WARRANTLESS SEARCHES AND AWARDS FOR DAMAGES IN LIGHT OF THE JUDGMENT IN

Shashape v The Minister of Police Case No.: 1566/2018

1 Introduction

The law of criminal procedure is "double functional" in that it not only dictates the proper procedure for the execution of police functions but also serves as a ground of justification in substantive law against otherwise unlawful conduct (see Joubert *The Criminal Procedure Handbook* 13ed (2020) 8). Nevertheless, personal liberties, even in the pursuit of justice in a country overrun by crime, cannot be sacrificed indiscriminately simply to further the diligent investigation of crime (see Packer "Two Models of the Criminal Process" 1964 113(1) *University of Pennsylvania Law Review* 1–68; Van der Linde "Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources: A Discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC)" 2020 23 *Potchefstroom Electronic Law Journal* 1–28; South African Police Service "Crime Situation in Republic of South Africa Twelve (12) Months (April to March 2019_20)" (31 July 2020) https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf (accessed 2020-09-01)).

An example of personal liberties being sacrificed in favour of the pursuit of justice is the search and seizure of private spaces of individuals. Search and seizure may be effected both with and without a warrant and is regulated by the Criminal Procedure Act 51 of 1977 (CPA). However, where a police official acts outside of this legislative matrix, his or her conduct is not regarded as lawful; he or she may not rely on official capacity as a ground of justification against an (unlawful) search. In such instances, the Minister of Police may be vicariously liable in delict owing to the unlawful conduct of police officials. Such cases are relatively rare.

This contribution will focus on two specific aspects – namely, search and seizure conducted *without a warrant*, and subsequent awards for damages based on unlawful, warrantless searches. The recent judgment in *Shashape v The Minister of Police* (WHC (unreported) 2020-04-30 Case no 1566/2018 (*Shashape*)) is discussed against this backdrop.

2 Relevant constitutional principles

Police search and seizure affects two specific and interrelated constitutional rights. These rights are the right to dignity under section 10 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the right to privacy under section 14 of the Constitution. Section 10 simply states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". Human dignity is furthermore a foundational value of our constitutional democracy. In this regard, section 7(1) holds that "[the] Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". The right to privacy is, however, more elaborate. Section 14 provides:

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

Section 14 is therefore quite elaborate in the sense that it provides for constitutional protection against arbitrary search and seizure. Section 36 of the Constitution, however, allows for the limitation of rights under "reasonable and justifiable" circumstances. The right to privacy must, for example, be balanced against the State's (and society's) legitimate interest in maintaining law and order (see *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In Re: Hyundai Motor Distributors (Pty) Ltd v Smit No* 2001 (1) SA 545 (CC) par 55; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) par 73–80; *Magobodi v Minister of Safety and Security* 2009 (1) SACR 355 (Tk) par 7; *Tinto v Minister of Police* 2014 (1) SACR 267 (ECG) par 50). In *Minister of Safety and Security v Van der Merwe* (2011 (5) SA 61 (CC) par 56), Mogoeng CJ moreover held that when courts consider the validity of search warrants, they "must always consider the validity of the warrants with a jealous regard for the search person's constitutional rights". Furthermore, the Supreme Court of Canada in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* ([1990] 1 SCR 425 508) succinctly points to the consequences of reckless search and seizure:

> "The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence has been

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

(Also see *Magajane v Chairperson, North West Gambling Board* 2006 (2) SACR 447 (CC) par 70; *Tinto v Minister of Police supra* par 51–52.)

In this case, the Supreme Court of Canada *inter alia* reminds us that the execution of search and seizure must be performed keeping in mind that the suspect is presumed innocent (enshrined in s 35(3)(*h*) of the Constitution). An unlawful search may also impact the right to freedom and security of the person (especially under s 12(1)(*c*) and (*e*)). Section 25 also comes into play as it stresses that "[n]o one may be deprived of property except in terms of law of general application". In the context of the ensuing discussion, it becomes evident that (unlawful) searches are unfortunately also associated with a degree of undue physicality.

