

The search and seizure powers of environmental management inspectors

M Kabai

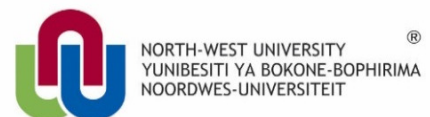
25622323

Mini-dissertation submitted for the partial fulfilment of the degree *Magister Legum* in *Environmental Law and Governance* at the Potchefstroom Campus of the North-West University

Promoter: Prof PG du Toit

November 2016

It all starts here TM



ACKNOWLEDGEMENTS

First I wish to thank my supervisor, Prof Pieter Du Toit, whose expertise, understanding, patience and guidance as supervisor and mentor greatly assisted my efforts.

I also wish to thank my family for their moral support, particularly my parents who taught me that dedication and hard work lead to success.

Lastly I must thank my wife Tebogo whose love and support pushed me beyond the edge of my limits.

Abstract

*Environmental management inspectors (EMIs) are important players when it comes to enforcement of and compliance with environmental law in South Africa. As a result, this study addresses their mandate, functions and the powers they possess in connection with search and seizure, with or without a warrant. The study falls to some extent under at least two sub-themes of the research unit, namely environmental governance and local government and environmental rights. The study is a literature study, comprising an exploration of legislation, study of case law, electronic sources, text books and academic articles relating to the mandate and functions of EMIs and also the powers of the environmental management inspectors to search premises and seize items. **Keywords:** Governance, Enforcement, Compliance, Search and Seizure.*

TABLE OF CONTENTS

| | |
|---|---------|
| Table of contents | iii - v |
| List of abbreviations | vi |
| 1 Introduction | 1 |
| 1.1 The appointment and role of the Environmental Management Inspectors | 2 |
| 1.1.1 National Environmental Management Act: Air Quality Act 39 of 2004 | 5 |
| 1.1.2 National Environmental Management Act: Waste Act 59 of 2008 | 7 |
| 1.1.3 National Environmental Management Act: Protected Areas Act 57 of 2003 | 8 |
| 1.1.4 National Environmental Management Act: Integrated Coastal Management Act 24 of 2008 | 9 |
| 1.1.5 National Environmental Management Act: Biodiversity Act 10 of 2004 | 9 |
| 1.2 Powers of search and seizure generally | 10 |
| 1.3 The relationship between the Criminal Procedure Act and NEMA | 12 |
| 2 Search and seizure powers with a warrant | 13 |
| 2.1 Introduction | 13 |
| 2.2 Statutory provisions in respect of search warrants | 13 |
| 2.2.1 National Environmental Management Act | 13 |
| 2.2.2 Criminal Procedure Act | 14 |
| 2.3 Requirements for a valid search | 15 |
| 2.4 The execution of search warrants | 17 |
| 2.4.1 The disposal of seized items | 18 |
| 2.4.1.1 The manner in which property must be disposed of in terms of the CPA | 19 |
| 2.5 Consequences of unlawful search and seizure | 20 |
| 3 EMIs search and seizure powers without a warrant | 22 |
| 3.1 Introduction | 22 |
| 3.2 Statutory provisions in respect of warrantless searches | 23 |

| | | |
|---------|--|----|
| 3.2.1 | National Environmental Management Act | 23 |
| 3.2.2 | South African Police Act | 24 |
| 3.2.3 | Criminal Procedure Act | 25 |
| 3.2.2.1 | General provisions of the Act | 27 |
| 3.2.2.2 | Consent searches | 29 |
| 3.3 | Conclusion | 33 |
| 4 | Environmental Management Inspectors' routine inspections | 34 |
| 4.1 | Introduction | 34 |
| 4.2 | Routine inspection by EMIs | 37 |
| 4.2.1 | Legal representation during routine inspection | 40 |
| 4.2.2 | Confidentiality of information during routine inspection | 40 |
| 5 | Conclusion and recommendations | 42 |
| 5.1 | Introduction | 42 |
| 5.2 | National Environmental Management Act | 43 |
| 5.3 | Validity of search and seizure warrants | 44 |
| 5.4 | Reasonable grounds criterion | 44 |
| 5.5 | Search and seizure with a warrant | 45 |
| 5.6 | The stage after search and seizure | 46 |
| 5.7 | Recommendations | 47 |
| 5.7.1 | Specific Environmental Management Act | 47 |
| 5.7.1.1 | National Environmental Management Act: Air Quality Act | 47 |
| 5.7.1.2 | National Environmental Management Act: Water Act | 48 |
| 5.7.1.3 | National Environmental Management Act: Waste Act | 49 |

Bibliography

LIST OF ABBREVIATIONS

| | |
|--------|---|
| APPA | Atmospheric Pollution Prevention Act |
| CPA | Criminal Procedure Act |
| DEAT | Department of Environmental Affairs and Tourism |
| ECA | Environmental Conservation Act |
| EIA | Environmental Impact Assessment |
| EMI | Environmental Management Inspector |
| GDACE | Gauteng Department of Agriculture, Conservation and Environment |
| MEC | Member of the Executive Council |
| NEMA | National Environmental Management Act |
| NEMAQA | National Environmental Management Act: Air Quality Act |
| NEMBA | National Environmental Management Act: Biodiversity Act |
| NEMPAA | National Environmental Management Act: Protected Areas Act |
| NEMWA | National Environmental Management Act: Waste Act |
| SAPS | South African Police Service |
| SEMA | Specific Environmental Management Act |
| RSA | Republic of South Africa |

Chapter 1

1 Introduction

The environmental rights in South Africa are entrenched in the *South African Constitution* (Constitution) which states that everyone has a right to an environment that is not harmful to their health or well-being.¹ This constitutional right has brought about a new awareness of environmental protection and sustainable development which is now reflected in South Africa's environmental legislation. The Constitution is intended to promote environmental justice in South Africa by ensuring that all members of society are not exposed to a harmful environment.² In order for the right to be meaningful there must be environmental enforcement mechanisms against those who deliberately cause harm to the environment.³

The *National Environmental Management Act* (NEMA)⁴ was enacted with a view to giving effect to section 24 of the Constitution. NEMA provides for the appointment of the Environmental Management Inspectors (EMIs).⁵

EMIs ensure that section 24 of the Constitution is advanced and also ensure that the NEMA as the framework legislation and other environmental legislation are not contravened and they are enforced.⁶ Both EMIs and members of the South African Police Service (Police) have the authority to investigate those who are suspected of violating environmental laws and this includes powers of search and seizure.⁷ The NEMA further provides that all police officers have the powers of EMIs.⁸ Police officers and EMIs are key role players in ensuring that environmental laws are enforced.⁹

The purpose of this dissertation is to examine the powers of EMIs in respect of search and seizure, especially EMIs' powers to search and seize with a warrant, EMIs' powers

1 Section 24(a) *Constitution of the Republic of South Africa*, 1996.

2 Kidd *Environmental law* 2 303.

3 Boyd *The Environmental Rights Revolution: A Global Study of Constitution, Human Rights, and the Environment* 237.

4 *National Environmental Management Act* 107 of 1998.

5 Sections 31B, 31BA and 31C *National Environmental Management Act* 108 of 1998.

6 Section 31O *National Environmental Management Act* 108 of 1998.

7 Section 31H (5) *National Environmental Management Act* 108 of 1998.

8 Anon 2013 <http://www.issa.org.za>.

9 Truter 2014 <http://www.werksmans.com>.

to search and seize without a warrant and their powers in connection with routine inspections, and in the end to draw some conclusions and possibly make recommendations. Following is a general overview of the appointment and role of EMIs in environmental law enforcement.

1.1 The appointment and role of the Environmental Management Inspectors

EMIs are commonly known as the 'Green Scorpions'.¹⁰ They are officials from national, provincial and municipal government departments designated by the Minister of Environmental Affairs or Member of the Executive Council (MEC) to monitor compliance with, and enforce national environmental legislation, including regulations and permits issued under such legislation.¹¹ EMIs came into being as result of the amendment to the NEMA that came into operation in May 2005.¹² It also introduced a number of offences in respect of EMIs in section 34A such as:

- (a) hindering or interfering with an EMI in the execution of that EMI's official duties;
- (b) pretending to be an EMI, or the interpreter or assistant of such an EMI;
- (c) furnishing false or misleading information when complying with a request of an EMI; or
- (d) failure to comply with a request of an EMI.

According to the Department of Environmental Affairs, EMIs were created because of the following reasons:

- (a) a lack of proper compliance monitoring and enforcement system;
- (b) a lack cooperation between different departments;
- (c) weak legal instruments;
- (d) inspectors' improper relationship with polluters;
- (e) a lack of proper communication channels;
- (f) offenders played departments off against each other;

¹⁰ Tucker and Mandlana 2007 <http://www.enviropaedia.com>

¹¹ Section 31D *National Environmental Management Act* 107 of 1998.

¹² *National Environmental Management Amendment Act* 46 of 2003.

- (g) to provide environmental enforcement officials with a comprehensive set of legislative powers to enable them to carry out their constitutional mandate; and
- (h) to promote consistency in which compliance and enforcement activities are carried out in terms of national environmental legislation.¹³

There are different categories of EMIs depending on their experience, qualifications and seniority. EMIs are categorised according to a ranking system from Grade 1 to 5. A Grade 1 EMI has more powers than any other grade EMI. Grades 1, 2, 3, and 4 EMIs are found across all EMI offices and they undertake compliance monitoring, and administrative and criminal enforcement activities in the brown, green and blue subsector. Furthermore, Grade 5 EMIs are appointed as “field rangers” to execute compliance and enforcement duties within various national and provincial protected areas.¹⁴ EMIs’ powers are linked to the grade of individual EMIs, and are distributed as follows:

Table 1: EMI ranking system¹⁵

| Grade 5 EMIs | Grade 4 EMIs | Grade 3 EMIs | Grade 2 EMIs | Grade 1 EMIs |
|---|--|---|--|--|
| Powers of search, seizure and arrest in terms of S31H (5) (Chapters 2 and 5 of the <i>Criminal Procedure Act</i> (CPA) 55) | Inspection powers in terms of S31K (1) to (4) | Inspection and investigation powers in terms of S31H (1) to (4). | Inspection and investigation powers in terms of S31K and S31H (1) to (4). Enforcement powers in terms of S31I and S31J and S31H(5) (CPA powers of search and | Inspection and investigation powers in terms of S31K and S31H (1) to (4). Enforcement powers in terms of S31I and S31J and S31H(5) (CPA powers of search and seizure and arrest) |

¹³ Bapela 2009 <http://www.dwaf.gov.za>.

¹⁴ Anon 2013 <http://www.environment.gov.za>.

