkpoints and cordoning areas off were reviewed for this project and a discussion of these requirements is presented in Appendix A.

The crucial decision as to what rules and remedies will best secure individuals against unreasonable invasions rests with the judiciary; judges, therefore, must judge. In the context of our very young human rights history, search and seizure poses a difficult yet fundamental challenge to policing in South Africa.

STANDING ORDERS AND REGULATIONS RELATING TO SEARCH WARRANTS

Consolidation, the section at SAPS head office that keeps all standing orders and regulations on record, conducted a search at the request of the researchers for any order or regulation that deals with search, seizure or search warrants.

The search produced a number of regulations irrelevant to the theme of this project (such as instructions around police cells, case dockets, registers for warrants of arrest and safe custody of detainees). The search did produce a verbatim version of sections 11 and 41 of the Arms and Ammunition Act and section 13 of the South African Police Service Act.

The search also produced an instruction relating to the searching of male and female arrested persons. This instruction appears to provide sufficient detail about the way in which the search should be conducted, such as that it should be done in the presence of another officer and that prisoners should not be made to strip in sight of the public or, if possible, other prisoners.

The search produced no instructions regarding the way in which searches should be conducted during the investigation and prevention of crime or instructions concerning the legal requirements around search warrants. However, Legal Services at National Standards and Management Services have drafted comprehensive guidelines regarding search and seizure (refer Appendix C). It would appear that once these have been finalised and made available to all police members, these will be the first set of guidelines or instructions around this policing function.

IMPRESSIONS: POLICE PRACTICE AROUND SEARCHES

A list of the topics covered during the interviews conducted with police officers, magistrates and prosecutors are given in Appendix B. The impressions gained from the interviews are discussed in the sections that follow.

The search warrant culture within the SAPS

Searches are conducted by police officers within the context of a particular policing culture. The procedures that are followed probably have little to do with training (poor training on the legal requirements regarding searches will be referred to in a later section), even less to do with regulations and instructions (these appear to be largely absent) and more to do with practices that are learnt *on the job* from colleagues.

Very diverse opinions and views were obtained from the members interviewed. Interviews with police officers were opened with the question, "Do you experience any difficulties meeting the legal requirements relating to searches during the performance of your functions as a police officer?" Responses ranged from, "Although a search is probably conducted with every investigation, there is never a need for a search warrant" to, "We always get a warrant".

Whether or not a warrant is obtained appears to be largely related to the type of crime being investigated. Officers at Orlando Police Station, for example, reported that since they deal mainly with cases of assault, theft and rape, searches are seldom undertaken. When they are, it is with the consent of the person concerned. In their opinion, *ordinary* detectives and police officers do not

use search warrants and do not have a need to use them. Their view is that warrants are used by detectives from specialised units.

A member of Legal Services referred to a three-year period that he served as a prosecutor at the KwaTema Magistrates' Court. Eighty percent of the cases that were dealt with related to violent crime such as assault and robbery and only 20% were cases such as possession of dagga and vehicle crime. He noted that for most of the cases therefore, search warrants were not needed or used.

Jeppe Police Station, on the other hand, has a very different environment to police. There are five hostels – housing many thousands of residents – in its jurisdiction. Criminals use the hostels as a hide out. When police officers enter a hostel, they are said to be *sitting ducks*. Officers at Jeppe Police Station reported using search warrants frequently when conducting searches due to the recent trend of the way in which evidence is obtained being challenged in court. SAPS Legal Services for the Johannesburg area assists police stations with applications for warrants.

Most of the information being received by the police that needs to be followed-up in the form of a search comes from either Crime Stop or the police's own network of informants. Depending on the nature of the information received, it will be either followed up by a visit to the place mentioned (for example, a private house where illegal firearms are reportedly being kept) or cross-checked with information from other sources. If premises are visited with the purpose of conducting a search, officers will request the owner or occupier to allow the police to search. The impression gained from the interviews conducted for this project is that people generally agree. If consent is not obtained, a search will in most cases be conducted anyway under section 22 of the Criminal Procedure Act. In the case of certain types of information, such as information relating to organised crime or fraud, the officers involved appear to prefer to obtain a warrant.

Some of the police officers interviewed referred to an instruction that was issued early in 1996 stating that all searches should preferably be conducted with a warrant. Clearly, the vast majority of searches are being conducted with the consent of the person being searched, or the owner or occupier of the premises being searched. One wonders how many members of the public are aware of their right to refuse a search; probably very few.

Most officers interviewed stated that 99% of the public give their consent if they are approached courteously and treated with respect. Opinions such as "If you deal with the public in a decent manner you will get their consent" and "The way you approach people is extremely important - if you do it decently, you will get their co-operation" were often expressed. Members at one police station summed up the issue of consent as follows: "As long as the police act in a professional manner, do not damage property and conduct the search in an orderly, polite

manner, the general public will not complain." An officer from a specialised unit expressed the view the things have changed; experienced detectives no longer "bang down doors".

Officers at one police station informed the researchers that there is never resistance to a search – even in the case of persons who are hiding stolen goods, drugs or weapons. The added that it is important for the police to show their identification – the public usually ask for identification. Identification has become an issue in the townships in particular because criminals are parading as police officers to gain entry into homes.

Legal Services reported that there are occasions when the use of force is necessary to gain entry to a premises. The officers working in the Johannesburg area, for example, often contact Legal Services first to discuss the circumstances of a forced entry before going ahead. In such instances, the police compensate for damages caused to property. Legal Services is of the opinion that there is "very little or no breaking down of doors".

Legal Services referred to the fact that if a warrant is applied for and rejected, the officer cannot still go and do that particular search. This means that rather than run the risk of having an application rejected and not being able to conduct a search, officers tend to rather not apply for a warrant. In his opinion, this is the culture around warrants that needs to be addressed.

Police perception of a dilemma regarding searches

One officer described the search situation as being "between a rock and a hard place". On the one hand, the community provides information to the police and wants them to take action, such as search a house when someone has reported that drugs are being sold. They cannot understand why the police do not come immediately and raid the place. This officer was of the opinion that the general public do not understand the search process and the need to apply for a warrant. He suggests that this leads to the public losing faith in the police.

Officers from SANAB are also of the opinion that the police are faced with a dilemma – the public want action; they want their reports to be followed up. SANAB furthermore referred to the fact that in their daily dealing with the drug situation on the streets, there is the dilemma of being able to search under the Drugs and Drug Trafficking Act without a warrant, but there is a threat of this being challenged in court.

Officers at one station referred to the fact that on the one hand, meeting the requirements to apply for a search warrant is difficult because of the degree of detail required – information may be received in the form of a sworn statement by

a victim, but the statement provides insufficient detail to apply for a warrant. On the other hand, the public want their goods back (for example, in the case of a housebreaking). The police do not know how to deal with this sort of dilemma and it appears to lead to a lot of frustration in their work.

At Jeppe Police Station, officers do not apply for warrants themselves – legal Services (at the area level) assists them with this task. However, it takes time for this process and there is often a need to act quickly. Particularly in the case of stolen goods being kept at hostels, the goods are moved around very quickly. If the police receive information and go and investigate and the person refuses a search, if they then go and apply for a warrant of course the element of surprise will have been lost. The type of search that is a direct follow-up to some type of suspicious behaviour – such as when a suspect is being chased – is accepted by the courts. However, the minute that there is some delay, the courts require that a warrant should have been obtained. Legal services referred to the fact a police officer's prime concern is to combat crime and it is often difficult to make *on the spot* decisions that are within the confines of the law.

The specialised units

Murder and robbery

Murder and Robbery (as with many other units) rely heavily for information on their extensive informer network. When informers supply information, naturally they are not prepared to sign a statement – remaining anonymous is as important to them as protecting their identity is to the police. Depending on the situation (i.e. depending on whether it is an informer who is well-known to the police and with whom they have built up a relationship of trust), the police may either accept the information on face value or first check it. Then, depending on whether there is time, they will either apply for a warrant or go ahead and conduct a search. However, officers from Murder and Robbery mentioned that they have free access to the Attorney-General's office and can at any stage request advice regarding the advisability of a particular search.

Vehicle Crime

The officer interviewed reported that warrants are used when premises, such as a chop shop, are to be searched. However, in the case of searching a vehicle, it is quite impractical to get a warrant. A vehicle is a method of transport; therefore a stolen vehicle is a *moving crime* – you have to act immediately. In his opinion, conducting searches in the case of, for example, housebreaking is quite simple – you know the address and you can get a warrant to search a premises where

you suspect stolen goods are being kept. With vehicles, this is not possible. He reported that they do not search premises as often as they search vehicles.

Vehicles that are stolen in city areas are often recovered in rural areas (such as near or at borders). This means that the crime must first be investigated at the place where the vehicle was discovered, and then the docket must be sent back to the place where the crime took place. This makes the question of applying for a search warrant that much more complicated.

In the case of *chop shops*, they usually receive information from informers and first evaluate its accuracy by either visiting the scene or cross-checking it with other information. Then, if time permits, they apply for a warrant. It takes only two hours to completely strip a car, which means that it may be impractical to get a warrant. However, officers from the Vehicle Crime unit generally apply for a warrant in the case of syndicated crime in order to ensure a watertight case in court.

Commercial Crime

The Commercial Crime unit indicated that because of the type of the criminal activity under investigation, when their officers do a search, they need to know what to look for – commercial crime means particular documents must be looked for. Unless the officer is adequately trained in this line of work, he is not going to know what to look for. They try to get around this problem by taking more documents than are probably going to be needed and sending back the rest to the suspect after the documents have been sorted at the office. This practice clearly runs the risk of being challenged in court.

The officer interviewed reported that the unit tries to ensure that an experienced member is present at every search, but this is not always possible. It was also mentioned that they prefer to take a prosecutor with them on searches. Investigating officers in the Commercial Crime unit work closely with the prosecutors, who assist them in applying for warrants. The contents of the docket are used to make a statement which forms the basis of the application.

When they seize computerised information, they take computer staff with them. If this is not possible, the whole computer is brought back to the office and it takes about a week to extract the information needed. These often leads to complaints from suspects.

In their line of work in particular, there is reportedly very little reason why a warrant cannot be obtained. The type of the crime under investigation means that there will be sufficient time to apply for a warrant. It was also mentioned that the nature of their work is such that they do not have to break down doors. The

interviewee indicated that they usually systematically gather a lot of information about a case and then get a warrant before conducting a search. Suspects charged with this type of offence are generally represented in court, which means that the evidence gathered will be under close scrutiny.

However, in the Fraud unit and Syndicated Fraud unit, information from informers flows in at a considerably faster rate and there is a need to act quickly; this means that officers in these units often conduct searches without warrants.

Suspects often try to stop the police from searching – even when they have a warrant; they usually insist on their attorney being present. The law does not require this and inexperienced officers will simply succumb to this type of pressure. This also happens with privileged documents: often when officers enter a premises to conduct a search, the suspect says his documents are privileged. Inexperienced officers may simply accept this. Experienced officers know that where there is doubt around this issue, documents can be taken to the clerk of the court for safekeeping until the issue of privilege is settled. The interviewee referred to the fact that it takes three years to train a detective to do commercial crime work. At present, the experienced detectives do not have time to do in-service training.

The fact that one case of commercial crime is often investigated simultaneously in different parts of the country (because of the organised nature of this type of crime) presents problems in terms of applying for a warrant. At present, the operation is conducted in two phases: first, you must go to each magisterial district where each part of the case is being investigated and request a magistrate to issue a warrant. Only when all the warrants have been obtained in all the relevant areas, can you then go back to all the areas to simultaneously conduct the searches. Obviously, if you do not co-ordinate the searches, the evidence will disappear. There is often a hold-up due to the fact that a magistrate in a particular area is not available to issue a warrant. The officer interviewed expressed the view that legislation should make provision for a judge to issue a warrant if need be, since judges can issue warrants for searches in any magisterial district (not only the district of their jurisdiction, as with magistrates). This would make simultaneous searches much easier to execute.

Diamond and Gold

Much of the work done by the Diamond and Gold unit involves the system of entrapment. Before setting up a trap, they take a statement from an informant. The information is then first tested by an officer by either infiltrating the syndicate or talking to the suspect. The police officer comes back and makes his own statement and then requests permission to set up a trap.

In the case of syndicates, operations are usually carried out undercover. Officers first collect a lot of information and only when they feel they have sufficient to provide reasonable grounds, they go to the house or business and conduct a search. The interviewee indicated that reasonable grounds in this case refers to a sworn statement from an informant. He reported that they always work closely with the Attorney-General's office. When necessary and on the advice of the Attorney-General, a warrant is obtained.

The Diamond and Gold unit indicated that a warrant is usually obtained when a search is to be conducted at the premises of a big company. The officer interviewed reported that they abide by the legal requirements for search warrants. However, under the Diamonds Acts and the Mining Rights Act, they are permitted to search without a warrant.

Tracing Unit

According to the officer interviewed, the Tracing unit makes fairly extensive use of electronic surveillance (telephone tapping). To use this type of equipment, you need a search warrant. The unit acquires extensive information by means of telephone tapping. Particularly when working on syndicated crime, a thorough investigation must be conducted first to get sufficient facts to apply for a warrant. Accurate and detailed information will also help in opposing bail once a suspect has been arrested.

The tendency recently is to first conduct a thorough investigation before conducting a search. For example, the unit will put 10 detectives on a case who will infiltrate a syndicate; a lot of technical equipment (presumably concealed recorders) will be used. They will then get sufficient information to apply for a search warrant. The application for a warrant must be accurate and it must comply with the requirements. The unit has examples of what is required in an application and these have been circulated among their members.

Firearm unit

The Firearm unit reported that if they were required to conduct a *one-off* search – such as at an individual house where an illegal firearm was reportedly being kept – they generally do not get a warrant. However, in a similar vein to what was reported by the Diamond and Gold unit, if the search is to be conducted at a business or a hostel, they apply for a warrant.

South African Narcotics Bureau (SANAB)

As mentioned in a previous section, the Drugs and Drug Trafficking Act allows SANAB (or any other) officers to make searches and seizures without a warrant.

However, there is considerable anxiety around the fact that these wide powers have not been tested in the constitutional court. It has been suggested by the Attorney-General that searches be only conducted under the provisions of the Criminal Procedure Act. Officers at SANAB experience this as restrictive.

Frequency of legal/illegal searches

Clearly, hundreds of searches are being conducted throughout the country by the SAPS every day. From the interviews conducted for this project it would appear that only in a very small proportion of these is a search warrant obtained. The rest are conducted with the consent of the individual concerned. It is doubtful whether consent in this case is informed consent. When consent is not given, searches are often conducted regardless, under the provisions of section 22 of the Criminal Procedure Act. However, this provision clearly states that the officer must on reasonable grounds believe that a warrant would be issued if he were to apply for one and that the delay in applying for one would defeat the purpose of the search. Whether this provision is being met in the case of all searches conducted without consent and without a warrant is highly debatable.

An officer from one police station reported that during his career he has conducted hundreds of searches and they have always been with consent. He added that during the four years that he has been stationed at that particular police station he has never had occasion to apply for a search warrant, even though a search is probably conducted with every investigation.

Legal Services is of the view that consent sometimes means that police officers simply walk into a premises to conduct a search and the person whose rights are being infringed is too scared to deny access. Another opinion was expressed that the public give their consent because they believe that the police will not overstep their authority.