3 Search and seizure under the CPA

This section sets out the legislative framework for warrantless searches under the CPA, as well as the guidelines for warrantless searches performed based on information provided by informers, including anonymous informers. This is followed by an analysis of the most pertinent cases where damages were awarded based on warrantless searches. (The scope of this discussion therefore does not include instances of unlawful arrest or detention without a facet of search and seizure.) This section serves as a contextual background to the discussion of the *Shashape* judgment.

3 1 Relevant provisions dealing with warrantless searches

Section 20 of the CPA refers to articles susceptible to being seized, namely an article

"*(a)* which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

Furthermore, according to section 22 of the CPA, a warrantless search may be effected against any persons, containers or premises, to seize an article listed in section 20. This may only occur in a few instances, namely:

"*(a)* if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
(b) if he on reasonable grounds believes–
(i) that a search warrant will be issued to him under paragraph *(a)* of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

A warrantless search and seizure may, therefore, take place if a person who is authorised to do so consents to such a search in terms of section 22(*a*) of the CPA. This includes, most patently, the owner or tenant of a property. The consent provided must also be, as Du Toit points out, of a certain quality (Du Toit "Circumstances in Which Article May Be Seized Without Search Warrant" in Van der Merwe (ed) *Commentary on the Criminal Procedure Act* RS 63 (2019) 30E). A person can only give valid consent if he or she has the capacity to do so and has been informed of the purpose of the search (Du Toit in Van der Merwe (ed) *Commentary on the Criminal Procedure Act* 30E). A failure to properly inform someone of the purpose of the search will consequently render the "consent" and the subsequent search invalid (*Magobodi v Minister of Safety and Security supra* par 16). "Capacity" must also be understood in the sense of "authorisation". In *S v Motloutsi* (1996 (1) SACR 78 (C)), a warrantless search was effected based on the consent of a person who had no authority to give such consent. A lessee had given consent to search a sitting room that he had sublet to the accused. The court correctly held that this search was unlawful (see *S v Motloutsi supra* 87). A police official should ascertain whether a person has the authority to give consent before issuing a request for a warrantless search (*Magobodi v Minister of Safety and Security supra* par 14). Furthermore, if an item falls outside the scope of section 20, the question of consent and the validity to conduct a search becomes irrelevant (*Sigwebendlana v Minister of Safety and Security* (ECMHC (unreported) 2013-02-28 Case no 27/94; *Magobodi v Minister of Safety and Security supra* par 13). A person must also be informed of his or her right to refuse consent and to be informed of such right of refusal (*Magobodi v Minister of Safety and Security supra* par 14).

Section 22(*b*)(i)-(ii) involves a two-pronged inquiry. If, in terms of section 22(*b*)(i), a police officer has *reasonable grounds* to believe that a warrant would have been granted under section 21(1) (by means of a warrant issued by a judicial officer), a warrantless search may also be effected. In addition this, the officer must under section 22(*b*)(ii) on reasonable grounds believe that the delay in obtaining the search warrant would lead to obstructing the aim of the search. This typically covers instances where a suspect might be evading justice or where it is believed that the suspect might destroy evidence, or might otherwise attempt to evade justice if officers had first to obtain a search warrant. In *S v Brown* (ECPEHC (unreported) 2019-02-05 Case no CC 18/2018), a member of the Organised Crime Unit, Shaw, was patrolling the coast and noticed suspicious activity, where some of the accused were removing items from the ocean, placing it in bags and then in a vehicle's boot. Upon approaching the scene, he was obstructed by some of the parties and the latter fled the scene. A car chase ensued but Shaw managed to catch up with one party, Renier. Shaw enquired about the contents of the boot from this party who informed him that it was abalone (*S v Brown supra* par 17–20). It is clear that had Shaw obtained a search warrant, it would probably have frustrated the object of the search because the accused were in the process of leaving the scene. In *Seapolelo v Minister of Police, Republic of South Africa* (NWHC (unreported) 2018-03-