¹⁵ Craigie et al *Environmental Compliance and Environmental Institutions* 95.

| | | | | |
|--|--|---|---|---|
| of 1977), S31I and S31J. | | | seizure and arrest) | Administrative powers in terms of S31L and S31N. |
| Note: This grade is reserved for field rangers only. | Note: Investigation and enforcement powers (e.g. search, seizure and arrest) are excluded for this grade. | Note: Investigation and enforcement powers (e.g. search, seizure and arrest) are excluded for this grade. | Note: Administrative powers (e.g. issuing compliance notices) are excluded for this grade. | |

EMIs' enforcement actions include formal or informal warnings to comply and the issuing of compliance notices or directives.¹⁶ If the person fails to comply with the compliance notice or directive, the EMI must report the non-compliance to the Minister or MEC.¹⁷ The Minister or MEC may revoke or vary the relevant permit or authorisation.¹⁸

In addition, in *Khabisi NO and Another v Aquarella Investment 83 (Pty) Ltd*,¹⁹ it was also shown how important EMIs are in ensuring compliance with environmental laws. The Gauteng Department of Agriculture, Conservation and Environment (GDACE) environmental inspector issued compliance notices in terms of section 31L of the NEMA and directives in terms section 31A of the *Environmental Conservation Act 73* of 1989 to both the first and second respondents in order to cease all construction activities. The respondent elected to ignore the compliance notices and directives issued by the applicants as it considered them invalid and of no force or effect. The court found that

¹⁶ Section 34A *National Environmental Management Act* 107 of 1998.

¹⁷ Section 31N (2) *National Environmental Management Act* 107 of 1998.

¹⁸ Section 31N (2) (a) *National Environmental Management Act* 107 of 1998.

¹⁹ 2007 9114/2007 TPD (Reportable).

the respondent, by ignoring the compliance notices and directives issued by an EMI, breached section 31L (4) of the NEMA. The provision requires that the recipient of a compliance notice must comply with it within the prescribed period stated in the notice unless the Minister or MEC has agreed to suspend the operation of the compliance notice.²⁰ These matters are an indication of the critical role the EMIs play when it comes to the enforcement of and compliance with environmental laws in South Africa.

As pointed out in the introduction, the NEMA provides for the appointment of the EMIs and their powers, including powers relating to investigations, search of premises, seizure of items, routine inspections, and the power to issue compliance notices. The following section will provide an overview EMIs' mandates²¹ and functions²² as contained in the NEMA and other specific environmental management acts (hereafter referred to as SEMAs). EMIs are designated to enforce SEMAs according to their mandate issued by the Minister or relevant MEC.²³ EMIs must see to it that environmental legislation is followed and enforced.

1.1.1 National Environmental Management Act: Air Quality Act 39 of 2004

The *National Environmental Management Act: Air Quality Act 39 of 2004 (Air Quality Act)* was promulgated in 2004, and came into effect on 11 September 2005 with exclusion of a number of key provisions, including, in particular, all the licensing provisions. The Act provides that an atmospheric emission licence (AEL) may also require the holder of the licence to comply with all lawful requirements of an EMI carrying out his or her duties in terms of the NEMA, including a requirement that the holder of the licence must, on request, submit to the EMI a certified statement indicating:

- (a) the extent to which the conditions and requirements of the licence have not been complied with;

20 Section 31L (4) *National Environmental Management Act 107 of 1998*.

21 Section 31D *National Environmental Management Act 107 of 1998*.

22 Section 31G *National Environmental Management Act 107 of 1998*.

23 Sections 31B and 31C *National Environmental Management Act 107 of 1998*.

- (b) particulars of any failure to comply with any of those conditions or requirements;
- (c) the reasons for any failure to comply with any of those conditions or requirements; and
- (d) any action taken, or to be taken, to prevent any recurrence of that failure or to mitigate the effects of that failure.²⁴

An EMI should either conduct his or her own monitoring or instruct the company to pay independent consultants, approved by the EMI, to conduct monitoring²⁵. This may be because:

- (a) the EMI wishes to do a spot check against the company's own monitoring. This is bearing in mind that the EMI can only use a compliance notice to instruct a company to engage an independent consultant where he or she has the reasonable belief of non-compliance.
- (b) the EMI suspects that the company has been falsifying its own monitoring records; or
- (c) the company's records are incomplete. This may constitute an offence by itself, but the EMI may also wish to prove non-compliance with permit conditions.²⁶

The *Air Quality Act* is one of the SEMAs, and as a result is enforceable by EMIs designated to enforce the provisions thereof through compliance notices. Many offences under the *Air Quality Act* also constitute offences under the provisions in section 28(14) of the NEMA, and it is important that EMIs investigating a crime under the *Air Quality Act* also gather evidence and prepare a case docket with evidence that supports the additional charges under the NEMA.²⁷ The *Air Quality Act* does not contain empowering provisions for the compliance monitoring and enforcement of its own provisions; these provisions are located in Chapter 7 of the NEMA, which provides for the designation, mandate and powers of EMIs to monitor compliance and enforce

²⁴ Section 43(2) *National Environmental Management: Air Quality Act* 39 of 2004.

²⁵ Section 31D *National Environmental Management Act* 107 of 1998.

²⁶ Section 31L *National Environmental Management Act* 107 of 1998.

²⁷ An example of offences is the non-compliance with the minimum emissions standards.

the NEMA and all the SEMAs, including the *Air Quality Act*. EMIs must monitor compliance with and enforce the NEMA and the SEMAs as specified in their letters of designation.²⁸

Finally, EMIs are also empowered to enforce any authorisation issued under their mandated legislation including permits and licences such as AELs under the *Air Quality Act*.²⁹

1.1.2 National Environmental Management Act: Waste Act 59 of 2008

The purpose of the *National Environmental Management Act: Waste Act 59 of 2008* (*Waste Act*) is to govern waste management in order to protect health and the environment.³⁰ The Act seeks to achieve these objectives through providing reasonable measures for the prevention of pollution, ecological degradation and securing ecologically sustainable development, as well as by providing for national norms and standards to regulate the management of waste.³¹ It also provides for specific waste management measures and for the licensing and control of waste management activities.³²

The *Waste Act* is one of the SEMAs; as a result, EMIs can investigate and enforce the provisions of this Act by issuing compliance notices in terms of the NEMA. The waste management licence issued in terms of the *Waste Act* may require the holder thereof to comply with all lawful requirements of an EMI carrying out his or her duties in terms of the NEMA, including a requirement that the licence holder must, on request, submit to the inspector a certified statement indicating:

- (i) the extent to which the conditions and requirements of the licence have or have not been complied with;
- (ii) particulars of any failure to comply with any of those conditions or requirements;
- (iii) the reasons for any failure to comply with any of those conditions or

28 Section 31G (1) (a) *National Environmental Management Act 107 of 1998*.

29 Section 31L *National Environmental Management Act 107 of 1998*.

30 Section 2 *National Environmental Management Act: Waste Act 50 of 2008*.

31 Preamble *National Environmental Management Act 107 of 1998*.

32 Sections 20, 21 and 50 *National Environmental Management: Waste Act 59 of 2008*.

requirements;

- (iv) any action taken, or to be taken, to prevent any recurrence of that failure or to mitigate the effects of that failure; and
- (v) include any other matters which are necessary for the protection of the environment.

Finally, when it comes to waste impact reports, the *Waste Act* affords the EMI appointed in terms of the NEMA the option to require, in writing, any person to submit a waste impact report in a specified form and within a specified period to the EMI.³³ Submission of a waste impact report may be required if the EMI on reasonable grounds suspects that such person has on one or more occasions contravened or failed to comply with this Act or any conditions of a waste management licence or exemption and that the contravention or failure has had or likely to have a detrimental effect on health or the environment, including social conditions, economic conditions, ecological conditions or cultural heritage, or has contributed to the degradation of the environment.³⁴

1.1.3 National Environmental Management Act: Protected Areas Act 57 of 2003

The *National Environmental Management Act: Protected Areas Act 57 of 2003* (Protected Areas Act) was enacted to govern South Africa's protected areas.³⁵ It is the primary legislation for the regulation and administration of protected areas, as it provides for the manner in which the different statutes governing protected areas should interact.³⁶ The *Protected Areas Act* is aimed at providing for the protection and conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes and for the management of those areas in accordance with national norms and standards.³⁷ EMIs have the mandate to

33 Section 66 *National Environmental Management: Waste Act 59 of 2008*.

34 Section 66 *National Environmental Management: Waste Act 59 of 2008*.

35 Section 2 *National Environmental Management: Protected Areas Act 57 of 2003*.

36 Section 6 *National Environmental Management: Protected Areas Act 57 of 2003*.

37 Section 11 *National Environmental Management: Protected Areas Act 57 of 2003*.

ensure that the authorisation issued complies in terms of the mandate given by the Minister.³⁸

1.1.4 National Environmental Management Act: Integrated Coastal Management Act 24 of 2008

The *National Environmental Management Act: Integrated Coastal Management Act* (Integrated Coastal Management Act) came into force on 11 December 2009.³⁹ The preamble of the *Integrated Coastal Management Act* provides a good idea of the approach and objective of this act by referring to the coastal zone as a “unique part of the environment in which the biophysical, economic, social and institutional considerations interconnect in a manner that requires a dedicated and integrated management approach”.

1.1.5 National Environmental Management Act: Biodiversity Act 10 of 2004

The *National Environmental Management Act: Biodiversity Act* 10 of 2004 (Biodiversity Act) is the main piece of legislation that deals with biodiversity conservation in South Africa.⁴⁰ The *Biodiversity Act* was enacted to provide for the management and conservation of South Africa’s biodiversity within the framework of the NEMA. It provides for the protection of species and ecosystems; the sustainable use of indigenous biological resources; the fair and equitable sharing of benefits arising from bio-prospecting involving indigenous biological resources; and for the establishment and functions of a South African National Biodiversity Institute. For this reason, EMIs need to monitor compliance and ensure that non-compliance is accounted for by the transgressor.

In the following section a general overview pertaining to search and seizures in South African criminal law enforcement are provided.

38 Section 31 (1) (b) *National Environmental Management Act* 107 of 1998.

39 *National Environmental Management Act: Integrated Coastal Management Act* 24 of 2008.

40 Section 2 *National Environmental Management Act: Biodiversity Act* 10 of 2004.

1.2 Powers of search and seizure generally

The Constitution guarantees everyone the right to privacy. Section 14 of the Constitution provides that:

Everyone has a right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed upon.

This section provides for a general right to privacy. It guarantees privacy with regard to private premises, private communications and the prohibition of unlawful entries and searches. Search warrants protect those aspects of a "person's life in regard to which a legitimate expectation of privacy can be honoured".⁴¹

However, the right to privacy, like all rights in the Constitution, is not absolute and section 36 (1) of the Constitution provides that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the right;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

South Africa has several laws that allow for searches and seizures and those laws include the CPA. Normally a search warrant must be obtained before a search and

⁴¹ Currie and De Waal *The New Constitution and Administrative Law* 2001 361.

seizure operation is conducted.⁴² There are, however, circumstances where searches and seizures may be conducted without a warrant.⁴³

The CPA, for instance, provides for a situation where a police official may search for or seize items without a warrant.⁴⁴ These include circumstances in which the person concerned consents to the search, or where the police official has reasonable grounds to believe that a warrant would have been issued and where the delay in obtaining the warrant would defeat the object of the search.⁴⁵ Any search and seizure that does not comply with the requirements of section 22 of the CPA will constitute an infringement of section 14 of the Constitution.