On the topic of consent, an officer from a specialised unit disclosed the following: "When the public does not give consent, we are supposed to go away and get a warrant. However, we know that when we come back with a warrant, the evidence will be gone." According to him, the way that the police deal with this sort of situation is to tell the person that they will be greatly inconvenienced if they do not co-operate; they will have to either accompany the police to the police station while a warrant is being applied for or an officer will be placed to guard their premises. "Most then agree."

One member of Legal Services was particularly candid about the manner in which searches are conducted by the police: "A lot of searches take place under circumstances where a warrant should have been obtained" and, "We can

certainly do more in terms of search warrants – we must legalise a larger percentage of our searches".

An officer from a specialised unit confirmed that a lot of searches are conducted illegally. In his view, "The public do not complain because they do not know their rights." He added that as the public are becoming increasingly exposed to television programmes (particularly American programmes), they are starting to demand to see a warrant. In this officer's opinion, the majority of searches that are conducted by the police do not meet the legal requirements.

A member of the Firearms unit reported that his section undertakes about 200 searches per month. They are conducted without a warrant under the provisions of the Arms and Ammunitions Act. On the other hand, other specialised units such as the section dealing with syndicated drugs (which is attached to the Commercial Crime unit) always use a warrant. It was reported that "These cases are sensitive and the manner in which the evidence is seized will be challenged in court".

Legal Services concluded as follows: "Unlawful searches are still taking place. There is a contradiction between the reality and the ideal – we are striving toward perfection in an imperfect situation. No matter how good your training is or your instructions and controls, you will always get police officers who do it wrong. We still need to work on the culture around this aspect."

One senior magistrate reported that he does not received many requests for warrants – in the two months since he has been stationed at that particular court he has issued three warrants and rejected about five. If one considers that the particular court serves a major metropolitan area, this seems to be an astonishingly small number of warrants. The magistrate confirmed this by adding that he presumes that a lot of searches are being undertaken without a warrant.

Another magistrate reported that she has experienced an increase in the number of requests for warrants and she puts this down to the fact that the police are becoming more cautious. She issues about 15 warrants per month. Again, if one considers that the particular court serves a large metropolitan area and that she is the only magistrate issuing warrants at that court, it is a very small number being requested. This magistrate appears to have a good working relationship with the police. She indicated that officers often come and ask her advice about whether or not to request a warrant in a particular case. She confirmed that it is mostly the specialised units that request warrants. Her opinion is that when an investigating officer is doubtful about whether or not to get a warrant, these days they usually decide to rather apply for one.

Some comments around roadblocks

The authorisation for setting up a roadblock has been delegated from Provincial Commissioner level to station commander level. He then authorises the head of proactive policing to set up roadblocks, including a helicopter roadblock. A form has been developed for this authorisation. It covers the requirements of the South African Police Service Act in that it mentions the date, duration, place and object of the roadblock.

According to officers from proactive policing, the element of surprise is essential in the case of roadblocks. Within two hours, a roadblock is no longer effective since word has spread and other routes are used. This is why there is a need to set up a series of roadblocks at random. The main purpose of this type of roadblock is crime prevention; vehicles are selected at random and searched, although officers know by experience (*gut feeling*) which vehicles to select. Search in this instance is with consent.

Roadblocks may also be set up on known exit routes from high-crime areas. The exits are closed off and officers look out for stolen vehicles and also search vehicles for stolen goods. Search is always with consent.

WHY WARRANTS ARE NOT OBTAINED

Practical problems associated with warrants

A number of interviewees expressed the view that officers often lack knowledge of and experience on how to conduct a proper search. One member interviewed was of the opinion that police officers are "too lazy" to study the Criminal Procedure Act. He noted that many officers are going straight from college to become station commanders (of small stations) and they do not have the practical experience that a member only gains from coming up through the ranks. His perception is that members are afraid to apply the law as it is laid down. Police officers need to be educated regarding what is possible in terms of the law.

At every search you ideally need someone to search, someone to oversee the process and someone to take notes. This is not always practically possible. The lack of commitment on the part of many officers was also referred to; it was said that many members see police work as "just a job". It was mentioned that officers do not prepare themselves adequately before applying for a warrant or before conducting a search. They do not sit down and consider all the facts of the case.

An officer at one police station was of the opinion that the delay caused by applying for a warrant hampers the work of the police. He pointed out that strictly speaking, the police cannot conduct a search using the "reasonable grounds" provision if there is the slightest chance that the courts will say that they had sufficient time, from the time that they received the information from the informant until they went to investigate, to apply for a warrant. This does not work in practice since suspects are moving goods around all the time. If information comes in, it must be reacted upon immediately otherwise there will be no point in conducting a search.

Another problem that was mentioned by a number of officers is the fact that the police can only seize an item that is specifically mentioned in a warrant, even if they come across another item that is obviously connected with an offence. When applying for a warrant, the legal requirements are that very specific details must be given about what is being searched for and precisely where the search is to take place. If an officer arrives on at a premises with a warrant to search for an illegal firearm and during the search discovers dagga, he is not permitted to seize the dagga. Case law has indicated that items seized which were not listed in a warrant will be challenged and found inadmissible.

The Commercial Crime unit in particular mentioned this as a problem. They can only seize the precise documents that are described in a warrant. In order to prevent having to apply for a second warrant to go back for other documents found at a premises (which will by that time no longer be there), there is the temptation to make the provisions of the warrant as wide as possible. This can also be challenged in court.

Related to this is the fact that a search can only take place at the specific premises indicated on the warrant. If the warrant describes the premises as a house, then outbuildings at the address, or even a vehicle that is suspected to be a stolen vehicle at the address cannot be searched. Furthermore, a warrant is issued to one specific police officer and he is the only person who can conduct the search. He can take along other officers to take notes or to oversee the process, but he must physically conduct the search. If someone else assists him, it may be challenged in court.

Access to magistrates

Considerable complaints were received from the officers interviewed regarding undue difficulties in gaining access to magistrates after hours. It would appear that the magistrates who have been identified at each magistrates' court to be available to issue warrants after hours are not always willing to do so. SANAB referred to the fact that if information is received from an informant or other

source after 16h00, they cannot get a warrant from the magistrate who is supposed to be on duty until the next morning.

This view was supported by Legal Services. It seems to be a regular occurrence that if you approach a magistrate at 13h00 or 14h00 about a warrant, he will tell you that you are welcome to bring the application, but he will not be able to issue it until the next day. Evidently, their usual comment is that they have to consult with other people on the matter. It was pointed out during interviews that if an officer receives information from an informant or a suspect at 15h00 or 16h00, when you approach the magistrate on duty at five minutes before 16h00 the usual response is that "Yes, I am on duty but I am not empowered to give you a warrant". Furthermore, some magistrates have started to insist that officers deal with a prosecutor first.

The officer from the Commercial Crime unit indicated that problems with gaining access to magistrates or with obtaining warrants from magistrates have become increasingly more evident in recent months. Magistrates appear to be hesitant and very careful, which many will argue is a good thing. However, some members are of the opinion that they are over cautious. The cautiousness is undoubtedly as a result of warrants being set aside in court and civil claims being instituted. The Department of Justice has tried to deal with the problem of warrants being set aside and civil suits by allocating only one magistrate at each court to issue warrants. This makes access very difficult.

Requirements for detail cannot be met

Understandably, magistrates require detail before they will issue a warrant – they require a description of the item that will be searched for (such as the type of drug), the identity of the person to be searched and the precise address where the search is to be conducted. This information must be given in the form of a sworn statement. Most of the information received by the police comes from informants and informants are not prepared to give sworn statements. The police also do not wish to give the names of informants, because with the possibility of corruption at police and court level, there is no guarantee in whose hands the information will find itself.

SANAB indicated that most drug-related information comes from Crime Stop which means that it is given anonymously. This is naturally of no use in applying for a warrant. According to the officers at one police station, magistrates will in some instances, such as when an officer is investigating a case and information becomes apparent to him, or when a witness provides information in the form of an affidavit, accept a statement from the officer himself. However, magistrates tend not to accept information received from an informant unless it is given under oath.

The police feel that the requirements for detail are too exact and unrealistic. For example, if the police wish to search a general dealer or a pawn shop for stolen goods, they need to be able to supply the specific code number of the items that they are looking for in order to be able to get a warrant. The Vehicle Crime unit mentioned the example of an informer giving information about stolen car parts in Mandela squatter camp. If the police do not go and search straight away, the parts will be gone. If they apply for a warrant, the magistrate requires a street address where the parts are alleged to be situated. However, there are no addresses in a squatter camp.

Similar problems were mentioned by officers from Jeppe Police Station. When they receive information about stolen goods in a hostel, if they were to apply for a warrant they would be required to give the room number where the goods are being kept. Naturally, this sort of detail is not available. Also, it is virtually impossible to obtain a warrant to search a complete hostel. It has been suggested to officers at the police station that they supply information in the application on how many persons have been arrested at a particular hostel in the past. This would then provide sufficient grounds to issue a warrant to search the entire hostel. However, the police indicated that they do not have the manpower to extract that kind of information from all the police files.

As mentioned in the previous section, magistrates have recently become wary of warrants being set aside in court and civil action that may result. An officer from one of the specialised units expressed the view that magistrates do not like being called upon to defend a warrant in court. They prefer to take the easy way out and not issue a warrant when there is any doubt in their mind. One could argue that to be cautious is not a bad approach when the possibility of infringing an individual's human rights is concerned. The police, however, experience this sort of cautiousness as making their job extremely difficult.

The same officer was of the opinion that magistrates (as well as police officers and prosecutors) do not always know the conditions under which they can issue a warrant and what the legal provisions are. He suggested that "Their yardstick is unrealistic and over and above that required by the [Criminal and Procedure] Act. When we do apply for a search warrant we find that the magistrates are seldom satisfied with the information supplied – they always want more detail. This is not always possible to give." He added that magistrates are going beyond the "reasonable grounds" provision – they want information that proves beyond "reasonable doubt" that the person to be searched or the premises to be searched is actually guilty of the suspected offence. "Their criteria are unreasonable."

According to an officer from the Commercial Crime unit, when magistrates are unreasonable with their requirements regarding the degree of detail that must be given in the sworn statement before a warrant will be issued, there is the danger that officers will go back and simply add the required information, whether

available or not. In his opinion, this happens frequently. He noted that there is a fine line between perjury and manipulation of information in order to be able to carry out your policing functions.

Magistrates, on the other hand, hold the view that although the police know the requirements for an application for a warrant, there are officers who still submit applications that do not meet the requirements. However, in their opinion, the majority of officers generally do their work well before applying for a warrant. One magistrate remarked that if a docket contains a number of sworn statements, the investigating officer compiles a summary of the facts and this is used as the basis for the warrant application.

It would appear that magistrates are prepared to discuss an inadequate application with the officer concerned and make suggestions for alterations in order that it meets the requirements. The officer is then given the opportunity to supply additional information and change the application accordingly.

POLICING AND HUMAN RIGHTS

Police perception of the impact of human rights on policing

It is common knowledge that morale among police officers is extremely low. Some of the members interviewed for this project were of the opinion that the uncertainty regarding how to act in terms of the new constitution and the demands of human rights is aggravating the low morale. The issue of not being permitted to point a firearm was mentioned as an example. Evidently, a large proportion of the officers that are killed are killed during an arrest situation. In the USA for example, an arrest is always made with a firearm. This is not permitted in South Africa and was mentioned as an issue that is adding to low police morale.

A member from Legal Services was of the opinion that human rights should not be used as an excuse for not doing a proper policing job. He feels that the current emphasis on human rights makes officers too hesitant to apply the law. He remarked that one must be careful not to dampen the enthusiasm of a police officer. An officer from one police station also expressed the view that members are very hesitant to search because of the possibility of civil claims. If they see suspicious behaviour, they often do not do anything about it, even when reasonable grounds exist. He commented that "This is not good for policing and in my opinion, it is happening frequently."

It was felt that criminal procedure is not applied *across the board*. The perception exists that there are very stringent requirements for the issuing of a search warrant when a police officers applies, but when other investigators (such as a police reporting officer) apply, they are issued a warrant even when they have not met the requirements. The view was expressed that this is very demotivating to police officers.

Officers from Jeppe Police Station indicated that although they understand the need to protect individual rights, in their view the legal requirements around search warrants are not practical and do not work in favour of combatting crime (and thus protecting ordinary citizens) – they work in favour of the criminal. "The police are fighting a losing battle."

Rejection of evidence due to illegal search and the setting aside of warrants in court

The manner in which evidence is obtained by the police is crucial to the legal credibility of the evidence in court. Section 35(5) of the Bill of Rights of the Constitution forms the basis for questioning the way in which evidence is obtained. Officers have to prove that a search was justifiable and reasonable under the circumstances. They must convince the court that there was insufficient time to apply for a warrant. One of the interviewees commented that the system at present works in favour of the accused.

The prosecutor interviewed for the project indicated that searches are becoming increasingly challenged in court. She noted that the way that evidence is obtained is being challenged by magistrates and it is not a case of magistrates becoming difficult, it is just that they are applying the right to privacy guaranteed in the Constitution. On the other hand, one of the magistrates interviewed was of the opinion that it is not up to a magistrate to question how evidence is obtained – it is up to the defence attorney. The magistrate is supposed to be impartial in the court proceedings and simply receive the evidence placed before him. When questioned whether all accused are represented in court he indicated that these days, most are.

Legal services is of the opinion that defence attorneys do not question the legality of evidence as often as they could – they are still focusing mainly on facts. If they did, many more instances of warrants being set aside and evidence rejected would occur. In his opinion, every single warrant could be questioned and if they were, only 20% would survive. The rest would be set aside on technical grounds.

On the other hand, the prosecutor interviewed expressed the view that if a warrant was correctly issued then there will be no problem in court. In her

opinion, whether a warrant stands up in court relates to how carefully the magistrate considered the facts ("applied his mind") before issuing the warrant. According to Legal Services, there are grey areas around issuing warrants – some magistrates will issue on certain evidence and others will not on the same evidence. Sometimes, a magistrate makes an honest mistake and issues a warrant when it should not have been issued. There can be also be differences of opinion around the grounds for issuing a warrant. Their advice is that for warrants in sensitive cases, it is advisable to approach the chief magistrate and ask him to appoint the best magistrate to issue a warrant in a particular case.

However, in the case of searches that were conducted without a warrant, this type of search is being increasingly challenged. The investigating officer will be required to show that reasonable grounds for suspicion existed for him to search without a warrant. In her view, the fact that the purpose of a search will be defeated by the delay caused by applying for a warrant is no longer considered sufficient reason not to get a warrant.

Although it may be true to say that if an investigating officer has done his *homework* properly there should not be problems with the warrant in court, sometimes a warrant being set aside in court is unavoidable. The information supplied in a sworn statement which formed the basis of the warrant application may be shown to be false. There is little that can be done to prevent this situation.

Because the way in which evidence is obtained is being increasingly challenged, the Commercial Crime unit has issued an instruction to their officers to bear in mind when making a statement that the statement may be made available in court. This means that if an officer wishes to protect the identity of anyone referred to in a statement, he should exclude that piece of information. Magistrates are now keeping copies of statements that form the basis of warrants. If there is civil action, the magistrate makes the statement available to the accused. The police are of the opinion that this jeopardises a case since the names of witnesses and informants become known. However, it has evidently served to stop the following illegal practice: In the past, when their warrants were questioned, it was possible for officers to produce a different statement than the one that the magistrate issued the warrant on.