0263/17 Case no 64/2017), the officers asserted that they were tracing persons allegedly involved in an armed robbery. The suspects had stolen a firearm and a cellphone and one of the suspects was alleged to have entered the home of the plaintiff. Considering the fact that the items were capable of being hidden without difficulty, the court agreed that the officers had reasonable grounds to believe that a warrant would have been granted to them and that a delay would have obstructed the object of the search. This would still have rung true – regardless of the absence of consent – and the court appeared not to believe the plaintiff's version regarding the absence of consent to search (par 33, 35–36). In *S v Motloutsi*, it was held that although the police officer in question had reasonable grounds to believe that a warrant would have been granted, the objective of the search would not have been defeated had he obtained a search warrant (*S v Motloutsi supra* 80 and 87). In that case, the officer contended that a warrant was not obtained from the warrant-officer on duty because such a warrant does not have "the same credibility as a warrant issued by a magistrate", and that obtaining one from a magistrate would have frustrated the objectives of the search (*S v Motloutsi supra* 80 and 87). The court, however, held that there was a "conscious and deliberate violation of the accused's constitutional rights", and held further that the evidence obtained was inadmissible (*S v Motloutsi supra* 88). An underlying supposition of the court appears to be that the ground under section 22(*b*) becomes irrelevant when there is a reliance on consent as the ground of the warrantless search (see *Nombembe v Minister of Safety and Security* (1998 (2) SACR 160 (Tk); Du Toit in Van der Merwe (ed) *Commentary on the Criminal Procedure Act* 30E). The facts in *Seapolelo v Minister of Police* can be distinguished slightly here as it appears that the police relied on both grounds for a warrantless search listed in section 22 and the court did not believe the plaintiff's version of events regarding the absence of consent (par 35–36).

Furthermore, the "reasonable grounds" under section 20 (relating to the items susceptable to seizure) must be established on objective grounds. In *Magobodi v Minister of Safety and Security*, for example, Miller J held that there was an absence of reasonable grounds in deciding to search the vexed vehicle. The court pointed out that there was a lack of information to point to a conclusion that the vehicle was an article described in section 20 (*Magobodi v Minister of Safety and Security supra* par 16). There must, consequently, at least be "a reasonable suspicion" that the article in question is one that is described under section 20 (*Ngqukumba v Minister of Safety and Security* (ECMHC (unreported) 2011-10-20 Case no 1354/2010 par 17). Didcott J in *Ndabeni v Minister of Law and Order* (1984 (3) SA 500 (D)) held that the CPA "calls for the existence in fact of reasonable grounds" and the determination of whether these facts exist "must be determined objectively" (*Ndabeni v Minister of Law and Order* 511; see also *Watson v Commissioner of Customs and Excise* 1960 (3) SA 212 (N) 216). In fact, it has been held that a subjective belief by a police officer is essentially irrelevant and is considered a mere "by the way" (*Ndabeni v Minister of Law and Order supra* 511).

Finally, section 29 of the CPA also states that a search and seizure, whether of a person or premises "shall be conducted with strict regard to decency and order".

3 2 I heard it through the grapevine: Warrantless searches based on information provided by informers

In instances where warrantless searches are effected based on information provided by a police informer, the information must measure up to a certain standard in order to comply with the "reasonable grounds" standard required by the CPA. The Canadian case of *Regina v Zammit* ([1993] 15 CRR (2d)) has been relied on for guidance on the standard with which informer information should comply (*Tinto v Minister of Police supra* par 65; Du Toit in Van der Merwe (ed) *Commentary on the Criminal Procedure Act* 30K–30L). This case, however, relies heavily on the *dicta* in *R v Debot* ((1986) 30 CCC (3d) 207 (Ont CA) (*Debot I*) 275 and *R v Debot* [1989] 2 SCR 1140 (*Debot II*)). In *Debot I*, the court held that an informer's assertion that he or she had obtained the vexed information from "a reliable informer" personally would constitute an insufficient basis for granting a warrant. The "underlying circumstances" that led to the "tip" must, therefore, be disclosed to the relevant judicial officer. The same logic applies to a warrantless search and "a mere conclusory statement" would be insufficient. The informer's tip must contain enough detail to satisfy officials that

> "it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance". (*Debot I supra* 218–219)

Martin JA held further that these criteria need not be present in all cases.

In *Debot II*, the Supreme Court of Canada (per Wilson J) held that "the totality of the circumstances [must meet] the standard of the necessary reasonable grounds" (*Debot II supra* 219). Wilson J continued as follows:

> "In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Secondly, where that information was based on a *'tip'* originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search?" (*Debot II supra* 1168)

Wilson J also agreed with Martin JA that officials must consider the "totality of the circumstances".