The NEMA provides for the general powers of EMIs to investigate environmental crimes, including the questioning of witnesses, the copying of documents and the taking of photographs and making of audio-visual recordings.⁴⁶ In certain circumstances, EMIs may conduct search and seizure operations and arrest a suspected environmental criminal.⁴⁷ However, as indicated in the introduction, not all EMIs are criminal investigators: some are empowered to conduct routine inspections, while others undertake administrative enforcement, i.e. the issuing of notices and directives.⁴⁸

When EMIs perform any duties in terms of the NEMA or a specific environmental management act, they must on demand by a member of the public, produce their identity card as proof of designation.⁴⁹

42 Sections 20 and 21 *Criminal Procedure Act* 51 of 1977.

43 Section 22 *Criminal Procedure Act* 51 of 1977.

44 Section 22 *Criminal Procedure Act* 51 of 1977.

45 Section 22 *Criminal Procedure Act* 51 of 1977.

46 Section 31H *National Environmental Management Act* 107 of 1998 and also Section 19 of CPA authorizes these powers.

47 Section 31H *National Environmental Management Act* 107 of 1998.

48 Section 31H *National Environmental Management Act* 107 of 1998.

49 Section 31F *National Environmental Management Act* 107 of 1998.

1.3 The relationship between the Criminal Procedure Act and NEMA

The NEMA provides that in addition to the powers set out in this section, an environmental management inspector must be regarded as being a peace officer and may exercise all the powers assigned to a peace officer, or to a police official who is not a commissioned officer, in terms of the CPA.⁵⁰

Chapter 2 of the *Criminal Procedure Act* provides for searches, seizures and the disposal of seized property.⁵¹ The CPA confirms that the provisions of Chapter 2 thereof, relating to search and seizure powers, shall not derogate from any power conferred by any other law to enter any premises or to search any person, container or premises or seize any matter forfeited or to dispose of any matter.⁵²

The state may in terms of the CPA seize anything which is concerned or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere; or may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.⁵³ In *Polonyfis v Minister of Police* the search warrant authorised only the seizure of machines, money and tokens; the SAPS, however, seized articles that the warrant did not mention and the court confirmed that the High Court correctly ordered the return of all those items not mentioned in the warrant.⁵⁴ In addition, the NEMA provides for further powers for EMIs in respect of the disposal of items seized,⁵⁵ powers to stop, enter and search vehicles, vessels and aircraft⁵⁶ and routine inspections.⁵⁷

The following chapter will focus on EMIs' search and seizure powers with a warrant.

50 Section 31H (5) *National Environmental Management Act* 107 of 1998.

51 *Criminal Procedure Act* 51 of 1977.

52 Section 19 *Criminal Procedure Act* 51 of 1977.

53 Section 20 *Criminal Procedure Act* 51 of 1977.

54 (64/2010) 2011 ZASCA 26 (18 March 2011) at Para 22.

55 Section 31I *National Environmental Management Act* 107 of 1998.

56 Section 31J *National Environmental Management Act* 107 of 1998.

57 Section 31K *National Environmental Management Act* 107 of 1998.

Chapter 2

2 Search and seizure powers with a warrant

2.1 Introduction

The chapter will focus on the powers of EMIs to conduct search and seizure operations with a warrant. A search is said to be any intrusion, other than arrest upon an individual's person, property or privacy for the purpose of seizing individuals or things or obtaining information by inspection or surveillance.⁵⁸ A search warrant is a document by which searches are authorised and legitimated by a judicial officer.⁵⁹ The requirements and certain aspects of issuing warrants will be discussed in detail. The chapter will further consider the protection the warrant procedure affords.

2.2 Statutory provisions in respect of search warrants

2.2.1 National Environmental Management Act

When designating a person as an EMI, the Minister of Environmental Affairs, the Minister of Water Affairs and Forestry or MEC, as the case may be, must determine whether the person concerned is designated for the enforcement of the NEMA, a specific environmental management act, specific provisions of the NEMA or a SEMA, the NEMA and all specific SEMAs or any combination of those Acts or provisions of those Acts.⁶⁰

The purpose of search and seizure is to discover, locate and to secure any material evidence in order to prove that a crime was committed. The EMIs' powers of search and seizure may only be exercised within the strict parameters of the empowering legislation, namely those provisions in respect of search and seizure granted to EMIs

⁵⁸ Finkelstein and Finkelstein *Constitutional Rights in the investigative process* 89.

⁵⁹ Sections 21 (1) and 25 *Criminal Procedure Act* 51 of 1977.

⁶⁰ Section 31D *National Environmental Management Act* 107 of 1998.

in the NEMA⁶¹, which incorporate sections of the CPA⁶² as was indicated in 1.3 above. The NEMA does not provide for the procedure to be followed when a search warrant is applied for or the requirements for a valid search warrant. It is therefore necessary to refer to the *Criminal Procedure Act* to establish these requirements.

2.2.2 Criminal Procedure Act

The *Criminal Procedure Act* provides that an article shall be seized only by virtue of a search warrant issued by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon or at any premises within his area of jurisdiction; or by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.⁶³

The section provides for two instances in which a warrant may be issued: during the pre-trial stage and at the trial. The police officer needs to obtain a search warrant in terms of the provision and in the case where a magistrate is not available, a justice of peace should be approached, instead of searching without a warrant.⁶⁴ *Justice* means a person who is a justice of the peace under the provisions of the *Justices of the Peace and Commissioners of Oaths Act 16* of 1963.⁶⁵ They are commissioned officers in the SAPS, National Defence Force and Correctional Services, directors of public prosecutions, registrars of the high courts and magistrates.

The CPA provides for a search warrant to be issued on any day, including weekends and public holidays.⁶⁶ The search warrant will remain effective until its execution, or

61 Sections 31k (3) *National Environmental Management Act* 107 of 1998.

62 Sections 31H (5) *National Environmental Management Act* 107 of 1998.

63 Section 21 *Criminal Procedure Act* 51 of 1977.

64 1996 1 SA 548 (C) 258.

65 Section 1 *Criminal Procedure Act* 51 of 1977.

66 Section 21 *Criminal Procedure Act* 51 of 1977.

until such time it is cancelled by the person who had issued it or in the absence of such person, then by any person of same authority.⁶⁷

2.3 Requirements for a valid search

Search and seizure are necessary tools to the combating of crime, yet they are measures which infringe upon personal rights and privileges protected by the Constitution.⁶⁸ The right to dignity,⁶⁹ bodily integrity,⁷⁰ privacy and prohibition of search⁷¹ and freedom in commerce and industry⁷² come to mind. These are universally acknowledged rights echoed in democratic constitutions and international treaties.

The importance of limitations on search and seizure powers was highlighted by a Supreme Court of Appeal decision. In *Powell NO and Others v Van der Merwe NO and Others*, Cameron JA pointed out helpful guidelines? on warrants:

“(a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liability of the subject and his or her rights to privacy and property.

(b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.

1. The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in terms in which it is expressed.
2. A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.
3. If a warrant is too general, or if its terms go beyond those the authorising statute permits, the courts will refuse to recognise it as valid, and it will be set aside.

67 Section 21(3) *Criminal Procedure Act* 51 of 1977.

68 Bill of Rights in the *Constitution of the Republic of South Africa*, 1996.

69 Section 10 *Constitution of the Republic of South Africa*, 1996.

70 Section 12(2) *Constitution of the Republic of South Africa*, 1996.

71 Section 14 *Constitution of the Republic of South Africa*, 1996.

72 Section 14(c), section 22 and section 25 *Constitution of the Republic of South Africa*, 1996.

4. It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligible and narrowly within the bounds of the empowering statute.⁷³

Requirements in respect of the issuing of a warrant were laid down by the Constitutional Court in *Minister of Safety and Security v Van der Merwe*.⁷⁴ The court had to adjudicate whether the search and seizure warrants issued in terms of section 21 of the CPA were valid or not. The court held that a valid warrant:

- (a) states the statutory provision in terms of which it is issued;
- (b) identifies the searcher;
- (c) clearly mentions the authority it confers upon the searcher;
- (d) identifies the person, container or premises to be searched;
- (e) describes the article to be searched for and seized, with sufficient particularity;
- and
- (f) specifies the offence which triggered the criminal investigation and names the suspected offender.

The court further set out the guidelines to be observed by a court considering the validity of warrants as follows:

- (a) The person issuing the warrant must have authority and jurisdiction;
- (b) The person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;
- (c) The terms of the warrant must be neither vague nor overbroad;
- (d) A warrant must be reasonably intelligible to both the searcher and the searched person;
- (e) The court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and
- (f) The terms of the warrant must be construed with reasonable strictness.⁷⁵

⁷³ 2005 5 SA 62 at Para 59 (SCA).

⁷⁴ 2011 (5) 61 CC (hereafter the *Van der Merwe*-case).

⁷⁵ 2011 5 61 (CC) at Paras 55 and 56.

The court referred to the intelligibility requirement for a valid search and seizure warrant and pointed out that it is a principle derived from the common law introduced by the courts and is quite separate and distinct from the statutory requirements in the CPA.⁷⁶ One of the requirements of the intelligibility rule is that the officer or official exercising the search warrant should be aware of the authority of the warrant in order to enable him or her to carry out the duty required, and also that the searched person understands why his or her privacy rights are invaded. It clearly shows that strict rules and measures are in place as to the requirements for a valid search and seizure warrant.⁷⁷

2.4 The execution of search warrants

The CPA gives guidelines as to the manner in which a search with a warrant must be executed or conducted.⁷⁸ In this regard it must be recalled that EMIs are provided with similar powers as police officers.⁷⁹ The CPA requires a police official to seize the article in question and authorises such official to search any person identified in the warrant or to enter and search any premises identified in the warrant and search any person found on or at the premises.⁸⁰ The CPA further requires that a search warrant must be executed by day unless the police official is specifically authorised therein to execute it by night.⁸¹

Further, a police official must, upon demand of any person whose rights have been affected by search or seizure under the warrant, hand to him or her a copy of the warrant.⁸² In *Polonyfis v Minister of Police*⁸³ Cachalia JA, delivering the unanimous judgement of the SCA, said:

After the search a copy of the warrant and any document referred to it must on demand be handed to the person in charge of the premises who may then

76 2011 2 SACR (CC) at Para 14.

77 2011 2 SACR (CC) at Para 14.

78 Section 21 Criminal Procedure Act 51 of 1977.

79 See par 1.3 above.

80 Section 21(2) *Criminal Procedure Act* 51 of 1977.

81 Section 21 *Criminal Procedure Act* 51 of 1977.

82 Section 21 (4) *Criminal Procedure Act* 51 of 1977.

83 2012 1 SACR 57 (SCA).

decide whether or not to challenge the validity of the warrant, either because it was unlawfully issued or unlawfully executed.⁸⁴

In addition, in *Goqwana v Minister of Safety NO & others*, the court held that it is accordingly imperative that the affidavit or sworn statement in support of the warrant should accompany the warrant and be handed over together with it.⁸⁵

In *Naidoo v Minister of Law and Order*, the court held that, once a search warrant has been issued by a competent authority, no person executing the warrant can widen its scope, even if the legislation widens the powers to more than those included in the warrant.⁸⁶ As a result, this will mean that a search warrant needs to be interpreted strictly. However, in *Polonyfis v Minister of Police* the court held that seized articles not mentioned in the warrant must be returned to the owner.⁸⁷

2.4.1 The disposal of seized items

The concept of seizure was described in the case of *Ntoyakhe v Minister of Safety and Security*⁸⁸ where the court held that the word *seized* is not limited only to the act of taking possession of an article, but also the subsequent detention thereof, otherwise the right to seize would be rendered meaningless and worthless. Further the court held that the right of further detention of a seized article is not unlimited and as a result does not confer upon the state the right to deprive a person of lawful possession of an article indefinitely.⁸⁹

84 2012 1 SACR 57 (SCA) at Para 19.