WHAT CAN BE DONE TO IMPROVE THE SITUATION

Police training

Poor training around search and seizure was repeatedly referred to during the interviews. Clearly, this is an area that requires urgent attention. Some of the issues that should be focused on during training include –

- individual rights and the need to protect the right to privacy;
- an officer's right to apply the law and his rights relating to search and seizure;
- an in-depth study of the provisions of the Criminal Procedure Act and other relevant legislation;
- the preparation of applications for warrants;
- the legal pitfalls around search and seizure and how to avoid civil claims (or, more importantly, how to avoid infringing individual rights); and
- the legal requirements for reasonable grounds and reasonable suspicion.

Ongoing, in-service training should focus on any changes to legislation that affect any aspect of search and seizure.

Legal Services was of the opinion that the provinces should become more involved in training on this issue. It was suggested that personnel from Legal Services should be sent on the prosecutors' course in order to provide added insight to the training on searches and search warrants that is being conducted by Legal Services. It was also suggested that prosecutors could be requested to lecture to officers on the legal requirements around searches.

Improved access to magistrates

Complaints around the fact that magistrates are not always available to issue warrants were made so frequently during the interviews that it is clear that this matter must be addressed. A process of negotiation should be initiated between the SAPS and the Department of Justice whereby the grievances and problems from both sides around the issuing of warrants could be aired and addressed. In fact, Legal Services suggested that forums be established at provincial level at which practical problems can be ironed out and dealt with in a constructive way in order to facilitate greater co-operation between magistrates, prosecutors and detectives.

The role of Legal Services

One way of solving the problem around access to magistrates would be for Legal Services in all police areas to issue warrants. Interviewees were asked their opinion on this approach. All thought that it was a good idea, but the issue of police credibility was raised. It was pointed out by Legal Services in Johannesburg, for example, that in the past the matter of obtaining confessions, and the way in which they were obtained, led to credibility problems around the

police. His fear is that the same problem may arise if Legal Services issues warrants. Although they are not police officers, they work for the police and are very *close* to policing activity. There is considerably less distance between members of Legal Services and police officers and magistrates and police officers. It is doubtful whether it will be possible to maintain the distance needed to be objective. It may also mean that undue pressure may be brought to bare on members of Legal Services to issue warrants in doubtful cases. One option would be for Legal Services to advise officers around the requirements for warrants and to carry the responsibility for the preparation of applications for warrants, but for a specifically designated and specially trained police officer to actually issue the warrant.

Johannesburg Legal Services also pointed out that there would need to be an enormous injection of administrative infrastructure if they were to issue warrants. He noted that they are already preparing warrant applications on behalf of investigating officers and this is very time consuming. He would prefer to see access around magistrates being improved.

The role of Community Police Forums (CPFs)

CPFs should play an active role in educating community members on their right to refuse a search, their right to demand that a search warrant be obtained, and their right to see a copy of the warrant. Members of the CPF could also be involved in the oversight of the monitoring mechanisms (such as the search register referred to below) currently being developed by National Standards and Management Services, once these mechanisms are in place. If the system of keeping a register of all searches carried out by officers at each police station is implemented, designated members of the local CPF could conduct regular inspections of the register, along similar lines to the cell inspections that are currently being carried out. This could be done in the presence of the station commissioner and *spot checks* could be conducted whereby specific incidents are followed up and the relevant officer requested to provide details of the circumstances around a search.

MONITORING POLICE PRACTICE AROUND SEARCHES

Introduction

With an organisation as large as the SAPS, it is a given that its staff compliment will be as diverse as South African society itself. The full spectrum of cultures, ideologies, attitudes, styles of interaction, levels of competence and degrees of

commitment to work ethics will undoubtedly be represented in the organisation. These factors impact on the way in which any particular officer approaches police work, particularly the parts of police work that have a bearing on human rights. For this reason, it becomes extremely important to monitor police practice around issues that touch on human rights or the infringement of individual rights, and Police practice around searches is one such issue.

Work being done by Legal Services, National Standards and Management Services

Compilation of guidelines on search and seizure

Legal Services has compiled guidelines for police officers on search and seizure. The document is in final draft form and appears to be a very thorough set of instructions around this issue. Once finalised and made available to every police officer, these instructions, if studied and followed, should go a long way toward (1) educating officers regarding the legal requirements and (2) removing any doubt and confusion that may have existed regarding an officer's rights and responsibilities pertaining to searches. These draft guidelines are attached as Appendix C.

Search warrant register

Legal Services is considering instituting a search register at each police station, in which basic information on searches, search warrant applications and roadblocks will be entered by every officer executing such activities. The register will be checked once a week by the station commissioner or a delegated commissioned officer. The draft proposal compiled by Legal Services is contained in the Guidelines for search and seizure, which forms Appendix C. The Secretariat for Safety and Security would be supportive of the institution of search warrant registers.

During the interviews conducted for this project, officers were asked their opinion on the desirability and feasibility of such a register. Most were positive about the idea, although some reservations were expressed, such as whether officers would be sufficiently conscientious to enter the details of a search each time one is conducted. On the other hand, it was pointed out that it would be an improvement on the present practice of entering all searches and roadblocks in the occurrence register, which means that it gets added to all other policing incident information for that station. This means that if one wants to go back and check the details of a particular search, at present one needs to work through all the information contained in the occurrence register to find what one is looking for. It was felt that a register dedicated to searches only would be an improvement.

Compilation of a standard warrant application form

Legal Services has also compiled a standard warrant application form which will be used throughout the service. This may help to address the problem of poor warrant applications referred to by the magistrates interviewed for this project. The proposed form is given in Appendix D.

Other monitoring mechanisms being considered

Other ways of monitoring the extent to which the legal requirements regarding searches are being met are presently being investigated. Members of the Directorate: Policy Monitoring (of the Secretariat for Safety and Security) together with members of Legal Services (National Standards and Management Services), are in the process of devising an ongoing monitoring mechanism, of which the search register will form part.

The possibility of monitoring all civil claims made against the SAPS in order to determine whether non-compliance with the requirements around searches played a part in the claim is being considered. It has however been pointed out that civil cases are instituted in only a small proportion of infringements and in all likelihood only by persons who have the financial means to do so.

The possibility of monitoring all cases where evidence is rejected due to problems with the manner in which it was obtained is also being considered. However, it has been noted that the record only reflects "insufficient evidence" when a conviction is not obtained and it is not possible to determine from this whether the way in which the evidence was obtained was the reason for the acquittal. The actual case transcripts would have to be examined to obtain this type of detail; naturally this has serious manpower implications.

The practical problems in relation to these two options still need to be considered and other options will be developed. This phase of the project is still in progress.

CONCLUSION

This report reflects on impressions of police practice in relation to searches and the extent to which the legal requirements for search and seizure are being met. The interviewees felt that in the context of a strict application of the law, the legal requirements are not, in most instances, being met. Police officers will contend that searches are being conducted with consent. However, consent in most cases is clearly not informed consent and in some cases it would appear that

consent is coerced. On the other hand, most reports indicate that when they do request consent, the police generally approach the public in a courteous manner, which probably accounts for the relatively small number of complaints received.

Police perception of a conflict of interests between the demands of human rights and the need to prevent crime and maintain law and order was also discussed in the report. The positive spinoff of police respect for human rights in the form of a more credible police force and public participation in crime prevention appears to escape most officers. Changing police culture around the execution of searches is not going to be easy and is but one of the police practice issues that need to be addressed during the SAPS transformation process. Monitoring police abuse of power in the search and seize terrain is certainly an area that the Secretariat for Safety and Security would wish to pursue.

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APPENDIX A

THE LEGAL REQUIREMENTS

The discussion of the legal requirements around search and seizure will be based on the Criminal Procedure Act, No. 51 of 1977 (hereafter referred to as the CP Act) and the South African Police Service Act, No. 68 of 1995 (hereafter referred to as the SAPS Act), being the two most important pieces of legislation that regulate police activities. Each subsection will be dealt with by presenting the legal provisions on the topic (in the left-hand column) and by giving a brief discussion of the provisions (right-hand column). The provisions are taken directly from the statutes but are reworded in the language of a layperson. The discussion is based on Du Toit *et al.*'s (1993) *Commentary on the Criminal Procedure Act* and the SAPS documents referred to in the reference list at the end of the report.

The detailed discussion of the CP and SAPS Acts will be followed by a brief discussion of only the sections that refer to search and seizure of the following Acts: the Drugs and Drug Trafficking Act, No. 140 of 1992; the Arms and Ammunition Act, No. 75 of 1969; the Mining Rights Act, No. 20 of 1967; the Diamonds Act, No. 56 of 1986; the Road Traffic Act, No. 29 of 1989; the Customs and Excise Act, No. 91 of 1964; the Import and Export Control Act, No. 45 of 1963 and the Merchandise Marks Act, No. 17 of 1941.

What may be seized

Section 20 of the CP Act affords the state the power to seize anything, but with the following provisions:

Provision

The state may seize anything -

- which is concerned in or is on reasonable grounds believed to be concerned in the commission or the suspected commission of an offence;
- which may provide evidence of the commission or suspected commission of an offence; or
- which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

Discussion

The powers described in this section are very wide and are intended to assist the police in the investigation of cases. Literally anything may be seized, as long as it falls within one of the three categories described.

Case law has shown that suspicion or belief is a subjective question and will be answered objectively when the facts of the case are before the court (*Ndabeni v Minister of Law and Order & another* (1985) 10 SA 500 (D)).

Section 20 of the CP Act also allows the seizure of articles that are indirectly connected with the commission or suspected commission of an offence.

However, once it becomes clear that a seized article will not be used in a future trial, it must be returned to the owner (*Ndabeni v Minister of Law and Order* 1984 (3) SA 500 (D)).

In instances where the state has sufficient evidence to proceed with a case, further search and seizure are considered by the courts to be not necessary and an interdict against such further search can be granted (as in *Highstead Entertainment (Pty) Ltd t/a 'The Highstead'* 1994 (1) SA 100 (C)).

The court has also ruled that when the time taken to investigate a case becomes very extended and there is no real prospect of the investigation being finalised, a seized article must be returned to the person from whom it was taken (*Choonara v Minister of Law and Order* 1992 (1) SACR 239 (W)).

Van Zyl J (in *Sasol (Eindoms) Beperk v Minister of Law and Order* 1991 (3) SA 766 (T)) held that privileged documents (such as legal documents) cannot be seized.

A search warrant should be used

With the exception of the circumstances described in sections 22, 24 and 25 of the CP Act (and other legislation which will be referred to in the following section), the article described above may only be seized with a search warrant (section 21 of the CP Act). The provisions relating to search warrants are described below. Furthermore, section 13, subsection 4 of the SAPS Act gives every police officer the power to serve or execute a warrant.

Provision

Discussion

Section 21 of the CP Act

An article referred to in section 20 of the CP Act shall be seized only by means of a warrant issued -

- by a magistrate or Justice of the peace if it appears to him from information provided under oath that there are reasonable grounds for believing that any such article is in the possession of a person or at any premises within his area of jurisdiction;
- by a judge or judicial officer presiding at criminal proceedings if it appears to him that an article in the possession of a person or at any premises is required in evidence at the proceedings.

The warrant requires the police official to seize the article in question; in order to do so, the officer is authorised to search any person identified in the warrant, or to enter and search any premises identified in the warrant and search any person found at such premises.

A search warrant shall be executed by day unless the issuing officer authorises the execution at night.

A search warrant may be issued on any day and shall be in force until it is executed or cancelled by the issuing officer or other person with similar powers.

A police official executing a warrant shall, after execution and upon demand of any person whose rights have been affected, hand him a copy of the warrant.

Case law (*Cine Films (Pty) Ltd v Commissioner of Police* 1971 (4) SA 574 (W)) has indicated that *reasonable grounds* do not equal the belief that a criminal case has been made out but only that, reasonably considered, there are grounds to believe that a person may be in possession of an article which can be used in proving a criminal case.

Also, in *NUSAS v Divisional Commander, South African Police* 1971 (2) SA 533 © it was ruled that a warrant must authorise both search and seizure and an order for seizure to be permissible. The authorisation for seizure (as well as search) must be clearly stated (*World Wide Film Distributors v Divisional Commander, South African Police* 1971 (4) SA 574 (C)).

The information required under oath is usually submitted to the magistrate or justice of the peace by the investigating or other officer in the form of an affidavit. The information must be studied by the issuing officer before the warrant is issued.

In order for a warrant to be issued once a case is already being heard in court it must be apparent to the presiding officer that an article that is in the possession of someone is required as evidence at the proceedings. In this case there is no requirement for information to be supplied under oath – the presiding officer makes the decision to issue the warrant based on the proceedings of the case.

It is not necessary to describe each and every article in detail – classes and types of articles can be mentioned in the warrant provided that descriptions are reasonably clear (*Cine Films (Pty) Ltd v Commissioner of Police* 1971 (4) SA 574 (W)).

The presiding officer ruled in *Divisional Commissioner of Police v SAAN* 1966 (2) SA 503 (C) that the conduct of the officer executing the warrant must be reasonable at all times; his actions must be confined to the objects set out in the warrant; and he may only act as authorised.

The execution of warrants at night are permissible.

Section 13, subsection 4 of the SAPS Act

Every police officer shall be competent to serve or execute any summons, warrant or other process whether directed to him or to any other member.

in exceptional circumstances, such as when it is to the successful investigation of a case. Urgency is the most common ground for night execution of warrants.

While the person being searched has a right to information regarding what he must hand over, the person being searched for, the work of the police officer should not be hampered by the requirement to provide technical information. However, a warrant that purports to authorise the seizure of anything that does not fall within the description of an article in section 20 of the CP Act is invalid. According to a ruling in *De Wet v Willers NO 1953 (4) SA 124 (T)* and *S v Pogoroda (1) SA 244 (T)*, officers executing a warrant are allowed to act within the boundaries of what is described in the warrant. If the warrant is too wide or unclear, it can be set aside.

The person whose rights are affected by the search and seizure may demand a copy of the warrant and this must be made available. He may inspect the original warrant before the start of the search and receive a copy of the warrant upon completion of the search.

In *Cheadle, Thompson & Haysom & others v Minister of Law and Order & others 1986 (2) SA 279 (W)* it was ruled that where a police officer claims to be seizing an article in terms of sections 20 and 21 and the article turns out to be a privileged legal document (for example, a document compiled by an attorney following consultation with a witness), the attorney has the right to receive reasonable time to have the warrant set aside before the seizure of the article since it is doubtful whether the warrant would have been granted to seize such an article in the first place.

Du Plessis J (in *Bogoshi v Van Vuuren NO & others v Director Office for Serious Economic Offences & others 1993 (2) SACR 98 (A)*) ruled that legal professional privilege is a right necessary for the proper functioning of the adversarial system of justice and is therefore a fundamental right that can be claimed, not only during litigation, but

to prevent seizure of such an article.

Seizure of articles without a warrant

Section 22 of the CP Act makes provision for search and seizure under certain circumstances without a warrant. This is in recognition of the fact that it is not always possible to obtain a warrant and still be an effective investigating officer. Circumstances may require that a search and seizure be undertaken immediately when an officer comes upon certain facts or arrives at a particular scene. To first wait and apply for a warrant would defeat the purpose of the search since the alleged suspect would simply abscond. Other legislation, such as the SAPS Act, also provides for the search and seizure of articles without a warrant. These provisions are as follows:

Provision

Section 22 of the CP Act

A police officer may, without a search warrant, search any person, container or premises for the purpose of seizing any article referred to in section 20 of the CP Act

-

- if the person concerned consents to the search and seizure or if the person who may consent to the search of the container or premises consents to the search and seizure; or
- if he, on reasonable grounds, believes that a search warrant would be issued to him if he applied for a warrant and that the delay in obtaining a warrant would defeat the object of the search.