In this regard, the court in *Mabona v Minister of Law and Order* (1988 (2) SA 654 (SE)) refers to the circumspect treatment by courts of informer information. Jones J held that the information falls into the same category as "accomplices, quasi accomplices and police traps" and their tips "must be subjected to close and careful scrutiny" and corroboration before their

information can be trusted (*supra* 658). Other safeguards are also missing, such as the fear of perjury when testifying under oath (the credibility of which is closely monitored by the courts) and the lack of a formal complaint or statement – all exacerbated by the informer's insistence on anonymity (see *Mabona v Minister of Law and Order supra* 659). Pickering J relied on these sentiments in *Tinto v Minister of Police (supra)*. In that case, a police officer attempted to conduct a warrantless search (no search was ultimately effected) based on information provided by informers. The informers were known to the police and had provided reliable information "nine times out of ten" in the past. The plaintiff (and those who accompanied him) acted suspiciously by remaining in the plaintiff's motor vehicle for a prolonged period of time in the parking lot of a known crime "hotspot". The persons who accompanied the plaintiff furthermore walked between various banks and the vehicle. The cumulative conduct was thus in line with the known *modus operandi* of bank robbers (par 66–67). Pickering J relied on the standards set out in *Debot I* and *Debot II* and asserted that the reports by informers were detailed; "not based on mere gossip or rumour" and not merely a conclusory statement; pertained to information regarding a known crime hotspot and therefore the police had objective grounds to request a search (par 71–72).

It is therefore clear from a reading of the relevant case law that information supplied by informers must essentially also comply with the standard of reasonableness; attempts should be made to corroborate this information; and informer information must, in general, be treated with a degree of circumspection.

3 3 Overview: Previous cases dealing with damages for wrongful searches

In *Pillay v Minister of Safety and Security* ((2004/9388) [2008] ZAGPHC 463 (2 September 2008)), a 62-year-old woman was subjected to an unlawful search and seizure. The police broke through two security gates and two doors (located on the perimeter walls and main entrance to the house). Door frames and locks, cupboard door locks as well as internal doors were damaged during the process. The house was left in a chaotic state as cupboards were emptied, and clothes scattered throughout the house. The plaintiff was also subjected to a body search. So terrified by the experience was she that she called the South African Police Service (SAPS) flying squad to come to her aid. The sequence of events traumatised the plaintiff to such an extent that she was diagnosed with post-traumatic stress disorder (PTSD) by her psychiatrist. The plaintiff's symptoms included "flash-backs and reliving the traumatic event, anxiety, mood disturbances, upsetting dreams, persistent avoidance, sleep disturbances, impaired concentration, memory deficiencies, depression, feelings of guilt, rejection and humiliation" (*supra* par 7). Her psychiatrist gave a general prognosis that was "not positive" and confirmed she would need further treatment. The plaintiff's treatment at that time consisted of medication and counselling. However, he explained that her symptoms had subsided over time (*supra* par 6–7). The defendant's expert psychiatrist, Dr Fine, came to a similar conclusion citing

"chronic and ongoing PTSD and major depressive disorder" [*sic*] coupled with dysfunctional behavioural and mood patterns. This had led to the loss of amenities of life as well as emotional distress. Dr Fine, ironically, indicated that the plaintiff still suffered from severe psychiatric lesions years after the incident and that she would require lifelong intermittent treatment as her prognosis was poor (*supra* par 8).

Meyer J essentially rejected the references to previous awards by the parties as the learned judge pointed out that these were "not directly comparable" to the factual matrix in the present case. The court pointed towards the following broad factors in ascertaining the general damages claimed, specifically: the trauma suffered by the plaintiff; the gross violation of her privacy; her feelings of humiliation and degradation; her chronic PTSD; her poor prognosis; the probability of lifelong psychiatric treatment; caution against awarding extravagant awards for general damages; and fairness towards the defendant (*supra* par 10). Regarding the last factor, the court cited *De Jongh v Du Pisanie NO* (2005 (5) SA 457 (SCA)). In that case, the Supreme Court of Appeal (SCA) rejected the court *a quo*'s sentiments that frugal (or conservative) awards for serious injuries are at odds with a civilised society. Brand JA held that it is not society that is paying the damages but the defendant – in other words, the frugality of society is irrelevant in ascertaining the award (*supra* par 60). Brand AJ further evoked the words of Holmes J in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA C 284 (D), where it was held that

> "the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense." (*Pitt v Economic Insurance Co Ltd* 287)

The court in *Pillay* concluded that R150 000 would be appropriate in the circumstances (par 11).