85 (20668/2014) [2015] ZASCA 186 (30 November 2015) at Para 31.

86 1990 2 SA 158 W 289.

87 (64/2010) 2011 ZASCA 26 (18 March 2011) at Para 22.

88 1999 (2) SACR 349 (ECD).

89 1999 (2) SACR 349 (ECD) at 354 e-f.

2.4.1.1 The manner in which seized property must be disposed of in terms of the CPA

Perishable goods must be treated according to the circumstances.⁹⁰ If the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, the police official should deliver the article to the person from whom, in the opinion of such police official, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so.⁹¹ If the article is not disposed of or delivered under this circumstance, then it must be given a distinctive identification mark and be retained in police custody or other arrangements should be made with regard to the custody thereof as the circumstances may require.⁹²

If no criminal proceedings are instituted in connection with the article or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.⁹³

If criminal proceedings are instituted in connection with the article and the accused admits his guilt, the article shall be returned to the person from whom it was seized, if such person may lawfully possess the article, or, if such person may not lawfully possess such article, the article shall be forfeited to the state.⁹⁴

If criminal proceedings are instituted in connection with the article and such article is required at the trial for the purposes of evidence or for the purposes of an order of court, the police official charged with the investigation shall deliver such article to the clerk of the court where criminal proceedings are instituted.⁹⁵ The judge or judicial

90 Section 30(a) *Criminal Procedure Act 51 of 1977.*

91 Section 30(b) *Criminal Procedure Act 51 of 1977.*

92 Section 30(c) *Criminal Procedure Act 51 of 1977.*

93 Section 31(1) (a) *Criminal Procedure Act 51 of 1977.*

94 Section 32(1) *Criminal Procedure Act 51 of 1977.*

95 Section 33(1) *Criminal Procedure Act 51 of 1977.*

officer presiding at criminal proceedings shall at the conclusion of such proceedings make an order as to how the article may be disposed of.⁹⁶

A court which convicts an accused of any offence may, without a notice to any person, declare any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence forfeited to the state.⁹⁷ Where an article is seized in connection with which an offence was committed in a country outside the Republic, the magistrate may order such article to be delivered to a member of a police force established in such country who may thereupon remove it from the Republic.⁹⁸

The powers of seizure are further subject to the EMI's mandate stipulated in the NEMA with regards to disposal of those items seized.⁹⁹ An EMI may request the person who was in control of the item immediately before the seizure, to take it to a place designated by the inspector, and if the person refuses to take the item to the designated place, the EMI may do so.¹⁰⁰ Further, in order to safeguard a vehicle, vessel or aircraft that has been seized, the EMI may immobilise it by removing a part.¹⁰¹ There is a duty on EMIs that an item seized including a part of a vehicle, vessel or aircraft must be kept in such a way that it is secured against damage.¹⁰²

In the following section a general overview pertaining to the consequences of unlawful search warrants and searches contrary to a valid warrant are provided.

2.5 Consequences of unlawful searches and seizures

A police official who acts contrary to the authority of a search warrant issued in terms of the CPA, or who, without being authorised thereto searches any person or container

96 Section 34(1) *Criminal Procedure Act* 51 of 1977.

97 Section 35(1) (a) *Criminal Procedure Act* 51 of 1977.

98 Section 36 (1) *Criminal procedure Act* 51 of 1977.

99 Section 31D *National Environmental Management Act* 107 of 1998.

100 Section 31I (2) *National Environmental Management Act* 107 of 1998.

101 Section 31I (3) *National Environmental Management Act* 107 of 1998.

102 Section 31I (4) *National Environmental Management Act* 107 of 1998.

or premises or seizes or detains any article shall be guilty of an offence.¹⁰³ The Constitution further states that 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.¹⁰⁴

Unlawful searches and seizures by EMIs may render evidence obtained inadmissible before the court. It was seen in *Mthembu v S* where the court held that section 35(5) of the Constitution requires the exclusion of evidence that was improperly obtained from any person, not only from an accused person.¹⁰⁵

The exclusionary principle, in other words, prevents or limits the violator regarding the right from benefiting from the violation if it would render an accused's trial unfair or be detrimental to the proper administration of justice. The principle is understood not to replace other admissibility rules. This means that it operates in addition to ordinary rules to exclude evidence that would otherwise be admissible. In the following section remedies pertaining to search with a warrant are provided.

The *actio ad exhibendum* is one of the remedies to address the issues on search and seizure powers. In *Minister of Police v SA Metal and Machinery* the court mentioned that, in addition to proving ownership of the goods, there must be allegation and proof of wrongful alienation of goods before *litis contestatio*, awareness of the claim at the time of alienating the goods and the suffering of patrimonial loss as a result of the wrongful alienation of the goods.¹⁰⁶

Another remedy is the *mandament van spolie*. In *Ngukumba v Minister of Safety and Security*,¹⁰⁷ the court held that "the essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor". It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person

103 Section 28 *Criminal Procedure Act* 51 of 1977.

104 Section 35(5) *Constitution of the Republic of South Africa*, 1996.

105 2008 4 All SA 522 SCA Para 25.

106 (462/13) [2014] ZASCA 95 (1 July 2014) at Para 15.

107 (087/13) [2014] ZACC 14.

must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process".¹⁰⁸

108 (087/13) [2014] ZACC 14 at Para 10.

Chapter 3

3 EMIs' search and seizure powers without a warrant

3.1 Introduction

Generally, it is more preferable that searches should be conducted on the authority of a search warrant issued by a judicial officer; however, circumstances may arise where the delay in obtaining such a warrant would defeat the object of the search. That is when the NEMA, SAPS Act and CPA serve to regulate circumstances under which a search may be conducted without a warrant.

In the light of the above passage, the constitutional right that everyone has a right to privacy, which includes the right not to have their person or their home searched, their property searched, their possessions seized and the privacy of their communications infringed upon must be protected during the operation of search and seizure without a warrant.¹⁰⁹ In *S v Gumede and Others* it was held that the provisions of sections 22(b) and 23(1) of the CPA which authorise searches are not unconstitutional. To the extent that the provisions limit the right to privacy, such limitation is reasonable and justifiable in accordance with the limitations clause.¹¹⁰

The rules in order for a law authorising a search and seizure to be constitutional in terms of the limitation clause:¹¹¹

To comply with section 36, the authorising law must properly define the scope of the power to search and seize. Secondly, prior authorisation by an independent authority is usually required. Thirdly, the Act must require the independent authority to be persuaded by evidence on oath that there are reasonable grounds for conducting the search.

109 Section 14 *Constitution of the Republic of South Africa*, 1996.

110 1998 (5) BCLR 530 (D).

111 Currie and De Waal *Bill of Rights handbook* 2005 325.

Searches and seizures can only be lawful if there are justifiable limitations of the right to privacy and balance between the interests of the individual and those of the state. In *Magobodi v Minister of Safety and Security & another*, the court held that it had a constitutional duty to oversee searches and seizures and to ensure that such actions were reasonable and justifiable in the circumstances.¹¹²

The CPA provides for search without a warrant; this can be divided into two situations: a search conducted with the consent of the person concerned, and a search undertaken on the reasonable belief that a warrant will be issued to the police official and that delay will defeat the object of the search.¹¹³ Sections 22, 23 25(3) and 27 of the CPA deal with searches without warrants and will be discussed in detail below. Consent given to conduct a search by the concerned person places a police official in a better position than in the case of a search conducted without consent. It takes away the procedural burden of proving the existence of reasonable grounds to the search.

This chapter will address the provisions of the NEMA and CPA pertaining to warrantless search and seizure. Sections of the South African Police Service Act¹¹⁴ relating to search and seizure will also be considered. Then principles relating to consent, exigent circumstances, and search and seizure will be addressed focusing on the mentioned Acts.

3.2 Statutory provisions in respect of warrantless searches

3.2.1 National Environmental Management Act

This section of the dissertation considers warrantless search and seizure powers of EMIs in terms of the NEMA. Generally, a search warrant is required to inspect residential premises, unless there is consent, or there are reasonable grounds to

112 2009 (1) SACR 355 (Tk) at Para 7.

113 Section 22 *Criminal Procedure Act* 51 of 1977.

114 *South African Police Service Act* 68 of 1995.

believe that a warrant would be issued on application, but the delay caused by application would "defeat the object of the entry or inspection".¹¹⁵

EMIs may, without a warrant, enter and search any vehicle, vessel or aircraft or pack-animal¹¹⁶ if any of such is being or has been used, or contains or conveys anything which is being or has been used to commit an offence or breach of such law or a term or a condition of a permit,¹¹⁷ And further if any of such contains or conveys a thing which may serve as evidence of such offence or breach.¹¹⁸

EMIs may, without a warrant, seize anything contained in or on any vehicle, vessel, aircraft or pack-animal that may be used as evidence in the prosecution of any person for an offence in terms of the NEMA or SEMAs.¹¹⁹ EMIs may, in certain circumstances at any time, and without a warrant order the driver of a vehicle or vessel to stop, or the pilot to stop or land.¹²⁰ EMIs may apply to the National or Provincial Commissioner of Police for written authorisation in terms of section 13 (8) of the *South African Police Act* 68 of 1995, to establish a roadblock or a checkpoint.¹²¹ An EMI has all the powers of a member of the South African Police service in terms of section 13 (8) of the *South African Police Service Act* 68 of 1995.¹²²

3.2.2 South African Police Act

EMIs may exercise all powers assigned to a peace officer or to a police official who is not a commissioned officer.¹²³ EMIs, when exercising these powers, may search without a warrant any person, premises, other place, vehicle, vessel or aircraft or any receptacle, and seize any article that is found and may lawfully be seized.¹²⁴ The

115 Section 31K *National Environmental Management Act* 107 of 1998.

116 Section 31J *National Environmental Management Act* 107 of 1998.

117 Section 31J (1) (a) *National Environmental Management Act* 107 of 1998.

118 Section 31J (1) (b) *National Environmental Management Act* 107 of 1998.

119 Section 31J (2) *National Environmental Management Act* 107 of 1998.

120 Section 31J (4) (a) *National Environmental Management Act* 107 of 1998.

121 Section 31J (6) *National Environmental Management Act* 107 of 1998.

122 Section 31J (7) *National Environmental Management Act* 107 of 1998.

123 Section 31H (5) *National Environmental Management Act* 107 of 1998.

124 Section 13(6) *South African Police Service Act* 68 of 1995.

search may be conducted at any place in South Africa within 10 kilometres, or any reasonable distance from any border between South Africa and any foreign state or in the territorial waters of South Africa, or inside South Africa within 10 kilometres of or any reasonable distance from such territorial waters or at any airport or within any reasonable distance from such an airport.¹²⁵

The National or Provincial Commissioner may authorise a police official in writing to set up a roadblock(s) on any public road in a particular area or a checkpoint(s) at any public place in a particular area.¹²⁶ A police official who sets up such a roadblock or checkpoint may search without a warrant any person or vehicle that is stopped or any receptacle or object of whatever nature that is in the possession or in, on or attached to such a vehicle, and seize any article referred to in section 20 of the CPA, that is found in the possession of the person or in, on or attached to the receptacle or vehicle.¹²⁷

A police official may set up a roadblock for the purposes of seizing certain articles without written authorisation from the National or a Provincial Commissioner, if such a police official reasonably believes that there is an object which is concerned in, on or may afford evidence of, or is intended to be used in the commission of an offence listed in Schedule 1 of the CPA, and such an object is present in or is about to be transported in a motor vehicle in a particular area, and a search warrant will be issued to him or her under section 21(1)(a) of the CPA if he or she has reason to believe that the object will be transported in a specific vehicle and he or she has applied for a search warrant, and the delay that will be caused by obtaining the authorisation will defeat the purpose of the roadblock.¹²⁸

3.2.3 *Criminal Procedure Act*

¹²⁵ Section 3(b) *South African Police Service Amendment Act* 41 of 1997.