Section 13, subsection 6 of the SAPS Act

Any police officer may, where it is reasonably necessary for the purpose of the control of

Discussion

It is reasonable to expect that during everyday work there will be a need to conduct *on-the-spot* searches, and section 22 makes provision for this. However, if the search is conducted under the *reasonable grounds* provision, whether reasonable grounds were present is an objective question which will be answered by the presentation of all the facts to the court. The official will have to show that the reasonable grounds existed when he decided to act without a warrant (*Alex Cartage (Pty) Ltd & another v Minister of Transport & others* 1986 (2) SA 838 (E)).

If, in order to effectively and thoroughly search a premises an officer requires assistance and assistance is not readily available, case law has indicated that section 22 does not permit an officer to close down a business that is operating at the premises being searched, even if by allowing the business to remain open the search becomes meaningless (refer *Goncalves v Minister of Law and Order & another* 1993 (1) SA 161 (W)). This is because it would have been the intention of the legislature to allow the law to hurt a person or his business more than is absolutely necessary to complete an investigation. Closing down a business simply because an officer

the illegal movement of people or goods across the country's borders -

- search any person, premises, vehicle, vessel, aircraft or any other receptacle without a warrant. This applies at any place within 10 kilometres or other reasonable distance from any border between the RSA and any other state, or in the territorial waters of the RSA; and
- seize anything found in the possession of such person or at such premises which may lawfully be seized.

cannot immediately carry out a search clearly w do so.

In *Ndlovu v Minister of Police, Transkei & others* (2) SACR 33 (Tk) the presiding officer ruled that someone gives consent under protest it cannot be considered to be consent.

Search and seizure relating to arrested persons

The search of arrested persons and seizure of anything found on the arrestee is dealt with in section 23 of the CP Act.

Provision

When a person is arrested, the person making the arrest may -

- if he is a peace officer, search the arrestee and seize any article referred to in section 20 of the CP Act found on the person, in the custody of the person or under the control of the person. Where the peace officer is not a police officer, he shall hand over any seized article to a police officer; or
- if he is not a peace officer, seize any article referred to in section 20 of the CP Act found on the person, in the custody of the person or under the control of the person and hand it over

Discussion

Section 23 provides that any person who makes an arrest is able to search the arrested person without a warrant and seize anything found on or under the control of the arrestee, with the provision that, if the person making the arrest is not a police officer, any article seized during the search must be handed over to a police officer. The articles that can be seized include anything that may be used to endanger the life of the arrestee or anyone else.

to a police officer.

The following provision was added by means of Act 33 of 1986:

On the arrest of any person, the person making the arrest may place in safe custody any object found on the arrestee which may be used to cause bodily harm to himself or others.

Police powers to enter premises

In order for the police to investigate crime and to maintain law and order and the security of the state, they need to be able to enter premises. Sections 25 and 26 of the CP Act make provision for them to do so. Although a warrant is generally required to enter premises, under certain circumstances, which are clearly laid down, premises may be entered without a warrant. In addition, section 13, subsection 7 of the SAPS Act grants the National or Provincial Commissioner the power to authorise that an area be cordoned off and that premises may be entered in order to be searched. Police powers to enter premises are described below:

Provision

Section 25 of the CP Act

If it appears to a magistrate or justice of the peace from information provided under oath that there are reasonable grounds for believing -

- that the internal security of the RSA or the maintenance of law and order is likely to be threatened by any meeting being held or about to be held on any premises within his area of jurisdiction; or
- that an offence has been or is being or is likely to be committed or that preparations for the commission of any offence are taking place at a

Discussion

The provisions contained in section 25 of the CP Act which empower the police to enter premises, were legislated as a result of the court's decision in *Venter v Officer Commanding South African Police, Johannesburg* 1955 (2) SA 87 (W). When reasonable grounds exist from information provided under oath that the internal security of the country is threatened by virtue of a meeting that is being held or will be held in a magistrate's area of jurisdiction, he may issue a warrant that authorises the police to enter the premises. Similarly, when reasonable grounds exist from information provided under oath that a crime is being, or is about to be committed, or is being planned, then a magistrate may issue a warrant that enables the police to enter the premises.

Once the warrant has been issued, the police may

premises within his area of jurisdiction,

he may issue a warrant authorising a police officer to enter the premises concerned at any reasonable time in order to -

- carry out an investigation and take steps that the police officer may consider necessary for the preservation of the internal security of the RSA or the maintenance of law and order or the prevention of an offence;
- search the premises or any person in or at the premises for any article referred to in section 20 of the CP Act which the police official on reasonable grounds suspects to be in or at the premises or upon such person; and
- seize any such article.

The warrant may be issued on any day and shall be in force until it is executed or cancelled by the issuing officer or person of similar authority.

A police officer may, without a warrant, act as described above if he on reasonable grounds believes -

- that a warrant would be issued to him if he were to apply for one; and
- that the delay in obtaining a warrant would defeat the object thereof.

Section 26 of the CP Act

Where a police officer, during the investigation of an offence or alleged offence, reasonably suspects that a person who may provide information in respect of the offence is at any premises, he may,

enter the premises in order to carry out an investigation or to take whatever steps considered necessary to maintain security and law and order. What is considered necessary in this case depends on the subjective judgement of the police official concerned (in other words, the objective standard rule does not apply in this case).

However, when a police official enters a premises for the purpose of searching the premises or any person at the premises for an article referred to in section 20 of the CP Act because he reasonably suspects that such an article is on the premises or a person, the objective test applies (refer *Ndabeni v Minister of Law and Order & another* 1994 (3) SA 500 (D)). This means that upon presentation of all the facts in the case, the official will have to show that reasonable grounds existed for searching for a section 20 article.

Section 25 of the CP Act also makes provision for entering a premises without a warrant. When the delay caused by obtaining a warrant will defeat the purpose of an entry, and when a police officer reasonably believes that he would have been issued a warrant based on the facts, he is empowered to enter and search a premises and persons at such premises. Again, there must be an objective means of testing that reasonable belief existed (*Ndabeni v Minister of Law and Order & another* 1994 (3) SA 500 (D)).

Entering premises in order to obtain evidence during the investigation of an offence is provided for by section 26 of the CP Act. A police officer may enter premises with a warrant in order to obtain evidence (such as a statement), provided that he reasonably suspects that a person who can provide information regarding an offence is at the premises. However, he can only do this with the consent of the occupier of the dwelling (*Minister van Polisie en 'n ander v Gani* 1979 (4) SA 759 (A)). Once consent to enter has been given, the officer has the right to interrogate the person whom he believes can provide information in a case. However, the person has the right to

without a warrant, enter the premises for the purpose of questioning the person and obtaining a statement from him. This provision is subject to the occupant of the premises giving his consent to the police officer's entry.

Section 13, subsection 7 of the SAPS Act

The National or Provincial Commissioner may, where it is reasonable under the circumstances to restore public order or to ensure safety of the public in a particular area, in writing authorise that the particular area may be cordoned off.

This written authorisation must specify -

- the period (not exceeding 24 hours) during which the cordon shall be effective;
- the area to be cordoned off; and
- the purpose of the proposed action.

Upon receipt of this written authorisation, any member may cordon off the area concerned or part thereof and may, where it is reasonably necessary in order to achieve the objective of the action as set out in the authorisation, search, without warrant, any person, premises, vehicle, receptacle or object of any nature and seize any article referred to in section 20 of the CP Act found in the possession of any person who was searched or in any area that was searched. A member executing such a search shall, upon demand of any person whose rights have been affected, show a copy of the written authorisation.

silent (*Gosschalk v Rossouw* 1966 (2) SA 476 (

Authorisation by the National or Provincial Commissioner under section 13, subsection 7 of the SAPS Act to cordon an area off also allows a police officer to enter a premises, conduct a search without warrant (including the search of a person or person's property) and seize any article referred to in section 20 of the CP Act. Entry and search under this provision is for the purpose of restoring public order or ensuring public safety.

Resistance against entry or search

Naturally, the police will at times encounter resistance when lawfully entering a premises and conducting a search. Section 26 of the CP Act makes provision for the use of reasonable force in the face of resistance. Section 13, subsection 3(b) of the SAPS Act binds a police officer to use the minimum amount of force that is reasonable in all circumstances where the use of force is authorised. These provisions are as follows:

Provision

Discussion

Section 27 of the CP Act

Clearly a police officer is authorised, under certain circumstances, to use force. It is equally clear from both section 27 of the CP Act and section 13, subsection 3(b) of the SAPS Act that only the minimum amount of force which is reasonable in the circumstances is permitted.

A police official who may lawfully search any person or premises, or who may enter any premises under section 26 of the CP Act, may use such force as may be reasonably necessary to overcome any resistance to such search or entry of the premises, including breaking any door or window of such premises. This provision is subject to the police official first audibly demanding admission to the premises and informing the occupant of the purpose for which entry to the premises is being sought.

The last provision shall not apply where the police official is on reasonable grounds of the opinion that any article which is the subject of the search may be destroyed or disposed of if the provision to audibly demand admission is first complied with.

Section 13, subsection 3(b) of the SAPS Act

Where a police officer who performs an official duty is authorised by law to use force, he may use only the minimum force which is reasonable in the circumstances.

Conducting searches in a decent and orderly manner

The requirement to conduct searches in a decent and orderly manner is entrenched in at least two pieces of legislation: section 29 of the CP Act and section 13, subsection 3(a) of the SAPS Act.

Provision

Discussion

Section 29 of the CP Act

A search of any person or premises shall be conducted with strict regard to decency and order; a female shall be searched by a female only, and if no female police officer is available, the search shall be made by any female designated for the purpose by a police officer.

Section 29 of the CP Act makes provision that searches be conducted in a decent and orderly fashion, with due regard being paid to decency dignity of the person being searched. These sentiments are also expressed in section 13, subsection 3(a) of the SAPS Act, which requires all police duties be performed in a reasonable manner. Both these provisions are in support of the fundamental right to human dignity contained in section 10 of the Constitution.

Section 13, subsection 3(a) of the SAPS Act

A police officer who is obliged to perform an official duty, shall, with due regard to his powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.

Wrongful search and the award of damages

Members of the public need to be protected against wrongful search and in the event of this taking place, they have a right to be compensated for damages suffered. In recognition of this, the circumstances of wrongful search are clearly stipulated in section 28 of the CP Act and provision is made for compensation.

Provision

Discussion

A police official -

- who acts contrary to the authority of a search warrant issued under section 21 of the CP Act or a warrant issued under section 25 of the CP Act; or
- who, without being authorised to do so, searches any person, container or premises, or seizes any article, or enters and searches any premises or person on such premises -

shall be guilty of an offence and liable on conviction to a fine not exceeding R200 or imprisonment for a period not exceeding six months and shall, in addition, be liable for awards made in favour of any person in compensation for damage suffered as a consequence of wrongful entry, search or seizure.

- Where any person falsely gives information on oath under sections 21 or 25 of the CP Act and a search warrant or a warrant is issued and executed on the grounds of such information, and such person as a consequence of the false information is convicted of perjury, the court convicting the person may, upon the application of any person who has suffered damage as a consequence of the unlawful entry, search or seizure, or by application of the prosecutor acting on the instructions of the injured person, award compensation in respect of such damage, whereupon the provisions of section 300 of the CP Act shall apply *mutatis mutandis* with regard to such award.

Legislation has made provision for public recourse damages in the event of a police officer conducting a search, entry or seizure that does not comply with legal requirements. Members of the public are entitled to damages when the information that was given under oath which formed the basis of a warrant was shown in court to be false.

An officer who conducts an illegal search may be found guilty of an offence and will be liable for the damages awarded. In addition, any person who provides false information under oath which then forms the grounds for a warrant may be found guilty of an offence and be liable for the damages awarded.

Setting up roadblocks

Section 13, subsection 8 of the SAPS Act makes provision that the National or Provincial Commissioner may, where reasonable in the circumstances in order to exercise a power or perform a function referred to in section 205 of the Constitution in writing authorise a member to set up a roadblock or roadblocks on any public road or set up a checkpoint at any public place. The written authorisation must specify the date, approximate duration, place and purpose of the proposed action. In accordance with the written authorisation, any police officer may set up a roadblock or checkpoint.

Notwithstanding the above provision that the National or Provincial Commissioner may authorise the setting up of roadblocks and checkpoints, any police officer who has reasonable suspicion to believe that -

- a Schedule 1 offence has been committed and that a person who was involved in the commission of the offence is or is about to be travelling in a particular area;
- someone who is a witness to such an offence is or is about to be travelling in a motor vehicle in a particular area and a warrant for his arrest has been issued or such a warrant would be issued if the information were to be given to an issuing officer but the delay in obtaining such a warrant would defeat the purpose of the roadblock;
- a person who is reasonably suspected of intending to commit a Schedule 1 offence and who may be prevented from committing such an offence by setting up a roadblock is or is about to be travelling in a motor vehicle in a particular area;
- a person who is a fugitive after having escaped from custody is or is about to be travelling in a motor vehicle in a particular area; or
- any object which is concerned in, may afford evidence of or is intended to be used in the commission of a Schedule 1 offence, either within the RSA or elsewhere which is being or is about to be transported in a motor vehicle in a particular area and for which a search warrant would be issued if all the facts were submitted to an issuing officer and the delay caused by the application for the warrant would defeat the purpose of the roadblock -

may set up a roadblock on any public road or roads in the area concerned for the purpose of establishing whether a motor vehicle is carrying such an object or person.

The officer in charge of the roadblock must display a sign or barrier indicating to motorists to stop so that drivers are able to bring their vehicles to a stop. Any driver who refuses to stop shall be guilty of an offence.

Any officer may, without a warrant, in the case of a roadblock that has been set up in accordance with the above provisions, search any person or vehicle stopped at such a roadblock or any article or receptacle in possession of a

person, and seize any article referred to in section 20 of the CP Act. The police officer shall, on demand of the person whose rights have been affected by the search and seizure, show him a copy of the written authorisation for the roadblock or checkpoint and inform him of the reason for the roadblock.

The search is to be conducted in a decent and orderly manner with strict regard to decency and order, with female officers searching female persons and if no female is available, females being searched by any female designated by the police officials conducting the search.

Other relevant legislation

Certain pieces of legislation other than the CP Act and the SAPS Act that give the police powers of search and seizure will be briefly discussed. Only the sections of the Acts that relate specifically to search and seizure will be referred to.

Drugs and Drug Trafficking Act, No. 140 of 1992

Section 11 of the Act sets out the powers that police officers may exercise when investigating drug-related offences. A police officer may -

- if he has reasonable grounds to suspect that a drug-related offence has been or is about to be committed, enter or board and search any premises, vehicle, vessel or aircraft on or in which any substance is suspected to be found;
- if he has reasonable grounds to suspect that any person has committed or is about to commit an offence under the Act, search any such person;
- if he has reasonable grounds to suspect that any article which is being transmitted through the post contains a scheduled substance in respect of which an offence has been committed, he may open and examine it in the presence of any suitable person;
- seize anything which in his opinion is connected with a contravention of the Act.