As to special damages for damage to the plaintiff's property, the court pointed solely towards the reasonable costs for repairs. This amounted to R21 049 (*supra* par 12). There was also a third claim relating to monies and jewellery that had disappeared from the plaintiff's safe but the court found that the plaintiff had failed to discharge her onus sufficiently for the court to find that the police were responsible for that as well (*supra* par 13–17).

In *Minister of Safety and Security v Augustine* (2017 (2) SACR 332 (SCA)), the respondents comprised a family of four who were subjected to a search without a lawful warrant at 02:00 in the morning. This was followed by insults, humiliation and intimidation by *inter alia* pointing firearms at them. The third respondent was pushed to the ground by the boot of an officer and a rifle was pointed at his head. The first respondent was then ordered to lie down and also had a rifle pointed at his head. A vast number of officers, between 30 and 45, had furthermore entered the premises (*supra* par 7–9). The respondents were under the initial impression that they were being burgled. They were only informed after 30 minutes that the "intruders" were police officers who subsequently discovered that they were at the wrong house (*supra* par 10–12). Locks, doors, and glass panes had been broken in the process and the respondents experienced humiliation as neighbours

witnessed the police leaving their house (*supra* par 11 and 14). The respondents suffered a range of psychological consequences owing to the conduct of the police, which was attested to by an expert clinical psychologist. This included insomnia, flashbacks, PTSD, reduced level of general functioning, dysthymia, anxiety, guilt, self-blaming, psychosis, aggressive impulses, irritability, and paranoia. The first respondent's work performance was impacted and the third and fourth respondents suffered academic problems. The first respondent additionally suffered a heart attack and the family had to relocate owing to the negative association with their previous home (*supra* par 19–24).

Gorven AJA referred to the role of comparable awards and held that they should be used as guidance and not be followed slavishly (par 28). Reference is made to *De Jongh v Du Pisanie* (*supra*), where it was held the consequences of the harm might be more or less serious than a case currently under consideration; and that should consequently impact the award (*De Jongh v Du Pisanie supra* par 63). Courts should further refrain from mechanically applying the consumer price index (*Augustine supra* par 28). The SCA further referred to other comparable cases, varying in degrees of comparability, including *Pillay* (see *Kritzinger v Road Accident Fund* ([2009] ZAECPEHC 6 (24 March 2009); *Minister of Police v Dlwathi* [2016] ZASCA 6 (20604/14; 2 March 2016); *Minister of Safety and Security v Van der Walt* 2015 (2) SACR 1 (SCA)). The facts in *Kritzinger v Road Accident Fund* do not concern police action at all but they do, however, deal with emotional shock and trauma. Further, the facts in *Minister of Safety and Security v Van der Walt* are distinguishable from *Pillay* and *Shashape* in that the case deals with unlawful detention rather than a warrantless search. *Minister of Police v Dlwathi* also deals not with a warrantless search, but with assault. Gorven AJA points towards the "aggravating factors" present in the case, including the fact that it occurred at 02:00 in the morning and that the events traumatised the respondents to the extent that they had to relocate. The family as a whole was impacted in such a way that they could not even adequately comfort each other (*Augustine* par 34). The court also censured the police for their unlawful conduct, which was quite the opposite of their constitutional duty to protect inhabitants of the country (*Augustine* par 37; also see s 12(1)(*c*) of the Constitution; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); the Preamble to the South African Police Service Act 68 of 1995). The applicants were further censured because there were "deliberate falsehoods" presented to the court regarding a document that was found bearing the name of Eugene, the *actual* suspect they were looking for. The appellants purported to have found these documents in the home of the respondents, which would have justified their warrantless search. The appellants also misrepresented the fact that the semi-detached home of the respondents was in fact the same house Eugene was living in. This was also false (*Augustine supra* par 18 and 37). In addition, there was also a patent attempt to thwart efforts to report this conduct either to the police or the Independent Police Investigative Directorate (*Augustine supra* par 15). The SCA consequently dismissed the appeal and agreed with the court *a quo*'s award of R200 000 (for the first to third respondents each) and R250 000 (to

the fourth respondent, who displayed the most significant psychological impact) (*Augustine supra* par 35 and 38).