¹²⁶ Section 13(8)(a) *South African Police Service Act* 68 of 1995.

¹²⁷ Section 13(8)(g) (i) *South African Police Service Act* 68 of 1995.

¹²⁸ Section 13(8)(d) *South African Police Service Act* 68 of 1995.

3.2.2.1 General provisions of the Act

EMIs have powers to execute mandates assigned to police officials in terms of chapters 2, 5, 7 and 8 of the CPA.¹²⁹ The state may, subject to chapter 2 of the CPA, seize anything that is concerned or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence within the Republic or elsewhere.¹³⁰ The state may seize anything that may afford evidence of the commission or suspected commission of an offence in the Republic or elsewhere.¹³¹ Lastly, the state may seize anything that is intended to be used or on reasonable grounds is believed to be intended to be used in the commission of an offence.¹³² The section makes it clear that the seizure powers are limited to articles and items which are either used during or may provide proof of an offence in the Republic or elsewhere, or provide proof that there is a plot made for the commission of an offence.

An EMI exercising powers assigned to him or her in terms of section 31H (5) of the NEMA may without a warrant search any person or container or premises for the purpose of seizing any article referred to in section 20, if the person concerned consents to this search for and seizure of the article in question; or if the EMI on reasonable grounds believes that a search warrant will be issued to him or her under section 21 of the CPA and that the delay in obtaining such warrant would defeat the object of the search.¹³³

Interpretation of sections 20 and 22 of the CPA clearly shows that burden of proof lies with the police official. The police must show the existence of reasonable suspicion upon which the police base the reasonable belief, which means that facts must exist at the time when the police acted without a warrant being issued to them.¹³⁴ In *Goncalves v Minister of Law and Order* the court held that section 22, read with section

129 Section 31H (5) *National Environmental Management Act* 107 of 1998.

130 Section 20 (a) *Criminal Procedure Act* 51 of 1977.

131 Section 20 (b) *Criminal Procedure Act* 51 of 1977.

132 Section 20 (c) *Criminal Procedure Act* 51 of 1977.

133 Section 22 *Criminal procedure Act* 51 of 1977.

134 Section 22(b) *Criminal Procedure Act* 51 of 1977.

20, does not authorise the police to close the business on the premises where the search is being conducted.¹³⁵

Police officials may also act without a warrant if they on reasonable grounds believe that a warrant would be issued to them if they applied for it and that the delay in obtaining such warrant would defeat the object thereof.¹³⁶ In the case of *Mnyungula v Minister of Safety and Security*,¹³⁷ the warrantless provisions of the CPA was considered; the court held that the onus is on the police to prove, objectively viewed, the existence of ample facts upon which the police base the reasonable belief, which facts must exist at the time when the police acted without a warrant, and not at a later stage.¹³⁸ The court further referred to the case of *Ndabeni v Minister of law and Order and Another*,¹³⁹ where that court in turn quoted the following from Milne J:¹⁴⁰

(T)here can only be reasonable cause to believe... where, considered objectively, there are reasonable grounds for the belief ... (I)t cannot be said that an officer has reasonable cause to believe... merely because he believes he has reasonable cause to believe.

In the light of this passage, reasonable grounds must exist objectively when conducting or executing a warrantless search and seizure, and not at later stage or afterwards. This will practically mean that a police official cannot satisfy himself on reasonable grounds; only after he has already seized the documents that bring facts to light on which he "based" his reasonable belief can he do so. There is a requirement of reasonable belief to be complied with before and it needs to be based on objective and true facts. A police officer cannot form his own reasonable belief on the basis of what he subjectively believes to be reasonable.

135 1993 (1) SA 161 (W).

136 Section 25(3) *Criminal procedure Act* 51 of 1977.

137 [2003] JOL 11934 (Tk).

138 [2003] JOL 11934 (Tk) Pages 5-6.

139 1984 (3) SA 500 (D).

140 1984 (3) SA 500 (D) Page 511.

A police officer, who may lawfully search any person or premises or may enter such premises, may use such force as may reasonably be necessary to overcome any resistance against such search or entry of such premises, including the breaking of any door or window of such premises, provided that such police official must first audibly demand admission to the premises and notify the occupier and others on the premises of the purpose for which he seeks to enter such premises.¹⁴¹

In *Mnyungula v Minister of Safety and Security*,¹⁴² the court also had to consider the following question:¹⁴³

Is it the law of this land that once a policeman on incorrect 'facts' formed a 'bona fide' reasonable belief that there are sufficient grounds to seize a vehicle, that that seizure is 'forever' or can the 'reasonable belief' later be rebutted by the true facts being shown, causing the seizure to lapse?

The court held that it can, in terms of its inherent powers, set aside the seizure in the interest of justice and order the seized article to be returned when it is shown that the "facts" or "grounds" relied upon by the policeman when forming the "reasonable belief", did not in reality exist or were false.¹⁴⁴

3.2.2.2 Consent searches

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred in section 20 of the CPA: if the person concerned consents to such search for and seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and seizure of the article in question.¹⁴⁵ In the light of this provision an

141 Section 27 *Criminal Procedure Act* 51 of 1977.

142 [2003] JOL 11934 (Tk).

143 [2003] JOL 11934 (Tk) Page 12.

144 [2003] JOL 11934 (Tk) Page 12.

145 Section 20 (a) and (b) *Criminal Procedure Act* 51 of 1977.

operation may be conducted without a search warrant. However, the following requirements must be met:

(a) The consent must be valid

In *S v Motloutsi* a person who was leasing property (lessee) sublet a room to the accused. The court held that the consent from the lessee did not amount to a valid consent in terms of section 22(a) of the CPA because the lessee did not have the accused's property in his custody or under his control and he did not have the right to enquire too inquisitively into the accused's private possessions.¹⁴⁶ Therefore the court concluded that the search and seizure was unlawful.

In *Ndlovu v Minister of Police, Transkei and Others* the applicant took the vehicle to the police under protest and shortly thereafter instructed attorneys to obtain the return thereof. The court held that there had been no consent to the vehicle's seizure.¹⁴⁷ *Nombembe v Minister of Safety and Security* is an example of the converse situation: N's motor vehicle was seized by the police with the consent of G, in whose possession it was for purposes of repair; N's application for return on the basis that he as owner had not consented was refused.¹⁴⁸

However, the court took a different direction in *Ngamlana v MEC for Safety and Security and Another* where it held the following regarding the "person who may consent" thereto:

To require the person who may consent to the search of the premises to have authority to consent to the seizure of a section 20 article found on the premises is to read into section 22(a) words which it does not contain. It would also be impractical to require a police official to be satisfied that the person consenting to the seizure has authority to do so, more particularly when it is borne in mind that in relation to many articles falling within the purview of section 20 of the

146 1996 (2) BCLR 220 (C).

147 1993 (2) SACR 33 (Tk).

148 1998 (2) SACR 160 (Tk).

Act it would be difficult to know at the time of seizure who the person or persons may be who might have a lawful right to possess the article. In my view, therefore, the mere fact that the person who may consent to the search and seizure that was not done pursuant to a warrant. If the person who may consent to either, or both, the search and the seizure, then what was not consented to can only be done by obtaining a warrant, unless the circumstances are such that the provisions of section 22(b)(i) of the Act can be invoked".¹⁴⁹

(b) The consent must be given voluntarily

When a person gives consent to the invasion of his or her privacy, the requirements of "reasonable grounds and prior authorisation" do not apply.¹⁵⁰ Waiver of rights is however never lightly inferred. In *Powell NO and Others v Van Der Merwe and Others*, Powell was confronted at his home, where the warrants and annexures were read to him. The search then proceeded. The next day Powell's attorney objected that the warrants were void because they were vague and that the search was unlawful. The attorney was present during most of the search. The Court found that initially and for most parts thereafter Powell indicated that he was willing to co-operate with the investigation and had nothing to hide. There was no question that Powell consented to an unlawful search. The question of paramount importance then, is whether the consent was validly, that is voluntarily, given. The voluntariness of the consent is to be determined from the totality of the circumstances.¹⁵¹

Consent must be given by a person who is aware of the true and material facts regarding the act consented to and by the person who is going to be harmed. In *S v Mayekiso en Andere*,¹⁵² accused 1 and 3 shared a home. The police obtained consent from accused 1 to enter the shared home and conducted a search. A bag with a pistol that belonged to accused 3 was seized. The court held that accused 1 had no authority from accused 3 to permit a search of his property in the house. Therefore, there was

149 [1998] (2) JOL 3821 (Tk) at Pages 4 -5.

150 Section 21 *Criminal Procedure Act* 51 of 1977.

151 2005 1 All 49 (SCA) 49.

152 1996 (2) SACR 298 (C).

no valid authority to search and seize accused 3's bag, since consent in terms of section 22(a) was not obtained from accused 3.

(c) Consent cannot validate an irregular search warrant

The protection provided in the CPA has to be interpreted with reference to the *Constitution of South Africa*.¹⁵³ The Constitution provides that everyone has a right to privacy, which includes the right not to have one's property searched and one's possessions seized.¹⁵⁴ However, this right is subject to reasonable and justifiable limitation.¹⁵⁵ The Constitution further provides that evidence obtained in a manner which 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.¹⁵⁶

The CPA stipulates that consent by the subject of a search and seizure operation can serve to validate such an operation where it is conducted without a search warrant.¹⁵⁷ However, where a search warrant has been issued then consent cannot validate an irregular search warrant because it will mean that information furnished to the Magistrate was also irregular. In *Beheermaatschappij Helling I NV v Magistrate, Cape Town*,¹⁵⁸ a search and seizure was conducted under the authority of a warrant that was subsequently found by the court to be invalid and it concluded that consent could not validate an irregular search warrant.¹⁵⁹

If this was to have the effect of legitimising an invalid warrant it would make the safeguards inherent in the primary requirement of a search warrant to be undermined. Therefore, no degree of consent or agreement by the subjects of the search could have the effect of rendering them valid or lawful.

3.3 Conclusion

153 Section 22 *Criminal Procedure Act* 51 of 1977.

154 Section 14 (b) and (c) *Constitution of the Republic of South Africa*, 1996.

155 Section 36 *Constitution of the Republic of South Africa*, 1996.

156 Section 35 (5) *Constitution of the Republic of South Africa*, 1996.

157 Section 22 (a) *Criminal Procedure Act* 51 of 1977.

158 2007 (1) SACR 99 (C) 147.