Section 11 also makes provision for the examination of registers, records or other documents which the police believe have a bearing on any offence under the Act. In addition, a police officer may require any vehicle, vessel or aircraft to be stopped or request the master, pilot or owner of any vessel or aircraft to sail or fly to a harbour or airport as may be indicated by the police officer.

The powers accorded to the police in the Drugs and Drug Trafficking Act are extremely wide. It should be noted that, according to the Commander of SANAB (Supt. J.J. van Aarde), the Attorney General's office has advised SANAB

members not to make use of this Act for searches and seizures but to rather obtain a search warrant in terms of the CP Act since search and seizure without a warrant under this Act has not been tested in court and may be considered unconstitutional.

Arms and Ammunition Act, No. 75 of 1969

Under section 11 of the Act, the Commissioner may, if he has reason to believe that a person is unfit to possess a firearm (for reasons of mental instability, inclination to violence, dependence on alcohol or drugs, or negligence regarding safekeeping), issue a warrant for the search and seizure of the firearm. The issuing of the warrant is to be preceded by a notice in writing delivered to such a person ordering them to appear before the Commissioner to give reasons why he should not be declared unfit to possess a firearm.

Any police officer, or other person authorised by the Minister, may at any time enter any arms and ammunitions factory and carry out an inspection in order to establish whether the requirements of the permit to manufacture arms and ammunition that was issued by the Minister are being complied with (section 31).

Section 32 stipulates that no person shall import, supply or possess certain firearms or classes of articles unless they have been issued with a permit by the Minister authorising them to do so. Whenever a person who has been issued with a permit becomes a disqualified person, a police officer is authorised to, without warrant, seize any article covered in the permit.

The Act also makes provision, under section 41, for any police officer, if he has reason to believe -

- that an offence under the Act has been committed by means of any article which he has reason to believe is at any premises or in possession of any person;
- that any person whom he has reason to believe has been declared unfit to possess a firearm is in possession of or has access to any arm or ammunition;
- that any arm or ammunition that is needed for the investigation of an offence is at any premises or in possession of any person,

the police officer may at any time without a warrant enter and search such premises or search such person and seize any such arm or ammunition.

Diamonds Act, No. 56 of 1986

Under the provisions of section 81 of the Act, any police officer may -

- at any reasonable time enter any premises at which any activity relating to unpolished diamonds is carried on and perform any activities that may be necessary to determine whether the provisions of the Act are being complied with;
- if he has reasonable grounds to suspect that an offence under the Act has been committed or is about to be committed in respect of any diamond by means of any machinery, at any time enter and search any premises at which such diamond or machine is suspected to be found;
- if he has reasonable grounds to suspect that any person has committed an offence under the Act in respect of any diamond, search any such person or any article in his possession or under his control (provided that a woman shall be searched by a woman only);
- if he has reasonable grounds to suspect that any packet which is being or has been transported through the post contains any diamond, stop during transit any such packet and open and examine any such packet in the presence of the person by whom it was dispatched, or any other suitable person;
- seize any such diamond, machinery, register or document which appears to provide proof of a contravention of a provision of the Act.

Mining Rights Act, No. 20 of 1967

Section 150 of the Act makes provision that any member of the police in charge of any investigation in connection with suspected unlawful traffic in unwrought precious metal may -

- at all times enter upon and examine and search any place or works that receives unwrought precious metal, stop and search and examine every vehicle conveying or suspected to be conveying unwrought precious metal, and
- seal, mark or otherwise secure any package or container found in such place, works or vehicle;
- take an account of all unwrought precious metal found in such place, works or vehicle and, if he thinks fit, take such unwrought precious metal into custody;
- force access to or open any place, works, vehicle, package or container which is locked if the keys thereof are not produced upon his demand;
- search any person whom he has reason to believe has unwrought precious metal hidden on his person or in his possession (provided that a female shall be searched by a female);
- board, search and freely remain on any train or vessel, or board and search any aircraft on which unwrought precious metal is being transported or on which such metal is suspected to be transported.

Road Traffic Act, No. 29 of 1989

The powers and duties of inspectors of licences are contained in section 8 of the Act. Bearing in mind that according to the provisions of section 334 of the CP Act, police officers are also inspectors of licences, examiners of vehicles and traffic officers, the Act makes provision, *inter alia*, for a police officer to -

- examine any motor vehicle in order to satisfy himself whether it is the motor vehicle in respect of which documents prescribed by the Act (such as certificate of ownership and/or licence) were issued;
- seize and impound any document that has been issued under the Act which appears or which the police officer suspects to be altered or defaced;
- seize and impound any licence or document which in his opinion may provide evidence of a contravention or evasion of any provision of the Act; or
- at any reasonable time, without prior notice and in the exercise of any power or the performance of any duty which in terms of the Act he is authorised or required to exercise or perform, enter any premises at which he has reason to believe any vehicle is kept.

Section 9 of the Act states that an examiner of vehicles (consequently, also police officers) may inspect, examine and test any vehicle in order to determine whether it is roadworthy. As with section 8, section 11(j) makes provision for the seizure and impounding of any document prescribed under the Act that is produced on demand by the owner, operator or driver of a vehicle, which in the police officer's opinion may afford evidence of a contravention of any provision of the Act.

Section 11(l) indicates that any traffic officer (thus, police officer) at any time may enter any motor vehicle and inspect such vehicle and any recording device installed in the vehicle. He may also, at any time, enter any premises on which he has reason to believe that a motor vehicle of an operator is kept or that any record kept in terms of the Act is to be found and inspect such vehicle or such record (section 11(m)). If any officer has reason to believe that an offence under the Act has been committed in respect of any record inspected by him, he may seize and impound that record. Furthermore, section 11(o) provides that any officer may inspect any motor vehicle or part thereof and impound any document issued in connection with the registration and licensing of such motor vehicle, where it is found that the engine or chassis number of the vehicle differs from the engine or chassis number as specified on the document. He shall direct that such motor vehicle be taken straight away to any police station for police clearance.

Customs and Excise Act, No. 91 of 1964

According to section 88, an officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether such ship, vehicle etc. is liable to forfeiture under the Act. Such ship, vehicle etc. may be detained where it is found, or removed to be stored at a place of security determined by the officer, magistrate or member of the police force.

Import and Export Control Act, No. 45 of 1963

An inspector (who may also be a police officer) may conduct investigations in order to determine whether the provisions of the Act are being complied with (section 3A). In order to do so, he may -

- enter and inspect any premises or vehicle in which there is or is suspected to be manufactured, supplied, stored, handled, sold, removed, transported or otherwise dealt with, any goods to which the Act applies;
- inspect any such goods or any book or document relating to such goods;
- seize any such goods or any book or document relating to such goods which may provide evidence of any offence in terms of the Act.

Merchandise Marks Act, No. 17 of 1941

Under the provisions of section 4 of the Act, any police officer may at any reasonable time examine any goods, and for that purpose open any packages, vessels or containers, if he has reasonable cause to suspect that they contain any goods. He may enter any place, whether it is a building or a vehicle or is in the open air, if he has reasonable cause to suspect that any goods are in or at that place, and if any such place is closed, may open that place. Any police officer may seize and detain any goods if he has reasonable cause to suspect that in respect of the goods the provisions of the Act have not been complied with, and may remove them or such portion thereof as may reasonably be necessary for further examination.

APPENDIX B

INTERVIEW QUESTIONS

1 How difficult, or how easy is it for detectives and other officers to meet the legal requirements for search and seizure?

2 In your opinion, are the legal requirements for search and seizure on the whole being met?

3 Are warrants being obtained when they should be obtained?

4 Is the consent of the person obtained when there is no warrant?

5 If consent is not obtained, what happens then?

6 Can you think of specific factors that contribute to non-compliance with legal requirements?

7 Are the requirements practical?

8 Do you think all your detectives understand the legal requirements around search and seizure?

9 What about training – do you think that police training adequately covers search and seizure?

10 Do you have any idea of the number of cases or proportion of cases going to court where evidence is rejected because of problems with meeting the legal requirements for search and seizure?

11 What about roadblocks – are the requirements always met?

12 Would you be able to estimate how many searches of (1) pedestrians (2) premises are conducted, on average, by this station in one month?

13 For how many of these searches are warrants obtained?

14 Legal Services at Head Office are considering having a register at each police station where a record is kept of every search. Do you think it will be possible and practical to keep such a register?

15 Do you think it is a good idea?

For magistrates:

1 Can you please tell me about the quality of the search warrant applications that you receive.

2 What proportion of these applications would you say do not meet the legal requirements and are rejected?

3 How often is evidence rejected in court because of the way in which it was obtained, in other words, what proportion of cases are unsuccessful because evidence was obtained illegally?

4 Are there any other issues around search warrants that you would like to raise?

APPENDIX C

DRAFT GUIDELINES ON SEARCH AND SEIZURE

1 INTRODUCTION

1.1 The object of the Constitution, 1996 (Act No 108 of 1996) is not to prevent or curb the thorough investigation or effective combatting of crime, but to protect the basic human rights of all individuals. The right to privacy is one of these rights. In this regard section 14 of the Constitution provides as follows:

Everyone has the right to privacy, which shall include 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.

1.2 The right to privacy is, however, not an absolute right and may, in terms of section 36 of the Constitution, be limited by law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The powers to search and seize conferred by the Criminal Procedure Act, 1977 (Act No 51 of 1977), limit the right to privacy. It is imperative that members exercise these powers strictly within the limits of the applicable provisions to ensure that the constitutional right to privacy is not violated.

1.3 Police officials are expected to actively protect and uphold the basic human rights of all individuals and must therefore not only protect and uphold the right to privacy, but must refrain from violating this right when conducting a search or seizing an article.

1.4 These guidelines are issued to guide members in conducting searches in accordance with the provisions of the Criminal Procedure Act and must be read together with the relevant sections of that Act, as well as the provisions of the Constitution.

2 DEFINITIONS

2.1 In these guidelines, unless the context otherwise indicates-

2.1.1 **Commentary** when used in a guideline, means that the text in the paragraph is given as commentary, and does not form part of the guideline.

2.1.2 **Commissioned officer** means a member of the SAPS appointed as such in terms of section 33 of the South African Police Service Act, 1995 (Act No 68 of 1995), and who holds the rank of captain or a higher rank.

2.1.3 **Police official** means a member of the SAPS appointed as such under section 5(2) or designated as such in terms of section 29 of the South African Police Service Act.

2.1.4 **Premises** includes land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft.

2.1.5 **Search** means any act whereby a person, container or premises is visually or physically examined with the object of establishing whether an article is in, on or upon such person, container or premises.

Commentary

Where a person is physically searched or premises entered in order to conduct a search, the constitutional rights of the relevant person or persons are infringed. A visual examination of a person or premises may also constitute a search where such examination invades a person's right to privacy, even without a physical search taking place. This will be the case where the person or premises is not in public view, and where the member overcame some obstacle in order to conduct the visual examination. As such conduct may also be considered to constitute a search, the normal legal rules pertaining to the conducting of searches, as are discussed in these guidelines, must be followed. An example of such a situation will be where a member looks over a wall into a person's enclosed backyard or through a key hole into a hotel room in an effort to establish whether an article, which has been involved in the commission of a crime, is in that backyard or hotel room.

2.2 The term **reasonable grounds to believe** is often used in these guidelines and also appears in several sections of the Criminal Procedure Act that will be referred to below. This concept may briefly be explained as follows:

2.2.1 A member will be regarded as having *reasonable grounds to believe* that a certain state of affairs exists (eg that a certain article is on certain premises or that a certain person is on certain premises) if

- such member *really* believes it;
- the member's belief is based on *grounds*; and
- *any reasonable member* would, in the circumstances and in view of the existence of those grounds, have held the same belief.

2.2.2 The word "grounds" means facts. Facts can only be established by the use of at least one of a person's five senses, i.e. sight, hearing, smelling, touching and tasting. A "gut feeling" or "hunch" is not a fact, and will, on its own and in the absence of facts supporting the belief, never constitute reasonable grounds for a belief. The facts need not be evidence which would be admissible in a court of law, but may consist of trustworthy information received from another person such as an informer (i.e. hearsay). Where the belief is based on information received from another, a member may afterwards be required to explain why he or she had relied on that information (one reason may be that the informer had often (before that) supplied information that proved to be correct). If it is possible in the circumstances, a member should verify the correctness of information received from another.

2.2.3 The member must form his or her own belief on account of the facts and must actually believe it himself or herself at the time when he or she conducts the search. It is insufficient to believe that there is a vague possibility that an article is on certain premises. The member must at least entertain a reasonable belief that the article is possibly on certain premises. A search where no belief on reasonable grounds existed prior to it being conducted, will not become lawful on the ground of facts discovered as a result of such a search. If a member doubts whether a state of affairs exists, such member should conduct further investigation to satisfy himself or herself that this is the case.

2.2.4 The mere fact that a member believes that a certain state of affairs exists, is not sufficient. The member must also be satisfied that any *reasonable member* would have formed the same belief. This will be the case if the average member who has received the same training and has more or less the same experience as the member who formed the belief, would also have formed such a belief in the circumstances.

2.2.5 In the case of searches and seizures, the law does not only require that a member has a reasonable belief that the article is on certain premises, but also requires that the member believes on reasonable grounds that the specific article was involved in or may afford evidence of the commission of an offence or that it will be used in the commission of an offence.

3 A SEARCH AND SEIZURE TO BE CONDUCTED IN TERMS OF THE LAW

Guidelines

3.1 A member may only conduct a search and seize an article when empowered by law to do so. There are many statutory provisions which authorize a member to search persons and premises and to seize articles. When executing a search or seizing an article, a member shall strictly adhere to the restrictions of the empowering law to ensure that a search and seizure is in fact conducted legally.

3.2 The primary Act regulating the power of a member to search and seize, is the Criminal Procedure Act. This Act clearly indicates the requirements that must be complied with before a search may be conducted or an article seized. The Criminal Procedure Act also addresses the disposal of seized articles before and after finalization of a criminal case. Disposal of seized articles is normally not addressed in other legislation. Where other legislation does not specify the manner in which a search must be conducted, an article must be seized or a seized article must be disposed of, the provisions of the Criminal Procedure Act must be followed.

3.3 It is of the utmost importance that these guidelines be complied with when a search and seizure is conducted. In addition to the fact that a member conducting an unlawful search may be found guilty of an offence, evidence obtained during or as a result of an unlawful search may be excluded by the court during the subsequent criminal trial. In this regard section 35(5) of the Constitution provides as follows:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Commentary

*Our courts have already on numerous occasions excluded evidence obtained by way of illegal searches which infringed the constitutional rights of individuals (see **S v Melanie en 'n Ander** and **Key v Attorney-General, Cape of Good Hope Provincial Division**). The fact that relevant and reliable evidence obtained during an illegal search is excluded during a criminal trial, may in many instances*

result in the acquittal of an accused – the importance of ensuring that a search is conducted legally can therefore not be overemphasized.

3.4 Before a member conducts a search or seizure, such member must ensure that he or she knows and understands the provisions of the applicable legislation, and conducts the search and seizure strictly in accordance with the provisions thereof. If a member has any doubt, the assistance of Legal Services or another competent member must be obtained before a search and seizure is conducted.