The court in *Augustine* referred to *Marwana v Minister of Police* (ECPEHC (unreported) 2012-08-28 Case no 3067/2010), which is sufficiently comparable to *Shashape* and *Pillay*. The plaintiff in *Marwana v Minister of Police* was employed as a domestic worker. She was arrested (without a warrant) and detained at the police station the day after a robbery occurred at her employer's residence. She was not present on the day of the robbery. The police took the plaintiff to her home and searched her home without her authorisation (*supra* par 4). Tshiki J held that the plaintiff would not have been able to consent in any case as she was not acting autonomously owing to her detention, assault, and never having been informed of her rights (*supra* par 18). There was also an absence of a search warrant. The plaintiff was subjected to an assault when she was struck by a wooden plank "and strangled with a plastic bag" (*supra* par 4). A medical practitioner confirmed the extent of her injuries, which included bruises on her upper arms and back, wrist abrasions, and bruises on her knees. The medical practitioner also relayed that the plaintiff informed him of strangulation with a plastic bag. This incident caused the plaintiff to soil herself (*supra* par 4). The court awarded damages for unlawful arrest and detention (R55 000), assault (R90 000) and unauthorised entry (R10 000). Note that the amounts were split as there were three separate and distinguishable events. The court referred to the fact that the plaintiff was unlawfully detained for approximately 30 hours but it regarded the assault as a particular violation of the plaintiff's rights – specifically, her rights to privacy and dignity (*supra* par 19–22). Tshiki J did not regard the unlawful search in as serious a light as the other violations because "there is no evidence that they had done something wrong or anything beyond their mandate" (*supra* par 22). The court, however, did specifically consider whether the ground under section 22(*b*) of the CPA was present but it seems to be implied that the police had no reasonable grounds to search the plaintiff's residence. One can, therefore, conclude that, as in *Marwana v Minister of Police*, an unlawful search on its own – in other words, without any damage to property, assault or psychological lesions – would attract an award for damages of R10 000.

4 *Shashape* case

4 1 Pertinent facts

The plaintiff, Ms Shashape, sued the Minister of Police for R100 000 in damages for an unlawful search and seizure and unlawful entry of her premises (*Shashape supra* par 1). The particulars of claim averred that a warrantless search and seizure, effected by two police officers, occurred on 24 March 2018 while she was not at the premises. This search and seizure was claimed to have been effected without her consent, as would have been required under section 22(*a*) of the CPA, or without a warrant in terms of section 25(1)(*a*) relating to State security, or without a warrant under section 21(1). It was further averred that the police officers did not have reasonable grounds to believe that a warrant would have been granted to them if they

had applied (s 22(*b*) read with s 21(1)(*a*); and s 25(3) read with s 25(1)). It was further averred that there were no reasonable grounds to believe that offences under the Drugs and Drug Trafficking Act 140 of 1992 had been committed or that there was a prospect that such offences were to be committed (see s 11(1)(*a*)). It was also alleged that the search had not been conducted in an orderly manner (s 29 CPA). Consequently, the unlawful entrance and search of the residence of the plaintiff constituted a violation of her constitutional rights to dignity and privacy, which caused the plaintiff to suffer harm in the amount of R100 000.