159 2007 (1) SACR 99 (C) 147.

In the light of this passage it is quite clear that any person exercising the reasonable grounds criterion in terms of a warrantless search and seizure must be satisfied that the grounds in fact exist objectively. It is not enough or sufficient that the EMI subjectively and *bona fide* believed that they had existed. This may also be applicable to the magistrate's and judge's discretion. Objective facts must exist at the time of the granting of the application for a warrant, based on the reasonable grounds.

It is important that when judges or magistrates exercise their discretion they must have sufficient information before them to be in a position to be satisfied on reasonable grounds. Therefore, it is the responsibility of the EMI to place the correct facts before the magistrate or judge to allow him or her to be satisfied on the existence of reasonable grounds.

The fundamental principles of a search and seizure without a warrant in terms of the CPA remain the same under the NEMA. The CPA is clear in sections 20 and 22 that the burden of proof lies with the police official. In this instance, the police must show the existence of reasonable suspicion upon which the police base the reasonable belief, which means that facts must exist at the time when the police official acts without a warrant being issued to him or her.

This chapter also discussed the meaning of the reasonable grounds criterion and it was concluded, with reference to case law, when and how this criterion could be satisfied. It was shown above that it is an objective criterion and that the facts need to exist at the time of the exercising of this discretion by the magistrate, judge or EMI.

Chapter 4

4 Environmental Management Inspectors' routine inspections

4.1. Introduction

The Minister of Environmental affairs and the relevant MEC may mandate EMIs with certain powers and functions in terms of their designation.¹⁶⁰ The NEMA requires EMIs to monitor compliance with and enforce those SEMAs they have been mandated to enforce according to their designation.¹⁶¹ In enforcing this provision, NEMA empowers EMIs with broad powers, including inspection,¹⁶² investigation,¹⁶³ enforcement¹⁶⁴ and administrative powers.¹⁶⁵

The intention of inspection is to assess and ensure compliance with environmental legislation, but also to support other projects such as:

- the national programme of prioritised review of registration certificate issued in terms of the *Atmospheric Pollution Prevention Act* (APPA) 1965 in preparation for the commencement of the *National Environmental Management Atmospheric Quality Act* (NEMAQA);
- the transfer of the permitting of disposal sites in terms of section 20 of the *Environmental Conservation Act*¹⁶⁶ from the Department Environmental Affairs and Tourism (DEAT);
- the implementation of the 2006 Environmental Impact Assessment (EIA) regulations under the NEMA; and
- monitoring the status or level of environmental compliance at a strategic level.¹⁶⁷

160 Section 31B and 31C *National Environmental Management Act* 107 of 1998.

161 Section 31G (1) (a) *National Environmental Management Act* 107 of 1998.

162 Section 31K *National Environmental Management Act* 107 of 1998.

163 Section 31H *National Environmental Management Act* 107 of 1998.

164 Section 31J and 31H (5) *National Environmental Management Act* 107 of 1998.

165 Section 31L and 34G *National Environmental Management Act* 107 of 1998.

166 Section 20 *Environmental Conservation Act* 73 of 1989.

167 Compliance Inspections by Environmental Management Inspectors of facilities with Environmental Authorisations, March 2007, page 1.

The accounting officers of premises which have environmental authorisation and/or environmental impacts to comply with should therefore expect and plan for compliance inspections, announced or unannounced, by EMIs to ascertain the premises' compliance with environmental legislation.

The following factors place no legal constraint on EMIs' powers to inspect a particular facility or premises:

- whether or not EMIs have or will inspect all the facilities in the area, or all the facilities in a particular sector;
- whether or not other similar facilities may be in non-compliance (all suspected non-compliance by other facilities may be reported to the EMI on site, to DEAT's anonymous toll-free Environmental Crimes and Incidents Hotline or to the relevant provincial environmental department;
- whether or not a complaint has been received;
- whether or not the inspection forms part of the annual planned programme of inspections;
- whether or not other departments have recently inspected the facility; or
- whether or not the facility is ISO14001 accredited and has recently been audited.¹⁶⁸

Inspections are likely to be carried out by a team of EMIs with different skills and specialisations. EMIs will often be employed by different institutions. EMIs are also entitled to bring with them any person whose assistance is reasonably required, including other government experts or external consultants, such as sampling experts or process engineers.¹⁶⁹

Environmental inspection refers to inspection of the actual quality of any of the environmental air, land, water and biota. South Africa conducts two types of environmental monitoring, first routine inspections conducted by the EMIs empowered

168 Compliance Inspections by Environmental Management Inspectors of facilities with Environmental Authorisations, March 2007, page 1.

169 Section 31G (2) (b) *National Environmental Management Act* 107 of 1998.

by the national and provincial executives as well as mandatory monitoring requirements specified in most issued environmental authorisation.

Mandatory monitoring is required by various environmental Acts. The Minister and Provinces must monitor the performance of water services institutions to determine whether they comply with national norms and standards.¹⁷⁰ The NEMAQA provides that any conditions may be added to any authorisation which could include monitoring.¹⁷¹ The NEMA requires monitoring of impacts,¹⁷² and further states that adequate provision must be made for the on-going management and monitoring of impacts throughout the life cycle of an activity. Furthermore, monitoring is required in respect of biodiversity status and bioregional plans.¹⁷³

EMIs are empowered in terms of the NEMA to ensure that environmental legislation is complied with and enforced.¹⁷⁴ This Act further empowers members of the SAPS to have all the powers of EMIs in respect of any offence under the NEMA or SEMAs; however, these powers exclude the powers to conduct routine inspections and the power to issue and enforce compliance notices, which leaves the EMIs only with the duty of reporting environmental offences.¹⁷⁵

Procedurally, the inspection team is likely to have a pre-inspection meeting with the person in control of the premises for introductions and to advise facility staff of exactly what they require (particularly access to staff and documents), and how long they think the process will take.¹⁷⁶ EMIs may then inspect any area of the premises.

On-site safety measures require EMIs to have their own safety equipment or tools and that personnel responsible of the facility provide them with the necessary safety

170 Section 27 *Water Services Act* 108 of 1997.

171 Section 41 (2) *National Environmental Management: Air Quality Act* 39 of 2004.

172 Section 24 (4) *National Environmental Management Act* 107 of 1998.

173 Sections 38 (1) (b) and 41 (c) *National Environmental Management: Biodiversity Act* 10 of 2004.

174 Section 31D *National Environmental Management Act* 107 of 1998.

175 Section 31(O) *National Environmental Management Act* 107 of 1998.

176 Compliance Inspections by Environmental Management Inspectors of facilities with Environmental Authorisations, March 2007, page 1.

information relevant to the site to be inspected and must ensure that they have personal protective equipment available.¹⁷⁷

Following is a general overview of powers of the EMIs to conduct routine inspections:

4.2 Routine Inspections by EMIs

In terms of NEMA provisions, EMIs may enter and inspect any building, land or premises or search, including but not limited to, any vehicle, vessel, aircraft, pack-animals, container, bag, box, or item at any reasonable time without a warrant in order to ascertain compliance with relevant environmental legislation.¹⁷⁸ However, a warrant is required to inspect residential premises, unless consent is given, or there are reasonable grounds to believe that a warrant would be issued on application, but the delay caused by application would “defeat the object of the entry or inspection”.¹⁷⁹

EMIs may during inspection request permits, licenses, permissions, certificates, authorisations, or any other document issued in terms of the NEMA or SEMA.¹⁸⁰ During inspection EMIs may question a person about any document, book or record or any written or electronic information which may be relevant for the purpose of an offence or breach of the law or permit, or which relates to the NEMA and SEMA.¹⁸¹ EMIs may further copy or make extracts from, or remove in order to make copies of, any document, book or record or any written or electronic information.¹⁸² Furthermore, EMIs may require a person to produce or deliver, to a place specified by EMI, any document, book, record or any written or electronic information.¹⁸³

During inspection, EMIs may question or interview a person about any specimen, article, substance or other item in respect of which there is a reasonable suspicion

177 Section 9 Occupational Health and Safety Act and section 2 General Safety Regulations (GN R1031 in GG 10252 of 30 May 1986)

178 Section 31K (1) *National Environmental Management Act* 107 of 1998.

179 Section 31K *National Environmental Management Act* 107 of 1998.

180 Section 31P *National Environmental Management Act* 107 of 1998.

181 Section 31H (1) (c) *National Environmental Management Act* 107 of 1998.

182 Section 31H (1) (d) *National Environmental Management Act* 107 of 1998.

183 Section 31H (1) (e) *National Environmental Management Act* 107 of 1998.

that an offence has been committed in terms of the law.¹⁸⁴ The person questioned by EMIs is not obliged to answer questions posed to him or her. In the event a person refuses to answer EMIs questions, the EMIs may then issue such a person with a notice with questions.¹⁸⁵ After the issuing of such a notice, the person must answer all questions even if it incriminates him or her, but will not be prosecuted on such evidence.¹⁸⁶

EMIs while performing their functions may inspect, question a person about, and if necessary remove any specimen, article, substance or other item which, on reasonable suspicion, may have been used.¹⁸⁷ EMI may request the person who was in control of the item, to take it to a place designated by the inspector, and if the person refuses to take the item to the designated place, the inspector may do so.¹⁸⁸

The NEMA further provides that EMIs while carrying out a routine inspection may seize anything in or on any, including but not limited to, business or residential premises, land or vehicle, vessel, aircraft, pack-animals, container, bag, box, or item that may be used as evidence in the prosecution of any person for an offence in terms of the NEMA or a SEMA.¹⁸⁹

During inspection EMIs may take photographs or make audio-visual recordings of anything or any person that is relevant for the purposes of investigation or for a routine investigation.¹⁹⁰ The NEMA further empowers EMIs to dig or bore into the soil and take samples, and remove any waste or other matter deposited or discharged in contravention of the law, permit or authorisation.¹⁹¹ EMIs can stop, immobilise and search any vehicle, vessel and even aircraft under certain circumstances.¹⁹² In addition to these powers, EMIs may also exercise powers conferred to police officials in terms

184 Section 31H (1) (f) *National Environmental Management Act 107 of 1998.*

185 Section 31H (1) (b) *National Environmental Management Act 107 of 1998.*

186 Section 31H (3) *National Environmental Management Act 107 of 1998.*

187 Section 180 H (1) (f) *National Environmental Management Act 107 of 1998.*

188 Section 31K (2) *National Environmental Management Act 107 of 1998.*

189 Section 31K (5) *National Environmental Management Act 107 of 1998.*

190 Section 31H 1 (g) *National Environmental Management Act 107 of 1998.*

191 Section 31H 1 (h) to (j) *National Environmental Management Act 107 of 1998.*

192 Section 31J *National Environmental Management Act 107 of 1998.*

of the CPA to search any person or container or premises, to seize certain items and to effect an arrest.¹⁹³

EMIs have administrative powers that they may exercise during routine inspection, namely to issue compliances notices if they have reasonable grounds to believe that a person has not complied with a provision of the law or a permit.¹⁹⁴ If a notice is issued, the recipient is afforded an opportunity to apply for a variation of and/or suspension of the notice.¹⁹⁵

EMIs may exercise on such building, land, premises, vehicle, vessel, aircraft, pack-animals, container, bag, box or item any of the powers mentioned in the general powers.¹⁹⁶ An EMI within his or her mandate may issue a written notice to a person who refuses to answer questions about any act or omission in respect of which there is a reasonable suspicion that it might constitute an offence.¹⁹⁷ However, the person is not bound or forced to answer the questions. If the person refuses to answer the question, then the EMIs may issue a notice with questions pertaining to the search in a prescribed form.¹⁹⁸ As a result, the recipient of such notice will be bound to answer all questions including the ones that incriminate; however, he or she may not be prosecuted on such evidence.¹⁹⁹

This was evident in the case of *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others*²⁰⁰ where Howie P and Nugent JA held as follows: where the Administrator's permission was unlawful and invalid, or exceeded his powers, it cannot just be disregarded as if it had never existed. Until the Administrator's approval (and also the consequences of approval) is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot be simply ignored. Further it was also evident in a reported case of *Khabisi NO and Another v Aquarella Investment*

193 Section 31H (5) *National Environmental Management Act* 107 of 1998.

194 Section 31L *National Environmental Management Act* 107 of 1998.

195 Section 31M (2) *National Environmental Management Act* 107 of 1998.

196 Section 31K (7) *National Environmental Management Act* 107 of 1998.

197 Section 31H (1)(b) *National Environmental Management Act* 107 of 1998.

198 Section 31H (1) (b) *National Environmental Management Act* 107 of 1998.

199 Section 31H (3) *National Environmental Management Act* 107 of 1998.

200 2004 (6) SA 222 (SCA) at P 241 Par 26.