4 GENERAL RULE: A SEARCH AND SEIZURE TO BE CONDUCTED IN TERMS OF A WARRANT

Guidelines

4.1 The most important rule to safeguard the rights of the individual against infringement and to ensure that the member executing the search or seizure acts lawfully, is the rule that a warrant be obtained before a search or seizure is conducted. This ensures that an independent judicial officer or justice of the peace (commissioned officer) is placed between the individual and the member. Such officer must decide on his or her own whether or not a search will be justified. Exceptions to this rule are contained in the Criminal Procedure Act, as it will often not be practically possible (or unwise) to first obtain a warrant before conducting a search or seizing an article. These exceptions require strict adherence to the requirements set out in them since the protection of the judgment of the independent judicial officer is not present when these exceptions apply. The rule that a warrant should be obtained prior to conducting a search or seizure should therefore be followed by members unless there are good reason not to do so. Members will often be confronted in court with the question why a search warrant was not obtained and will then be required to give reasons for their failure to do so. If the reason provided by a member in such a case does not justify action without a warrant, the search will be regarded as unlawful and the evidence found during the search may be excluded, apart from the fact that the member may be charged with an offence and that a civil claim may be instituted on account of the unlawful search.

5 RECORDING OF SEARCHES (SEARCH REGISTER)

Guidelines

5.1 A Search Register shall be kept at every station or unit and particulars concerning all searches of vehicles or premises conducted by members attached to that station or unit shall be recorded in the register. The following information shall be recorded in this register:

5.1.1 monthly reference number; and

5.1.2 crime reference number (CAS);

Commentary

Numerical recording of searches in the Search Register is required in order to cross refer to other documentation relating to the search. e.g. the investigation diary or pocket book.

5.1.3 date and time when the search was conducted;

5.1.4 particulars of the member(s) who conducted or helped with the search (number, rank and name);

5.1.5 grounds for conducting the search;

Commentary

The term "grounds for conducting the search" refers to the authorization for the search. If the search was authorized by a warrant, it must be stated as such and the person who issued the warrant must be identified. If a warrant was not obtained, the reason for searching without a warrant must be recorded. In all instances reference must be made to the applicable section and Act in terms of which the search was conducted.

5.1.6 particulars of the premises searched (address or registration number of vehicle);

5.1.7 particulars of other persons (civilians) present during the search, including their capacity with relation to the premises searched;

5.1.8 if force was used, the reasons for the use thereof and any injuries or damage caused in the process;

5.1.9 reference number of the receipt issued in respect of articles seized;

5.1.10 station and SAP 13 number where articles were handed in; and

5.1.11 particulars and signature of member making the entry.

Commentary

Although an official Search Register is not yet available, station commissioners and unit commanders must see to it that the above

information are recorded in a temporary register to be kept in the charge office or other appropriate office in the case of a unit.

5.2 In the case of a roadblock, only one entry is required (paragraph 5.1.1). Only the registration numbers of vehicles from which articles were seized, have to be recorded, although the total number of vehicles searched must be indicated (paragraph 5.1.5). The information required in paragraph 5.1.6 shall only be applicable to the vehicles identified in paragraph 5.1.5.

5.3 The required information has to be recorded in the Search Register after the vehicle or premises have been searched. The member who conducted the search must complete the Search Register. Where more than one member is involved in a search, the member in charge of the search is responsible for completing the Search Register.

5.4 The Search Register shall be inspected at least once a week by a commissioned officer, the station commissioner or the unit commander to ensure compliance with the guidelines on search and seizure contained in this document. The inspecting member shall select at least two entries of searches without warrants per week and interview the members involved in these searches to verify the reasons for these searches and why no warrants were obtained and shall, during such interviews also give guidance to such members on how to act in similar circumstances in future where it appears that they did not act strictly within the bounds of the relevant legislation. These inspections and interviews are primarily intended to assist members to better understand the legal principles involved in searches and seizures and inspecting officers should only institute disciplinary measures against members in those instances where it appears from the inquiries that the member(s) involved acted in gross disregard of these guidelines or the applicable legislation.

5.5 A failure by a member to make an entry in the search register after he or she has conducted a search, must be regarded as misconduct and be dealt with in terms of the disciplinary regulations.

6 ONLY ARTICLES RELATED TO OFFENCES MAY BE SEIZED (SECTION 20 OF THE CRIMINAL PROCEDURE ACT)

Guidelines

6.1 In terms of section 20 of the Criminal Procedure Act, a member may seize an article which falls within one of three categories:

6.1.1 articles which have been concerned or are on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, irrespective of where the said offence was committed;

6.1.2 articles which may afford evidence of the commission or suspected commission of an offence, irrespective of where the said offence was committed; and

6.1.3 articles which are intended to be used or on reasonable grounds believed to be intended to be used in the commission of an offence, provided that the said offence is intended to be committed within the Republic of South Africa.

Commentary

Articles which may be seized can be divided into two groups. The first group are those articles required to prove the commission of an offence (which has already been committed) in a court of law. These articles are articles which a member may seize during the investigation of a crime. The first two categories described in section 20 of the Criminal Procedure Act fall within this group. The second group refers to an article which a person intends to use in the commission of a crime. These are articles which a member may seize to prevent a crime from being committed. As an attempt to commit a crime also constitutes a crime under certain circumstances, these articles may also be required as evidence in a court of law. This group is represented by the third category described in section 20.

6.2 According to section 20 of the Criminal Procedure Act an article means 'anything'. The types of articles subject to seizure are therefore unlimited and may include documents and money. Depending on the circumstances of a specific case, where the mere possession of an article is not illegal and where enough evidence has already been obtained and no need exists to seize an additional article, further articles may not be seized.

Commentary

*In **Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order & others** an interdict against further search and seizure was granted where the State already had sufficient evidence and there was no need to procure further articles merely because they could also have been of use in proving the state's case.*

6.3 The first category of articles is extremely wide and should be interpreted restrictively. Therefore, in addition to being concerned in the commission of an offence, the article may only be seized under this category if it is either reasonably necessary to prove the offence, or if it is an article which will probably be declared forfeit to the State. In so far as articles seized under this category may also be used to prove that a crime has been committed, it overlaps with the second category. As the courts have shown a tendency to interpret the first category restrictively, the second category must also be used when any doubt exists whether the first will be applicable.

Commentary

*It should be noted that provision is **not** made for the seizure of articles which are on reasonable grounds believed to possibly be concerned in the commission or suspected commission of an offence – see **Mandela and Others v Minister of Safety and Security and Another**. Whether reasonable grounds exist to form a belief in terms of the first category will depend on facts from which inferences can be drawn. A practical example will be the mask worn by a bank robber as disguise. The mask did not play any role as far as the requirements for the commission of the offence are concerned, but it is indirectly involved, in the sense that it could serve to identify the robber. On the other hand, a television set bought with a cheque that bounced, cannot be seized as it is not concerned in the commission of the offence (fraud). The cheque endorsed by the bank that no funds are available is the exhibit necessary to prove the offence in this case, and the shop owner will have to institute a civil claim to recover the television set.*

6.4 The second category of articles is the one which will be most frequently used by members during the investigation of crime. Here the mere possession of the article may be a crime, or the article may serve as evidence of the commission of a crime.

Commentary

Examples of articles which fall in this category are unlicensed firearms, a knife used to commit an assault, blood stained clothes found at the house of a murder suspect and the cheque with which the crime of fraud has been committed.

6.5 The third category refers to those articles which were not used in the commission of a crime and the possession of which do not constitute a crime, but in respect of which there are reasonable grounds to believe that they will be used during the commission of a crime. In so far as this category also provides for the seizure of articles in order to prove that the crime of attempt to commit a crime has been committed, it overlaps with the second category. If there is any doubt, both categories must be cited as the reason for the seizure.

Commentary

Examples of articles in this category include a file found in the possession of a person in detention, housebreaking implements found in the possession of a person where such person is unable to provide a satisfactory explanation for being in possession thereof, and possession of a combination of industrial chemicals and other articles which may be used to manufacture an explosive device, once again if the possessor is unable to provide a satisfactory explanation.

6.6 Privileged documents in respect of which the holder of the privilege has not yet relinquished his or her privilege, may not be seized. Documents subject to legal privilege between a legal representative and his client therefore form an exception to the rule that 'anything' may be seized by the police.

Commentary

*Privileged documents were discussed in **SASOL III (Edms) Bpk v Minister van Wet en Orde**. Privileged documents do not include all the documents of a client in the possession of his or her legal representative, but only those documents drafted by either the client or the legal representative with the view to be used in a court case. Other documents required in terms of section 20, for example bank statements and invoice books, may still be seized. Where privileged notes appear on such documents, these may be blanked out by the legal representative, or the client, and must in any event be blanked out for court purposes.*

7 SEARCH WITH A WARRANT (SECTION 21 OF THE CRIMINAL PROCEDURE ACT)

Guidelines

7.1 As was pointed out, the golden rule pertaining to search and seizure is that whenever it is practically possible to do so, a search and seizure should only be conducted after a search warrant has been obtained.

Commentary

From the wording used in section 21(1) it is clear that searches should be conducted by virtue of a search warrant unless the exceptional circumstances which will be discussed later in these guidelines, are present – see guideline 8 hereunder.

7.2 In all instances where an application for a search warrant is made, it must be done in the form as per annexure "A", and must be addressed to a magistrate or justice of the peace. All commissioned officers are justices of the peace and therefore authorized to issue search warrants. In the interest of impartiality, and in order to enhance credibility, the commissioned officer issuing the search warrant must, unless there are compelling reasons, not be directly involved in the particular investigation. If the application is addressed to a magistrate, it must be noted that the person or premises to be searched must be within the magistrate's area of jurisdiction. As the jurisdiction of police officials is the whole country, this limitation is not applicable to commissioned officers issuing search warrants.

7.3 A search warrant must preferably be obtained from a magistrate, but if no magistrate is reasonably available, commissioned officers must not hesitate to exercise their issuing powers.

Commentary

In S v Motloutsi, the court decided that where a commissioned officer was available, the fact that a magistrate was not reasonably available, will be no excuse for not obtaining a search warrant.

7.4 Where a commissioned officer issues a search warrant, it must be done in the form as per annexure "B". A commissioned officer is not prohibited from issuing a search warrant where a magistrate had refused to do so, as long as the commissioned officer is convinced that the requirements, set out in section 21(1)(a) of the Criminal Procedure Act, are met. Such a commissioned officer must also consider the reasons for the refusal, provided by the magistrate, before issuing the warrant. The commissioned officer should, under these circumstances, only issue a search warrant after Legal Services agree that all the requirements are met. Where a magistrate repeatedly refuses to issue search warrants without valid reasons and in so doing hampers the police in performing their duties, this must be reported to the Provincial Commissioner, who must liaise with the relevant Chief Magistrate.

7.5 A member may apply for a search warrant at any time. Station commissioners and unit commanders must liaise with the local magistrates to obtain an after-hour standby list of magistrates for these and other purposes, e.g. bail applications.

Commentary

According to section 21(3)(b) of the Criminal Procedure Act a search warrant may be issued on any day, thus including weekends and public holidays. The need therefore exists for magistrates or justices of the peace to be available after hours in order to issue such warrants.

7.6.1 The application must contain information on oath indicating reasonable grounds for believing that an article mentioned in section 20 of the Criminal Procedure Act is in the possession or under the control of any person or upon or at any premises within the area of jurisdiction of the person to whom the application is addressed.

7.6.2 It must appear from such information that reasonable grounds exist for believing that:

- an offence was committed or is about to be committed;

- certain articles have been concerned in the offence or intended offence, or may afford evidence as to the commission thereof; and

- such articles are in the possession or under the control of a certain person or upon or at a certain premises.

7.6.3 For grounds to be reasonable, the information need not be sufficient to institute a prosecution. The purpose of the search is to find an article which is necessary to prove a criminal case. For this reason hearsay evidence (information supplied by a person who is not present) may be included as information in the sworn statement, as long as such evidence is believed to be true by the person providing the information on oath (to whom it was provided) as well as by the magistrate or justice of the peace issuing the search warrant. The information only has to be objectively speaking sufficient to enable the magistrate or justice of the peace to exercise his or her discretion reasonably.

Commentary

*In cases where the validity of search warrants were disputed e.g. the Mandela case (**supra**), the courts held that the grounds on which the warrant was issued have to be reasonable in the subjective opinion of the magistrate or justice of the peace who issued the search warrant. A court will only interfere with the decision of the person issuing the search warrant, if such person had not properly applied his or her mind to the matter. Whether the said magistrate or justice of the peace properly applied his or her mind to the matter, will be judged by a court on the information supplied in the statement(s) under oath.*

7.7.1 The search warrant may identify the member(s) authorized to conduct the search. The Criminal Procedure Act does not explicitly require the identification of the member(s) conducting the search, but section 21(2) refers to 'a police official' which could be interpreted as meaning a specific police official. It has become customary to identify the police official(s) authorized to conduct a search and this custom should be continued. If a specific member(s) is (are) named in the search warrant as the member(s) authorised to conduct the search, it is advisable to include after the name of the member(s) "or any other member of the South African Police Service", to ensure that other members may also take part in the search.

7.7.2 The search and seizure may only be conducted by police officials. In a case where the assistance of an expert is required to identify or get hold of certain articles, such expert must be a member.

Commentary

Where, for example, computers contain the information to be seized, a police expert must be used to retrieve such information without removing such

computers. If, however, no police experts are readily available, the computers should first be seized, whereafter an expert may be contacted to retrieve the information needed.

7.8.1 A search warrant obtained to search a specific person must explicitly authorize the member(s) to search the person identified in the warrant. Such person need not be identified by mentioning his or her name, as long as an accurate description is furnished which will enable identification, e.g. by describing the office he or she holds. If the warrant is obtained for searching a person, the premises where such person is found cannot be searched by virtue of such a search warrant. A search of the premises may only be conducted without a warrant provided that the prescribed requirements for a warrantless search are met (see guideline 8 below).

7.8.2 A search warrant authorizing the search of a premises must authorize the member(s) to enter and search the identified premises, and also to search all persons on or at the specific premises.

Commentary

If possible, only persons linked to the activities on the premises should be searched. Persons who are clearly identifiable as accidental bystanders may not be searched.

7.9.1 A search warrant must require the member(s) to seize particular articles mentioned in section 20 of the Criminal Procedure Act and which are specified in the warrant. The search warrant must provide clarity on the crime suspected as well as on the articles or class thereof which should be searched for. A detailed description of each and every article to be searched for, is not required. However, a warrant which is too wide and vague may be set aside. It is also possible for a court to declare parts of a search warrant invalid.

Commentary

Only those articles described in section 20 of the Criminal Procedure Act may be the object of the search. Types or classes of articles may be identified, as long as reasonably clear descriptions are given, e.g. all unlicensed firearms or parts thereof as well as ammunition that could be fired by such firearms.

7.9.2 Where a search is conducted in terms of a search warrant and articles, which are not mentioned in the warrant, but which relate to the same crime the warrant was obtained for, are found, special care must be taken by the member(s) present. Unless the circumstances are such that the articles may be seized without a warrant in terms of section 22 of the Criminal Procedure Act, an additional search warrant for those articles must first be obtained to prevent the seizure from being illegal. Although the search is legally allowed in terms of the

original search warrant, the seizure of articles not covered by that warrant amounts to an unlawful extension of the search warrant. A similar approach must be followed where other articles mentioned in section 20 of the Criminal Procedure Act, and which have no relation to the particular investigation, are found during the search.

Commentary

If one of the above-mentioned situations arise, members should only resort to section 22 of the Criminal Procedure Act in exceptional circumstances. If, for example, enough members are present during the search, some should secure the particular articles on the premises while a member leaves to obtain the additional search warrant.