The plaintiff, a gospel singer and cultural dancer, left her home along with her group to record an album on 24 March 2018. No one remained in the house and the plaintiff requested her mother (who lived directly behind her) to keep an eye on her house. This was because the two external doors, as well as the kitchen door of the plaintiff's house, were unable to lock. In the kitchen were strips of beef hanging, "cut like biltong" (*Shashape supra* par 9 and 19). While at the studio, the plaintiff's brother (who lived with his mother behind the plaintiff's residence) phoned the plaintiff and informed her of police officers who had arrived at her house. The plaintiff requested to speak to one of the officers, an Inspector Phiricwane. Ms Shashape instructed the latter not to enter the house until she arrived – and he replied that he had already done so and had found meat in her kitchen relating to livestock that had been slaughtered and stolen at a nearby farm the previous evening. They had effected this warrantless search based on an "anonymous tip" (*supra* par 20 and 23). After this exchange, the plaintiff returned (with her children and the cultural group in tow) and found all the doors that had been closed open and four police vehicles leaving the premises while two remained. There was also "a large number of curious onlookers in her premises". Her home was in disarray and the kitchen was being searched in a disorderly fashion (*supra* par 21–22). After relaying the information regarding the alleged slaughter and theft of the livestock and the anonymous tip, the plaintiff indicated that she had no knowledge of this incident and the meat she purchased was purchased at an abattoir. She could not provide a receipt to the officers as she had bought the meat along with three others for a total of R1 200 (she had contributed R300) (*supra* par 22–24). The next day (25 March 2018), an officer from the Stock Theft Unit seized a strip of beef so that it could be compared to the heads of the stolen livestock. The plaintiff rebutted and queried how this could be done considering that the meat was already dry, but the officer "informed her that he had his ways of doing so" and the plaintiff never heard from him again (*supra* par 25). The plaintiff was never charged, arrested, or prosecuted relating to the alleged stock theft and slaughter.

Here, Gura J considered the applicable legal principles relating to warrantless search and seizure. He then proceeded briefly to discuss consent to permit a warrantless search under section 22(*a*) of the CPA. Ultimately, the court held that the plaintiff did not consent to the search, and neither did her relatives (*supra* par 28–29). It is submitted that they would in any event not have been authorised to consent to such a search (see *Motloutsi supra* 87). The court does not refer to the ground under section 22(*b*) directly but merely holds that "the searching official will have to show

that reasonable grounds existed at the time when he decided to enter and search the plaintiff's premises without a search warrant" (and references *Alex Cartage (Pty) Ltd v Minister of Transport* 1986 (2) SA 838 without context). Gura J further asserts, correctly, that search and seizure is an infringement of our constitutionally protected right to freedom and must be done in a just and reasonable fashion, considering the particular circumstances (*Shashape supra* par 29). The court accepted the plaintiff's version of events and correctly found that the search and seizure occurred outside of the framework of section 22 of the CPA and the Minister of Police was "therefore wholly liable for the plaintiff's damages" (*Shashape supra* par 33).

4 2 The court's approach to the determination of the quantum

The court in *Shashape* considered the impact of the wrongful search on the plaintiff's life – especially the social and financial impact. The general trend, especially regarding the former, was that the community that once supported her, started to ostracise her owing to gossip and speculation that she was a stock thief.

Gura J discussed the plaintiff's testimony in which she recounted specific incidents that have led to her embarrassment. At a singing and dancing showcase the week following the unlawful search, she was humiliated after audience members boycotted and dismissed her. The parents of the children who belonged to her singing group refused to let them continue in the group and even her children were questioned at school regarding their mother's involvement in stock theft. The plaintiff was rendered incapable of performing as she usually did and also ceased selling CDs. The sales of her CDs had previously garnered approximately (she did not keep any records of her sales) R8 000 per month. The plaintiff consequently developed insomnia and hypertension. The hypertension started to impact her vision. To the plaintiff's family she in effect became *persona non grata* and was the first to be suspected if anything was stolen in the neighbourhood. The situation was described as disgraceful to the family and led her to feel unsafe in the community (*supra* par 34–38).

The court considered *Augustine* and *Pillay* as discussed above, but focused predominantly on the *facts* of the cases and not the underlying principles in reaching their decisions (discussed in more detail below) (*Shashape supra* par 39–40). Gura J correctly pointed out that the harm suffered by the plaintiff was less severe than in *Augustine* and *Pillay* but the court still took cognisance of the "untold misery" caused to the plaintiff and her family, which was evident from her demeanour as she delivered her testimony. The court pointed towards her mental as well as psychological health as well as the impact on her constitutional rights, specifically privacy and dignity. This had all impacted on her earning capacity and standard of living as she was left to rely on the maintenance she received from the father of her children and her welfare grant (*Shashape supra* par 42–43). Gura J also noted that the plaintiff had no source of fixed income and "[d]espite that

she is still a singer and dancer, there is no one to entertain because who is interested to listen to the lyrics of a suspected thief" (*supra* par 43).