*83 (Pty) Ltd and Others*²⁰¹ where Bosielo J held that the courts do not look favourably on persons who simply choose to ignore and disregard such a notice, even if they believe it to be invalid. In the light of the two said cases it is clear and shown that administrative powers of EMIs to issue notices are enforceable; if a person believes that such a notice is invalid or unlawful, then let him or her approach the court to set it aside and not just ignore such a notice.

Any person who objects to the notice may make representations, in writing, to the Minister or MEC within 30 days of receipt of the notice, or within such longer period as the Minister or MEC may determine.²⁰² After considering any representations or any other relevant information, the Minister or MEC may confirm, modify or cancel a notice or any part of the notice and must specify the period within which the person who received the notice must comply with any part of the notice that is confirmed or modified.²⁰³

4.2.1 Legal representation during routine inspection

Companies are not ordinarily entitled to insist on having legal representation during routine inspections²⁰⁴ and the inspection can therefore not be delayed or postponed by the unavailability of the legal representative. However, EMIs will not object to legal representation attending the inspection.

4.2.2. Confidentiality of information during routine inspection

During routine inspections EMIs do not conduct inspections in order to assess commercial information, for example pricing, costing, or expansion plans. However, it is possible that an EMI may come across such information during a routine inspection, or that such information may be relevant to the inspection, for example, where an expansion requires a certain authorisation before it can be implemented.

201 2008 (4) SA 195 (T).

202 Section 31M (1) *National Environmental Management Act 107 of 1998*.

203 Section 31M (2) *National Environmental Management Act 107 of 1998*.

204 Unless the particular situation falls within the provisions of section 35 of the Constitution or other applicable legislation.

Generally, it is an offence for an EMI to disclose information about any other person that was acquired while exercising or performing a power or duty in terms of the NEMA or SEMA unless:

- if the information is disclosed in compliance with the provisions of any law;²⁰⁵
- if the person is ordered by a court of law to disclose the information;
- if the information is disclosed to enable a person to perform a function in terms of the NEMA or a SEMA; or
- for the purposes of administration of justice.²⁰⁶

However, it is not an offence for an EMI to disclose information pertaining to the following:

- environmental quality or the state of the environment;
- any risks posed to the environment, public safety and the health and well-being of people; or
- compliance with or contraventions of any environmental legislation by any person.²⁰⁷

An EMI convicted of this offence is liable to a fine of R20 000 or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment.²⁰⁸ In the light of this, an EMI may also face a disciplinary hearing within a particular department.

205 For example, section 36 *Promotion of Access to Information Act*, 2000.

206 Section 31Q *National Environmental Management Act* 107 of 1998.

207 Section 31Q (1A) *National Environmental Management Act* 107 of 1998.

208 Section 31Q (2) *National Environmental Management Act* 107 of 1998.

Chapter 5

Conclusion

5.1 Introduction

An entrenched Bill of Rights in the Constitution can be viewed as the most important upgrade in the South African legal system. The right to privacy, the right to freedom and security of the person and other related fundamental rights give the courts responsibility as guardians of the Constitution, to prevent abuse of power of the criminal justice system by law enforcement agents of the state. The Bill of Rights protects the fundamental rights of individuals when they deal with the organs of state. The Bill of Rights places a responsibility on the state to protect the fundamental rights of the people of South Africa. The state must respect, protect, promote and fulfil the rights in the Bill of Rights,²⁰⁹ and all constitutional obligations must be performed diligently and without delay.²¹⁰

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and taking into account all relevant factors.²¹¹

One of the most significant constitutional remedies for the infringement of a constitutional right is the exclusion of evidence obtained in a manner that violates any right in the Bill of Rights if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.²¹² The exclusionary rule applies as a preventive measure against illegal or unlawful actions by state officials. In other words, state officials will not be in a position to produce before court evidence obtained unlawfully; the officials as a result are disciplined and discouraged from obtaining evidence illegally knowing that it will be excluded.

209 Section 7 (2) *Constitution of the Republic of South Africa, 1996.*

210 Section 237 *Constitution of the Republic of South Africa, 1996.*

211 Section 36 (1) *Constitution of the Republic of South Africa, 1996.*

212 Section 35 (5) *Constitution of the Republic of South Africa, 1996.*

South African environmental law faces the challenge of environmental enforcement. This may be as result of shortage of capacity and resources within spheres of government. In South Africa, the enforcement mechanism mostly used is criminal sanction. Criminal sanction may play a very important role in deterring offenders; however, it is ineffective when it comes to South African environmental law merely because the penalties for environmental damages are often not severe enough to deter environmental transgressors.

An improvement in environmental enforcement has been directives or guidelines of different laws passed by parliament. Such directives include among others section 31A of the ECA, section 19 of the NWA, section 45 of the MPRDA and section 28 of the NEMA. These provisions create a duty of care and empower competent authorities to direct transgressors to follow a number of steps to remedy the environmental harm or damage caused. The application of these provisions proved to be successful and improve environmental enforcement.

5.2 National Environmental Management Act

The NEMA (Amendment) was promulgated in 2005 which introduced a new enforcement section and a new part 2 which was inserted into chapter 7 of the NEMA, in terms of which the Minister and MECs responsible for the environment may appoint EMIs tasked with the monitoring and enforcement of certain environmental legislation. Sections 31B and 31C of NEMA provides for the designation of EMIs by the Minister or the relevant MEC to enforce specific environmental legislation according to their mandate. The EMIs have a duty to fill the enforcement gap that exists in South African environmental law and management. As such they must ensure compliance and enforcement in various important areas of the environment as designated.

The concept of search and seizure by EMIs was examined in this study by considering the statutes, cases, academic writing and other sources on the topic. The objectives of this study were to analyse the development of search and seizure in the NEMA, to provide a basic understanding of the warranted and warrantless search and seizure

provisions of the Act and the CPA, to determine the constitutionality of the search and seizure provisions of the Act and the CPA and to determine remedies available to the people in the Republic who have been subjected to search and seizure.

It was found that search and seizure has developed in South African environmental law from warrantless seizure in terms of section 31J of the NEMA and requirement of a warrant in terms of section 31k of the NEMA. The search and seizure powers of the police officials in the CPA are incorporated in the NEMA to be the powers exercised by EMIs. The basic principles of search and seizure by warrant remain the same under the NEMA.

5.3 Validity of search and seizure warrant

Another area that was not clear and which was examined in this study is the validity of a search and seizure warrant before and after it has been exercised. The NEMA is silent on the validity period and accordingly opens the *lacuna* in the Act relating to the validity period of a warrant before it has been executed. However, regarding whether a warrant expires when exercised or whether the same warrant can be used again to conduct a second search and seizure, it was concluded that the position is not quite certain in terms of the NEMA.

It was argued that the aspects of uncertainty regarding the validity of a warrant after it has been issued needs further legislative regulation and could be brought in line with the CPA, which would mean that the warrant lapses once it is issued.

5.4 Reasonable grounds criterion

It was further found that there is no definition of the reasonable grounds criterion in the NEMA, which is often required to be met by EMIs in executing warranted and warrantless search and seizure. It was found that anyone exercising the reasonable grounds criterion in terms of a warranted or warrantless search and seizure must be satisfied that the grounds in fact exist objectively. It is not sufficient that EMI or police

official subjectively and *bona fide* believed that they existed. A mere hope is also not satisfactory to meet the requirements of reasonable grounds criterion.

The reasonable grounds criterion can also be applied to judges and magistrate's discretion. For example, they must have reasonable grounds at the time of the granting or issuing of the application for a warrant, based on the objective facts existing at that time. It is however essential, in the context of the discretion of judges or magistrates, that the information which is presented before them must present sufficient details to place them in a position to satisfy themselves on reasonable grounds. It is therefore a burden on the EMI to place correct facts before the judge or magistrate to allow him or her to be satisfied on reasonable grounds.

5.5 Search and seizure with a warrant

It was concluded that the warranted search and seizure provisions of the NEMA and CPA should be constitutionally valid. The authorisation from a judge or magistrate when a warrant is issued is a sufficient safeguard and accordingly justifies a limitation of the right to privacy in terms of the constitution. It is safe to conclude that the constitutionality of the new warrantless provisions of the NEMA is not beyond doubt. The fact that no "everready" or "instant" warrantless powers are granted tends to lead to a conclusion that the provisions could be constitutionally valid. However, the courts will have to consider the purpose of the NEMA and a determination will have to be made on whether the circumstances under which such a warrantless operation may be conducted are narrowly defined.

There is no standard test from decided cases or precedents to be applied in order to determine the constitutionality of warrantless search and seizure provisions. It was also concluded that even though it may be found that the search and seizure provisions of NEMA and CPA are constitutionally valid, the conduct of an EMI or police official when conducting such a search and seizure, whether in terms of a warrant or warrantless, must be in compliance with the Constitution. Accordingly, should the provisions of the NEMA or the CPA be found to be constitutional, it was found that this

might not be the end of the constitutional conflict which he transgressor can initiate as it is still required from EMIs and police officials to conduct their search and seizure operations in compliance with the constitution.

5.6 The stage after search and seizure

The stage after a search and seizure was also analysed in this study and entails the rights and duties of the EMIs and the remedies available to a transgressor who has been subject to a search and seizure. The rights and duties of EMIs after a search and seizure, for example the duty to retain and preserve the item seized with reasonable care, were analysed and weighed up against the remedies of transgressor subsequent to a search and seizure operation. It was found that some remedies are contained in the NEMA and the CPA, for example, the right to examine and make copies, whereas other remedies derive from the Constitution, for example, access to court file.