7.9.3 Unless articles are found in plain view, a search warrant only entitles a member to search in places where articles covered by the warrant may possibly be found. When conducting a search, a member may not search in places where it is impossible to find the articles described in the warrant.

Commentary

Where a search warrant for example specifies a motor vehicle as being the object of the search, drawers, cupboards and persons may not be open and searched. Where such places and persons may not be searched in terms of the search warrant, any section 20 articles, e.g. drugs, found on persons during such an unauthorized search, may be excluded as evidence by a court of law, as the search will be illegal.

7.10.1 Section 21(3)(a) of the Criminal Procedure Act states that a search conducted by virtue of a search warrant shall take place during the day – thus between sunrise and sunset. The search may only be conducted by night if it is so authorized by the person who issued the search warrant. Such authorization must be requested when applying for the search warrant, and must appear in writing on the said warrant.

7.10.2 When conducting a search, it must be remembered that infringements of a private person's rights should be kept to a minimum. The effect of the search must be weighed up against the nature and seriousness of the offence as well as the urgency of the search. Therefore, where the premises of a business needs to be searched, the search should be conducted in a way which will disturb the business activity as little as possible, provided that it will not adversely affect the object of the search.

7.11 A search warrant does not expire automatically but can only be used once. Section 21(3)(b) of the Criminal Procedure Act provides that a search warrant shall be of force until it is executed or cancelled by the person who issued it. If

that person is not available, the search warrant may be cancelled by a person with the same authority as the person who issued it. A warrant which is no longer necessary for the investigation of the case, must be cancelled.

7.12.1 According to section 21(4) of the Criminal Procedure Act, any person whose rights have been affected by the execution of a search warrant, is entitled to a copy thereof. A person's rights will be affected, if the person was searched, if his or her premises was searched or if something belonging to him or her was seized. A member executing a search warrant is responsible for making copies thereof beforehand. A copy of a search warrant must be handed to every person whose rights have clearly been affected by a search and seizure.

7.12.2 Although a person whose rights have been affected by the search and seizure is only entitled to a copy of the warrant *after* the original search, the search warrant must be shown to him or her before commencing with the search if he or she is available at the time.

8 SEARCH WITHOUT A WARRANT (SECTION 22(b) OF THE CRIMINAL PROCEDURE ACT)

Guidelines

8.1 For the purpose of seizing any article mentioned in section 20 of the Criminal Procedure Act, a member who on reasonable grounds believes that a search warrant will be issued to him or her if he or she applies for such warrant, but that the delay in obtaining the warrant would defeat the object of the search, may search any person, container or premises without a warrant.

8.2 Section 22(b) of the Criminal Procedure Act provides for a search to be conducted without a warrant. Before a search may be conducted without a search warrant, the member must in the first place have reasonable grounds to believe that if there was time and he or she had applied for a search warrant, such a warrant would have been issued. Such a member must thus have trustworthy information, which he or she believes to be true, clearly indicating that an offence has been committed or is about to be committed. The information must also indicate that there are certain articles which have been concerned in the commission of the offence, may afford evidence as to the commission thereof, or which are intended to be used in the commission of a offence, and that these articles are in the possession or under the control of a certain person, or upon or at a certain premises.

Commentary

An example which illustrates the difficulties surrounding section 22(b), is where anonymous information is received, such as through the Crime Stop help-line,

that section 20 articles are on a certain premises and that they will shortly be removed from there to an unknown destination. Such information cannot be regarded as sufficiently trustworthy to constitute reasonable grounds for search without a warrant thus further investigation will be necessary to establish sufficient grounds for acting as afore-said. This does not mean that anonymous information is useless, but only that it cannot be used on its own to conduct a search and seizure. It may be used to investigate the case, for example to keep the premises under observation, or, depending on the circumstances, to try to obtain the consent of the person in control to search the premises.

8.3 Once the member is satisfied that the facts are sufficient to necessitate a search and seizure, he or she must have further reasonable grounds to believe that the facts of the situation are such that if the search is not conducted forthwith, the delay to obtain a search warrant would defeat the object of the search.

Commentary

The object of the search will be defeated, for example, where it is believed that there are drugs inside a premises, and that the drugs will probably be removed before the member returns with the warrant.

8.4 It must be clearly understood that section 22(b) constitutes an exception to the rule that a search warrant is required before a search and seizure may be conducted. The object of the exception is to enable members to obtain evidence when such evidence will be lost if the search is not conducted immediately. As a search and seizure constitutes a serious limitation of a person's right to privacy, the rule that a warrant is required is an important legal safeguard. The safeguard entails that the available facts must first be considered by an objective and responsible person who has to decide whether the member's belief that a search and seizure is justifiable, is reasonable. This safeguard is, however, avoided when a search is conducted without a warrant, and therefore the court will require that the facts strictly justify such a search, and that it was not practicable to first obtain a search warrant.

8.5 Should the court either find that the facts were insufficient to necessitate a search, or that a warrant could have been obtained before the search was conducted, the court may exclude evidence of articles found during the search and seizure, and declare the search illegal. Such a situation may then result in the acquittal of the accused due to a lack of evidence. Furthermore, the person whose rights were violated, will have a civil claim against the relevant member and the Service, and the member who conducted the illegal search may in terms of section 28 of the Criminal Procedure Act be found guilty of an offence (see guideline 14 below). Members must therefore carefully consider the facts before conducting a search and seizure without a warrant. On the other hand, where the circumstances are such that an immediate search is the only practical way to

procure necessary evidence, the powers conferred by section 22(b) must be exercised without hesitation.

Commentary

*In the case of **S v Motloutsi** (supra), the police conducted a search without a warrant. One of the reasons given for their conduct was that it was after hours, and that a Magistrate was not readily available. The court accepted that a Magistrate was not available but found that the commissioned officer (major) on duty could have been approached for a warrant, and that the search was therefore conducted illegally. The evidence obtained during the search was subsequently declared inadmissible. This case illustrates that it will normally be very difficult to rely on section 22(b) when conducting a search without a warrant.*

8.6 Apart from the provisions contained in section 22(b) of the Criminal Procedure Act, searches without a warrant are also authorised by:

8.6.1 section 23 of the Criminal Procedure Act regarding the search of an arrested person;

8.6.2 section 13 of the Police Service act, regarding the search of vehicles; and

8.6.3 other specific legislation, such as the Arms and Ammunition act, 1969 (Act No. 75 of 1969) and the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992).

8.7 In the specific circumstances set out in the above-mentioned legislation, the search and seizure must be conducted in terms thereof, and not by virtue of section 22(b) of the Criminal Procedure Act. The relevant provisions in these Acts are specifically formulated to relate to the unique circumstances addressed in that particular legislation, and these provisions explicitly state that no warrant is required when a search and seizure is conducted in terms thereof. It should also be noted that according to section 19 of the Criminal Procedure Act the provisions regarding search and seizure contained in the said Act shall not derogate from any power conferred by an other law to enter a premises or to search a person, container or a premises or to seize any matter.

9 SEARCH WITH CONSENT (SECTION 22(a) OF THE CRIMINAL PROCEDURE ACT)

Guidelines

9.1 A member may in terms of section 22(a) search any person, container or premises without a search warrant for the purpose of seizing any article referred to in section 20 of the Criminal Procedure act, if the person concerned consents

to such search for and the seizure of the article in question. The person concerned is the person who is about to be searched or the person in control of the specific premises or in possession of the container to be searched.

9.2 The onus to prove that a person has consented to a search and seizure, rests on the member who alleges that such consent has been obtained. Should the member not succeed in convicting a court of law that valid consent was obtained before the search was conducted the court may find that the fundamental rights of the person concerned were unlawfully violated. The evidence obtained during the search and seizure may then be excluded from being presented in court.

9.3 The requirements for valid consent are:

9.3.1 The consent must have been given voluntarily. Consent which are obtained by threats or violence will not be valid. A member may not threaten or assault a person in order to gain his or her consent to conduct a search and seizure. If a member believes on reasonable grounds that a search warrant will be issued to him or her if he or she applies for it, such member may inform the person that unless he or she consents to the search, a search warrant will be obtained and the search will be conducted without his or her consent. Consent given in such circumstances will still be valid consent, provided that the member is able to persuade the court that he or she did entertain such reasonable belief. If the member is unable to do so, his conduct will be regarded as unlawful and the consent invalid.

9.3.2 The consent may be given explicit or by implication. Consent may be given in writing, verbally or by way of other gestures. Mere submission to a search and seizure (paragraph 9.3.6 below), however, does not constitute valid consent. Where the consent is not given explicitly, a member must keep in mind that he or she carries the burden to prove that consent was indeed given, and must therefore make sure that the person is indeed giving consent.

9.3.3 The consent must be given before the search and seizure is conducted, and may be withdrawn at any time before the search and seizure has been completed. Consent given after a search and seizure has commenced, will not be valid. If the consent is withdrawn after the search has commenced, the member may only continue if entitled to do so in terms of section 22(b) (see guideline 8 above). This means that at the time when the consent is withdrawn, the member must have reasonable grounds to believe that a search warrant will be issued to him or her if he or she applies for such a warrant, but that the delay in obtaining the warrant would defeat the object of the search.

9.3.4 The person giving the consent must be capable of understanding what he or she consents to. A mentally ill, sleeping, unconscious or drunk person cannot give valid consent for a search and seizure. As far as children are concerned,

there is no legal age at which a child is considered capable of giving valid consent. The member will have to prove, if necessary, that the person was able to understand what he or she consented to and understood the nature of a search and seizure.

9.3.5 The person giving the consent must know what he or she is consenting to. The person who gives consent must understand the implications of what he or she is consenting to, i.e. the member will look through his or her clothing or property in order to obtain evidence of an offence. The member must be sure that the person knows what the consent is given for at the time when permission to conduct a search and seizure is requested. Furthermore, the member may only act within the limits of what was consented to. If a person consents to his or her garage being searched, the member may not without further ado search the house as well.

9.3.6 The mere fact that a person submits to a search and seizure being conducted or simply does not object to it being conducted, does not necessarily mean that the person consents thereto. The member must ensure that the person actually consents before the search is conducted, and does not merely allow it because he or she feels threatened or intimidated.

9.3.7 In principle, the consent must be given by the person who will be the subject of the search or who's rights will be infringed. A person who is not the owner or lessee, or who does not have the legal right to consent, may not give consent for a search and seizure. The member must ensure that the person who give consent has the legal right to do so. If any doubt exists, the search and seizure must not be conducted without a search warrant on the ground of such consent.

9.4 A member who alleges that a search and seizure was conducted with the consent of the person concerned, will have to prove that valid consent was indeed given. This provision must therefore be used with circumspection. It does, however, have great value where a member is conducting routine crime prevention duties and encounters a suspicious person at a place or under circumstances where sufficient grounds for a search do not exist. In these circumstances a member may request such person's permission to search him or her. It should be noted, however, that a mere refusal to be searched, will not, on its own, necessarily constitute sufficient grounds to search such person without a warrant or to form a certain belief, although it may contribute thereto.

9.5 It will not always be required from a member to obtain consent both to search, as well as to seize. A member who obtained consent to search and who finds an article which is clearly an article mentioned in section 20 of the Criminal Procedure Act, may seize such article forthwith. However, if the article found may possible be one mentioned in section 20, but the member does not have a

reasonable belief to that effect, the member must also obtain consent to seize the said article.

Commentary

The difference in this regard can be illustrated by means of the following example: after a murder was committed with a 9 mm pistol, a person is searched who consented to such search. Where an unlicensed 9 mm pistol is found on such person during the search, it may be seized without further consent. Where it is a licensed pistol, however, additional consent must be obtained before the pistol can be seized and sent for ballistic tests.

10 SEARCH OF ARRESTED PERSON AND SEIZURE OF ARTICLES (SECTION 23 OF THE CRIMINAL PROCEDURE ACT)

Guidelines

10.1 Section 23 of the Criminal Procedure Act confers certain powers to search and seize on a person making an arrest. A member who arrests a person, must, as soon as possible, search such person and seize any article mentioned in section 20 of the Criminal Procedure Act which is in the possession of or in the custody or under the control of the arrested person. No search warrant is required for such a search and seizure.

Commentary

*One of the circumstances in which a person may be arrested without a warrant of arrest, is where the member reasonably suspects that such a person has committed a Schedule 1 offence. It should be noted that a person may be arrested without a warrant on reasonable grounds to **suspect**, whereas the requirement to conduct a search without a warrant, is reasonable grounds to **believe**. (Once a person has been arrested, such person may forthwith be searched, and no warrant is required.) In both instances, before a person may either be arrested, or searched, reasonable grounds must exist before a member may act. The difference between a suspicion and a belief is that when something is suspected, further confirmation or investigation is necessary before it can become a belief. If, for instance, a member on patrol receives a description on the radio of a suspected robber with a bag who is in the vicinity, and he or she notices a person fitting the description with the described bag walking past him or her, he or she may reasonably suspect that person to be the robber. When the member then approaches the person, and such person panics and runs away, this may serve as confirmation, and what the member only reasonably suspected, may now become a reasonable belief. In the case of **Duncan v Minister of Law and Order**, the court confirmed that the word "suspicion" indicates that the person who holds the suspicion is not certain or does not have*

adequate proof. A reasonable belief on the other hand indicates that the person is certain and therefore holds a belief regarding certain facts. The difference between suspicion and belief is therefore that where a person only suspects something, he or she is not sure that what he or she suspects is actually true, whereas a person who reasonably believes something, is sure in his or her own mind that it is true.

10.2 The phrase "in the possession of or in the custody or under the control of" is very wide and includes far more than what is on the person of the arrested person or in the pockets of his or her clothing. Articles in such person's home or motor vehicle are also under his or her control, although he or she may not be personally present at or in these places when the arrest is made. Such places may, however, only be searched if the search will reasonably relate to the suspected crime(s) for which the person has been arrested. When an article is in the physical possession of someone else, but the arrested person is entitled to claim it, it is still considered to be under the control of the arrested person.

10.3 In the interest of the safety of the member and any other person in the vicinity, a member conducting the search of an arrested person must also place any object found on such person and which may be used to cause bodily harm to such person or to others, into safe custody. Various persons are protected against potential harm by this provision – notably the person who performed the arrest, the arrested person and other persons in the immediate vicinity of the arrested person. Such objects, if not articles mentioned in section 20 of the Criminal Procedure Act, remain the property of the arrested person and must be returned to such person upon his or her release.

11 ENTERING OF PREMISES IN CONNECTION WITH STATE SECURITY AND OTHER OFFENCES (SECTION 25 OF THE CRIMINAL PROCEDURE ACT)

Guidelines

11.1 A magistrate or justice of the peace may also issue a search warrant in terms of section 25 of the Criminal Procedure Act. The main aim of this section is to empower members to enter premises where meetings are to be held which may threaten state security or law and order. In addition, members are authorized to enter premises where an offence has been committed or is planned. The provisions thereof stipulate that a magistrate or justice of the peace is only authorized to issue a search warrant if it appears from information on oath that there are reasonable grounds to believe -

11.1.1 that a meeting is being held or is to be held in or upon any premises within his or her area of jurisdiction and that the internal security of the Republic or the

maintenance of law and order is likely to be endangered by or in consequence of such meeting; or

11.1.2 that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his or her area of jurisdiction.