It was accordingly found that there are various sources of remedies and the conclusion was reached that these remedies should be sufficient, which includes the right to claim damages in certain circumstances. It is however acknowledged that there are seemingly no remedies available to a transgressor to prevent injustice or harm before suffering damages. All the available remedies in place relate to the position after harm or damage has been done and they are available to undo or to balance the injustice or harm that has been suffered by the transgressor. There is thus still a *lacuna* in this regard but perhaps hope can be found in the CPA which requires that the police official must conduct the search with strict regard for decency and order. This could thus prevent harm or injustice during the course of the carrying out of the search, but does not cover the period before and after the search.

5.7 Recommendations

The law relating to search and seizure is very complicated but possible to understand. On the one hand, in some instances evidence is inadmissible in criminal cases due to

failure of EMIs to follow the legal provisions relating to search and seizure more than for any other reason that may exist. It is important that EMIs are knowledgeable about the relevant laws when conducting search and seizure. This means that EMIs must determine before the search, whether it is conducted with or without a warrant, the grounds on which they can justify their search before it reaches the court. Searches are valid because they are made with a warrant, incident to a lawful arrest and with consent. If the EMI is aware of all the legal requirements to validate search and seizure, he or she can determine justification at the time of search and seizure and not later. On the other hand, if EMI cannot justify his or her search and seizure, it is best not to conduct such search and seizure. Once such evidence has been tampered with by unjustified searches and seizures the court will render it inadmissible. The failure of the EMIs to adhere to the requirements of the Constitution results in the case being dismissed or lost or even result in the institution of civil actions against the state.

5.7.1 Specific Environmental Management Acts

5.7.1.1 National Environmental Management: Air Quality Act

In 2004 the NEMAQA was promulgated to improve and close the gaps in the *Atmospheric Pollution Prevention Act* (APPA). In terms of APPA there were many shortcomings, including the absence of national air quality standards, the absence of provisions appropriately addressing the issues of compliance and enforcement. For instance, non-compliance with a condition of a permit was not a criminal offence and as a result there was no punitive action that could therefore be taken against a permit holder that contravened its permit.

The NEMAQA provides for meaningful criminal offences against transgressors, but EMIs will have to develop detailed, robust evidence collection skills and expertise. The ordinary rules of maintaining a chain of custody and collecting evidence that proves the elements of criminal offence beyond reasonable doubt in terms of the CPA will not

be enough. However, evidence of excessive air emissions requires a particular skill and presents a number of difficulties. Such difficulties include, amongst others:

- the present absence of reliable self-monitoring of relevant pollutants by relevant facilities;
- the relatively complicated, relatively financially demanding or very expensive sampling required to prove contraventions of various excessive air emissions; for example, comparative surveillance, chemical fingerprinting for particulates, and diffusive samplers.

Importantly, EMIs who will be enforcing this Act will have to receive specialised training. EMIs basic training will not cover specialised fields such as the use of sampling equipment mentioned above as it focuses mainly on the basic understanding of legal methods of evidence collection.

5.7.1.2 National Environmental Management: Water Act

The NEMA and the NWA set out persons against whom directives can be issued and include the owner of such land, the person in control of land or premises or the lawful occupier who has a right to use such land on which pollution arises. Generally, there must be a pre-directive notifying the transgressor of the intention to issue a directive and inviting representations. This is an opportunity that the transgressor may use, but care must be taken to avoid self-incrimination and legal assistance should be sought before the representations are submitted to the relevant bodies. The NEMA and NWA do not provide for a mechanism to object to a directive issued to the transgressor. Therefore, the aggrieved party has only one option to approach the court for relief. Pending resolution, the issued directive becomes compulsory for the aggrieved party. In the light of this passage, the relevant government department should arrange for an independent body to review or appeal its internal resolutions against transgressors, such as mediators and arbitrators. By so doing the transgressor will be afforded a chance to make representations which will be unbiased and assessed by an independent body and this will reduce the legal costs for approaching the court directly for relief.

5.7.1.3 National Environmental Management: Waste Act

The enforcement powers of the EMIs derive from the NEMA. Most companies are exposed from non-compliance with conditions imposed in an environmental authorisation issued in terms of the NEMA or similar permit conditions from other SEMAs. For example, the conditions found in a waste management license issued in terms of the *National Environmental Management: Waste Act, 2008* or the permits issued earlier in terms of the *Environmental Conservation Act, 1989*. For this reason, it is very important to structure environmental management programmes to ensure that there is awareness and continuous compliance with every condition in any authorisation which the company has been issued with.

A further exposure from other companies is undertaking of certain listed activities without an environmental authorisation for such activity. Over the years there have been numerous changes in terms of government notices published by the Minister from time to time in respect of the activities which are listed. It is the responsibility of the companies to ensure that they comply with the changes or additions and to re-examine their operations more often, particularly when such a company undertakes to expand its operation on an existing activity authorised earlier to them.

In conclusion, as environmental management inspectors (EMIs) play an important role in enforcement of and compliance with environmental law in South Africa, this literature study aimed to explore legislation, case law, electronic sources, textbooks and academic articles in order to describe their mandate, functions and the powers to search premises and seize items in order to add to a better understanding of their function and contribution.

BIBLIOGRAPHY

LITERATURE

Literature – books and theses

- Boyd DR *The Environmental Rights Revolution: A Global Study of Constitution, Human Rights, and the Environment* (UBC Press Vancouver 2011)
- Craigie F, Paterson, A. and Kotzé, L. (eds) *Environmental Compliance and Enforcement in South Africa – Legal Perspectives* (Juta Cape Town 2009)
- Currie I and De Waal J *The New Constitutional and Administrative Law* (Juta Cape Town 2001)
- Harr JD and Hess KM *Constitutional law and the Criminal Justice System* (Belmont Wadsworth 2001)
- Kidd M *Environmental Law* (Juta Cape Town 2011)
- Du Toit E *Commentary on the Criminal Procedure Act* (Juta CapeTown 1996)
- LaFave WR and Israel JH *Criminal Procedure: Constitutional limitations in a nutshell* 6th ed (West Group St Paul Minn 2001)
- Steytler N *Constitutional Criminal Procedure: a commentary on the Constitution of the Republic of South Africa* (Butterworths Durban 1998)
- Woody RH *Search and Seizure: The Fourth Amendment for law enforcement officers* (Illinois Charles C Thomas 2006)

Literature - Journals, Articles

Fourie M "Enforcement of air quality legislation in South Africa" 2008 *Envolve* 1-15

Case law

Beheermaatschappij Helling I NV v Magistrate, CapeTown 2007 (1) SACR 99 (C)

Bernstein v Bester NO 1996 2 SA 751 CC

Cadac (Pty) Ltd v Weber-Stephen Products Co & others 2011 (3) SA 570 (SCA)

Divisional Commissioner of SA Police, Witwatersrand Area and others v SA Associated Newspaper Ltd and Another 1966 2 SA 503 A

Goncalves v Minister of Law and Order 1993 (1) SA 161 (W)

Goqwana v Minister of Safety and Security NO and Others (20668/2014) [2015] ZASCA

Janse van Rensburg NO v Minister van Handel en Nywerheid No 1999 2 BCLR 204 T

Khabisi NO and Another v Aquarella Investment 83 (Pty) Ltd and Others 2008 (4) SA 195 (T)

Magobodi v Minister of Safety and Security and Another 2009 (1) SACR 355 (TK)

Minister of Police v SA Metal and Machinery (462/13) [2014] ZASCA

Mnyungula v Minister of Safety and Security [200] JOL 11934 (TK)

Mthembu v S 2008 4 AII SA 522 SCA

Mosunkutu and Cornelius v Aquarella Investment 83 (Pty) LTD and others 2007 9114/2007 TPD

Naidoo v Minister of Law and Order 1990 2 SA 158 W 289

Ngamlana v MEC for Safety and Security and Another [1998] (2) JOL 3821 (TK)

Ngukumba v Minister of Safety and Security 087/13 [2014] ZACC 14

Ndabeni v Minister of Law and Order and Another [1984] (3) SA 500 (D)

Nombembe v Minister of Safety and Security 1998 (2) SACR 160 (TK)

Ntoyakhe v Minister of Safety and Security 2002 (1) SA 257

Oudekraal Estate (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

Parker Ross and Another v Director: Office for Serious Economic Offences 1995 2 BCLR 198 (C)

Thomson Newspapers Ltd v Canada (Director of Investigation and Research) (1990) 76 CR (3d) 129 (SCC)

Polonyfis v Minister of Police 2012 (1) SACR 57 SCA

Powell NO and Others v Van Der Merwe and Others 2005 1 All (SCA)

S v Gumede 1998 5 BCLR 530 D 37

S v Madiba 1998 1 BCLR 38 D

S v Mayekiso en Andere 1996 (2) SACR 298 (C)

S v Scholtz 1996 (2) SACR 623 (C)

Sithonga v Minister of Safety and Security 2008 (1) SACR 376 (SCA)

Thint (Pty) Ltd v National Director of Public Prosecutions 2008 12 BCLR 1197 n 13

Thomson Newspapers Ltd v Canada (Director of Investigation and Research) (1990) 76 CR (3d) 129 (SCC)

Government Publications

GN R1031 in GG 10252 of 30 May 1986

GN R494 in GG 28869 of 02 June 2006

GG No. 31884 of 11 February 2009

Proc R84 in GG 32765 of 01 December 2009

Legislation and government publications

The Constitution of the Republic of South Africa 1996

Criminal Procedure Act 51 of 1977

Environmental Conservation Act 73 of 1989

Harmful Business Practices Act 71 of 1998

National Environmental Management Act 107 of 1998

National Environmental Management Act: Protected Areas Act 57 of 2003

National Environmental Management Act: Biodiversity Act 10 of 2004

National Environmental Management Act: Waste Act 59 of 2008

National Environmental Management Act: Integrated Coastal Management Act 24 of 2008

National Environmental Management Act: Air Quality Act 39 of 2004

National Environmental Management Amendment Act 46 of 2003

Promotion of Administrative Justice Act 3 of 2000

Internet sources

Anonymous 2013 <http://lssa.org.za>

Anonymous 2013 *Comments by the Law Society of South Africa (LSSA) on the National Environmental Management Laws Amendment Bill [B26-2013], the National Environmental Management: Air Quality Amendment Bill [B27-2013], the National Environmental Management: Protected Areas Amendment Bill [B28-2013]* <http://lssa.org.za> [date of use 21 March 2015]

Anonymous 2013 <http://www.environment.gov.za>

Anonymous 2013 *National Environmental Compliance and Enforcement Report 2012/13* <http://www.environment.gov.za> [date of use 30 April 2014]

Anonymous 2012 <http://www.gov.za.gcis.gov.za>

Anonymous 2012 *Game farmers who fail to comply with will face prosecution* <http://www.gov.za.gcis.gov.za> [date of use 05 May 2014]

Bapela <http://www.dwaf.gov.za>

Bapela S *The Role of the Environmental Management Inspectors: MCC Forum: 21/05/09* <http://www.dwaf.gov.za> [date of use 25 April 2014]

Tucker and Mandlana 2007 <http://www.enviropaedia.com>

Tucker and Mandlana 2007 *Green Scorpions – Environmental Management Inspectors* <http://www.enviropaedia.com> [date of use 05 July 2015]

Truter 2014 <http://www.werksmans.com>

Truter J Environmental Law Compliance – the noose is tightening
<http://www.werksmans.com> [date of use 21 March 2015]