Commentary

The general acquirements regarding the issuing of search warrants in terms of section 25 of the Criminal Procedure Act are similar to those pertaining to such warrants issued under section 21(1)(a) of the Criminal Procedure Act. For example, it can be issued by a magistrate or justice of the peace (thus including commissioned officers), and information on oath indicating reasonable grounds to form a certain belief, is needed.

11.2 The search warrant shall authorize a member to enter the premises in question at any reasonable time. The provisions of this section differ from those contained in section 21(3)(a) of the Criminal Procedure Act, with regard to the time the search warrant may be executed. The reasonableness of the time the entering takes place, as required by section 25, will depend on the activities on the premises.

Commentary

A much lesser restriction regarding the time of entering the premises to execute the search warrant, is placed on members by this section. The various possibilities provided by section 25(1) for entering a premises, e.g. entering a premises, e.g. entering can take place before the meeting has started, is also indicative of this lesser restriction.

11.3 The purpose for the entering of the said premises shall be one of the following:

11.3.1 to carry out such investigations and to take such steps as the particular member may consider necessary for -

- the preservation of the internal security of the Republic; or
- the maintenance of law and order; or
- the prevention of any offence; and

11.3.2 to search the premises or any person in or upon it for any article referred to in section 20 of the Criminal Procedure Act which such member on reasonable grounds suspects to be in or upon or at the premises or upon such person; and

11.3.3 to seize any article mentioned in section 20 of the Criminal Procedure Act.

Commentary

Wide powers are given to members regarding the purpose for entering the premises in question. Firstly a member can carry out such investigations and take such steps as he or she may consider necessary for achieving one of the objectives listed in (i) - (iii). What is necessary, e.g. to dissolve the meeting, will thus depend on the subjective decision of the member concerned which means that objective standards will not apply. A member also has the power to search the premises and any person in or upon it and to seize article mentioned in section 20 of the Criminal Procedure Act.

11.4 This search warrant may also be issued on any day and the duration thereof is the same as one issued under section 21 of the Criminal Procedure Act, i.e. until it is executed, or cancelled by the person who issued it or by someone with like authority (see guideline 6 above).

11.5 The powers to investigate, search and seize in the circumstances discussed above may also be used by a member without a warrant if such member on reasonable grounds believes that a warrant will be issued to him or her, if he or she applies for it AND that the delay in obtaining such warrant would defeat the object thereof. A section 25 warrant is therefore not needed in a situation which is similar to the one provided for by section 22(b) of the Criminal Procedure Act (see guideline 8 above).

12 ENTERING OF PREMISES FOR PURPOSES OF OBTAINING EVIDENCE (SECTION 26 OF THE CRIMINAL PROCEDURE ACT)

Guidelines

12.1 A member who is investigating an offence or alleged offence and who reasonably suspects that a person who may provide information regarding such offence is on a certain premises, may enter such premises without a warrant. The purpose of the entry must be to question that person and to obtain a statement from him or her. A distinction is drawn between a private dwelling and other premises: lawful entry into a private dwelling requires the consent of the occupier thereof. Where no consent can be obtained, a member is not allowed to enter such private dwelling.

12.2 The purpose of an entry in terms of section 26 of the Criminal Procedure Act must be distinguished from situations where the purpose is to search and seize. In terms of this section the purpose of entering a premises is to obtain information regarding an offence from a person, and not to conduct a search. The person who may provide information regarding an offence referred to in

section 26, may be either a witness or a person of whom it is suspected that he or she was involved in the commission of the said offence. Where the person is a suspect, the member will only act in terms of this section if such member does not intend to lawfully arrest the suspect. Should the member decide that a lawful arrest can be made, such member may, if necessary in order to effect such arrest, act in terms of section 48 of the Criminal Procedure Act. This section authorizes a member to break open, enter and search the premises for the purpose of effecting the arrest, after such member first audibly requested entrance to the premises, indicated the purpose of seeking entrance, and failed to gain entrance to the said premises.

12.3 A member who enter a premises in terms of section 26 to conduct an interview with a person, is not entitled by the said section to search such premises. Should it become necessary during the member's presence on the premises, a search and seizure may be conducted in terms of section 21 or 22 of the Criminal Procedure Act (see guidelines 7, 8 and 9 above.)

12.4 If the person who may provide information refuses to answer the member's questions satisfactory, the matter must be discussed with the public prosecutor in order to obtain a subpoena in terms of section 205 of the Criminal Procedure Act for the public prosecutor to question the person before a magistrate.

Commentary

According to section 205, the attorney-general may request a judge or magistrate to subpoena a person who is likely to give material or relevant information regarding any alleged offence, to appear before a judge or magistrate for examination by the attorney-general or a public prosecutor. Upon the refusal by such person to answer the questions put to him or her, and if the said judge or magistrate is of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order, such person may be sentenced to imprisonment in terms of section 189 of the Criminal Procedure Act.

12.5 If the person who may consent to the entry of the member into a private dwelling, refuses the member entry, such member may not enter the premises but may approach the attorney-general or public prosecutor and request that a subpoena in terms of section 205 be issued. Such member may then serve the subpoena on the person suspected of having the information at his or her disposal which will then compel the person to appear before a magistrate and be questioned concerning his or her knowledge regarding the offence.

13 RESISTANCE AGAINST LAWFUL ENTRY, SEARCH AND SEIZURE (SECTION 27 OF THE CRIMINAL PROCEDURE ACT)

Guidelines

13.1 Section 27 of the Criminal Procedure Act in principle authorizes the use of force by members to overcome any resistance against lawful searching, or entering of premises under section 26 of the Criminal Procedure Act. According to the provisions of section 27 a member may use such force as may be reasonably necessary to overcome any resistance against a lawful search or entering of premises, including the breaking open of a door or window.

13.2 A member may lawfully search -

13.2.1 a person or premises (including the persons upon it) identified in a search warrant under section 21 of the Criminal Procedure Act;

13.2.2 a person or premises without a search warrant under section 22 of the Criminal Procedure Act;

13.2.3 an arrested person under section 23 of the Criminal Procedure Act;

13.2.4 premises and the persons upon it under section 25 of the Criminal Procedure Act; and

13.2.5 a person or premises in terms of other legislation (such as the Arms and Ammunition Act or the Drugs and Drug Trafficking Act).

As far as entering in terms of section 26 is concerned (guideline 12 above). it should be emphasized that a private dwelling cannot be entered without the consent of the occupier thereof. As a consequence of that provision, where a member enter premises for the purposes of obtaining evidence, such a member is not allowed to use force to gain entry to a private dwelling if the occupier thereof refuses to allow him or her entry. However, force may be used where entrance is sought into premises which is not a private dwelling, or such part of a premises which does not form part of a private dwelling, e.g. to get into a vehicle or to enter a premises where the gate is locked. As the term private dwelling is a legal technical term, the assistance of Legal Services must be obtained if any doubt exists in this regard.

13.3 According to section 13(3)(b) of Police Service Act, a member who is authorized by law to use force when performing an official duty, may use only the minimum force which is reasonable in the circumstances. The fact that only the minimum force which is reasonably necessary to overcome the resistance may be used, requires that the force used be proportional to the nature and seriousness of the crime involved, the resistance offered and the urgency with which the search has to be conducted. Before resorting to the use of force, the member must consider all the surrounding circumstances and must choose the alternative which will ensure that the object of the search is accomplished in a way which will have the least impact on the rights of persons involved.

13.4 A member is only allowed to use force after admission to the premises was audibly demanded by such member, and the purpose for which entry is sought, was notified. Members must demand admission in a loud voice to make it easier to find witnesses should it be alleged that this requirement was not met.

13.5 If a member is on reasonable grounds of the opinion that the article which is the subject of the search may be destroyed or disposed of if entry is first audibly demanded, it is not necessary to demand such entrance. This is the so-called 'no-knock clause' which is contained in section 27(2) of the Criminal Procedure Act. The reasonable grounds required only have to exist in the opinion of the member concerned. This clause is of particular importance when the police deal with small objects which may be swallowed, flushed down a toilet or otherwise be destroyed or disposed of if the person in possession thereof is 'warned' that the police have arrived.

13.6 If any doubt exist on the use of force to conduct a search or entering a premises in terms of section 26, the assistance of Legal Services must be obtained.

14 WRONGFUL SEARCH IS AN OFFENCE AND DAMAGES MAY BE AWARDED (SECTION 28 OF THE CRIMINAL PROCEDURE ACT)

Guidelines

14.1 A member who acts contrary to the authorization in a search warrant, or who conducts an unlawful search, or seizes an article without being authorized thereto by law, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months. A member executing a search warrant, or conducting a search without a search warrant must at all times conform to the applicable legal rules. If a member at any time doubts whether a specific action which he or she intends to carry out will conform to the legal rules applicable, the assistance of Legal Services must be obtained before the intended search and seizure is carried out.

Commentary

According to section 28(1) of the Criminal Procedure Act wrongful search constitutes an offence and a person committing the offence is liable on conviction to a fine or to six months' imprisonment. Examples of wrongful searches with a warrant will be:

- search premises A when the search warrant only authorizes the search of premises B;

- articles are seized which do not belong to the specified category in the search warrant; and

- *executing the search warrant by night without written authorization.*

A search without a warrant will be wrongful if no reasonable grounds are present for the member to believe, firstly, that a search warrant will be issued if he or she applies for one, or secondly, that the delay in obtaining such warrant would defeat the object of the search.

14.2 A member who conducts an illegal search or seizure may be ordered to pay damages to any person who was a victim to such wrongful search and seizure. If a member provided false information under oath in respect of which a search warrant has been issued, and is in consequence thereof convicted of perjury, the court convicting such member may also order him or her to pay damages as compensation to the person who suffered damages as a consequence of unlawful entry, search or seizure, as the case may be.

Commentary

Compensation may be awarded by the court to a person who suffered damages as a result of a wrongful search. The victim of the wrongful search must apply for such an award. If compensation in respect of the damages suffered is granted by the court, no further civil action may be instituted by the victim regarding the incident.

14.3 It should also be noted that section 28(1) does not include the whole spectrum of possible charges against a member who conducts an unlawful search and seizure. Such member may also be charged with common law crimes such as *crimen injuria*, assault, malicious damage to property, theft and even housebreaking with the intent to commit an offence.

15 SEARCH TO BE CONDUCTED IN A DECENT AND ORDERLY MANNER (SECTION 29 OF THE CRIMINAL PROCEDURE ACT)

Guidelines

15.1 A member shall conduct a search of any person or premises with strict regard to decency and order. A member shall only search persons of the same sex as he or she is. A person of the opposite sex shall not be searched, even if such person consents thereto. If no member of the same sex as the person to be searched is available, a private person of the required sex, shall be designated to perform the search.

Commentary

Although section 29 of the Criminal Procedure Act only refers to female persons and requires a female person to be searched by a female person only, the

section must be interpreted to include male persons, which means that a male person may be searched by a male person only.

15.2 A member who searches a premises shall conduct the search in an orderly fashion. Due respect for the belongings of other persons shall be shown at all times. Although a search must be thoroughly conducted, a member shall not cause unnecessary disorder or damage. Such member should always treat the possession of others like he or she wants others to treat his or her possessions.

16 GUIDELINES ON SPECIFIC LEGISLATION REGARDING POWERS TO SEARCH AND SEIZE

16.1 A project team under auspices of the Legal Component Detective Services will be established to formulate guidelines in due course on the powers to search and seize contained in the following legislation:

16.1.1 the Alien Control Act, 1991 (Act No 96 of 1991);

16.1.2 the Stock Theft Act, 1959 (Act No 57 of 1959);

16.1.3 the Livestock Brands Act, 1962 (Act No 87 of 1962);

16.1.4 the Liverstock Improvement Act, 1977 (Act No 25 of 1977);

16.1.5 the Game Theft Act, 1991 (Act No 105 of 1991);

16.1.6 the Abattoir Hygiene Act, 1992 (Act No 121 of 1992);

16.1.7 the Drugs and Drug Trafficking Act, 1992 (Act No 140 of 1992);

16.1.8 the Import and Export Control Act, 1963 (Act No 45 of 1963);

16.1.9 the Customs and Excise Act, 1964 (Act No 91 of 1964);

16.1.10 the Merchandise Marks Act, 1941 (Act No 17 of 1941); and

16.1.11 the Investigation of Serious Economic Offences Act, 1991 (Act No 117 of 1991).

16.2 The Legal Component National Safety Services will compile guidelines to be incorporated in this document in due course, on the following legislation:

16.2.1 section 13 of Police Service Act, 1995 (Act No 68 of 1995);

16.2.2 the Customs and Excise Act, 1964 (Act No 91 of 1964);

16.2.3 the Alien Control Act, 1991 (Act No 96 of 1991);

16.2.4 the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No 54 of 1972);

16.2.5 the Arms and Ammunition Act, 1969 (Act No 75 of 1956);

16.2.6 the Explosives Act, 1956 (Act No 26 of 1956);

16.2.7 the Import and Export Control Act, 1963 (Act No 45 of 1963);

16.2.8 the Control of Access to Public Premises and Vehicles Act, 1985 (Act No 53 of 1985); and

16.2.9 the Drugs and Drug Trafficking Act, 1992 (Act No 140 of 1992).

APPENDIX D

APPLICATION FOR A WARRANT TO SEARCH AND SEIZE

(Section 20, 21 and 25, Criminal Procedure Act, No. 51 of 1977)

Whereas it appears from information under oath contained in the affidavits of:

(state names of deponents) of which copies are attached to this application, that within the magisterial district of

_____ *(state magisterial district)*

there are articles identified in "Annexure A" hereto, which:

(a)* is on reasonable grounds believed to be concerned in the suspected commission of an offence;

(b)* may afford evidence of the suspected commission of an offence;

(c)* is on reasonable grounds believed to be intended to be used in the commission of an offence which offence(s) is/are the offence(s) of

(state the offence(s)), committed on/at approximately

(state date(s) of offence(s)), and such articles are

* in the possession of or under the control of

(state name(s) of person(s));

* upon or at

(describe premises),

Application is hereby made that a search warrant be issued, requiring the following members of the South African Police Service to

* search the identified persons;

* enter the identified premises and search all persons found on the premises who can be linked to the activities on such premises

and to seize any articles referred to in "Annexure A" found

* in the possession or under the control of such person;

* upon or at such premises

and deal with it in accordance with the provisions of section 30 of Act 51 of 1977.

The search shall be conducted during daytime.**

* *Delete if not applicable.*

** *If special reasons exist for the search to be conducted during the night, delete and motivate on the reverse side.*

Members who will conduct the search:

Rank Name Work address

(a)

(b)

(c)

(d)

(e)

(f)

(g) Any other member of the South African Police Service may be able to assist in conducting such a search.

Search warrant applied for by no. _____ rank

full names

on this the _____ day of _____ 19____.

SIGNATURE OF APPLICANT

I, the undersigned, no. _____ rank

full names

* hereby declare under oath/solemnly confirm:

It is necessary to conduct the search after hours for the following reasons:

* I am acquainted with the contents of this statement and understand it.

* I have no objection to the taking of the prescribed oath.

* I declare the oath to be binding on my conscience.

OR

I am acquainted with the contents of this statement, and understand it, and solemnly confirm it.

SIGNATURE OF DEPONENT

** Delete if not applicable*

SIGNED AND ATTESTED IN MY PRESENCE ON THIS THE _____ DAY
OF _____

_____ 19 _____ AT
_____ AND AT

_____ TIME.

COMMISSIONER OF OATH

Full names: _____

Capacity: _____

Business Address: _____

Area: _____