The court took the above circumstances into account, as well as the "limited resources which the respondent has at its disposal" and awarded the plaintiff R96 000 in compensation (*supra* par 44–45).

4 3 Discussion of Shashape judgment

The court found that the original warrantless search and seizure was unlawful but it did not comprehensively espouse or discuss the grounds under section 22 of the CPA. The court only referred to consent as a ground (s 22(*a*)) but did not pertinently refer to the two-pronged ground under s 22(*b)*. As alluded to above, it has been held (see *Magobodi v Minister of Safety and Security supra* par 16) that the ground under section 22(*b*) becomes invalid where the consent given was invalid but in this case, consent never appeared to be at issue. The plaintiff was absent from her home and therefore could not provide consent. It appears from the judgment that the family did not consent to the search either and *even if they had done so*, they would not have been authorised to do so. The more relevant ground to discuss was under section 22(*b*) – in other words, whether there was a reasonable belief by the officers that they would have been granted a warrant had they applied for one, and that the delay in obtaining a warrant would have thwarted the objective of their search. The court merely referred to the absence of reasonable grounds but it did not refer to these grounds at all.

It is submitted that this ground was in any event absent as well. The police relied on information provided by an "anonymous tip". Gura J also failed to discuss the principles relating to police reliance on informers (see heading 3 2 above). There was in any case not much to address, but it bears mentioning that the information supplied by the alleged informer did not comply with the *Debot I* and *II* standards. There was no mention as to whether there was an attempt to corroborate the information or whether the information was based solely on rumour and gossip in order to establish reasonable grounds for the search. Over and above that, it does not appear as if the Minister of Police (the defendant) had much of a defence to the plaintiff's allegations. In fact, the court held "that there is no explanation at all, let alone a reasonable account why the police decided to search the plaintiff's house" and further that the defendant had failed to discharge its onus in justifying the warrantless search (par 31).

Pillay is distinguishable, as the court in *Shashape* pointed out, in that the plaintiff in the former case had experienced severe emotional trauma, which was exacerbated by the fact that she was also subjected to a body search. The plaintiffs in *Pillay* and *Shashape* further differed in age and there were also comprehensive psychiatric reports substantiating Ms Pillay's claims – which reports pointed towards the need for lifelong psychiatric treatment.

The unlawful search in *Shashape* was not as egregious as that in *Pillay* (R150 000 award) or *Augustine* (R250 000 awards) as it did not involve the

element of physicality and property damage but was also not as minimal as the search in *Marwana v Minister of Police* (R10 000 award), which involved a mere unlawful search. What makes the facts in *Shashape* distinguishable from those in *Marwana* is that the former involved lasting and intense humiliation and loss of esteem in her community, which led to the effective destruction of her life's passion and source of income. This is exactly the type of harm the court spoke of in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*; search and seizure may irreparably impact the social standing of a subject and therefore a suspect's right to privacy and presumption of innocence should be guarded zealously. The author does not attempt to suggest whether or not the award was appropriate but it appears to be in line with previous comparable awards. It is however unfortunate that the plaintiff could not prove her patrimonial harm as that would probably have increased her award.

5 Conclusion

The *Shashape* case provided an opportunity to revisit the principles relating to warrantless search and seizure and subsequent awards for damages flowing from such unlawful conduct.

The execution of a search and seizure, especially when done without a warrant, involves a delicate traverse of the constitutional spectrum. This involves protections of a person's right to privacy, dignity, freedom and security of the person, property rights and the presumption of innocence. These rights and values must be weighed against the police's constitutional duty to investigate crime and protect the inhabitants of the country. However, this balance can only be maintained through the careful consideration of objective facts. At the time of the execution of a warrantless search, the subject thereof is mostly only a suspect. Regardless of the strength of the evidence, all persons subjected to searches (of all kinds) must be treated with dignity and respect, with due consideration of their right to privacy and the presumption of innocence. Nevertheless, malfeasance often occurs during warrantless searches. This, necessarily, invokes the double functionality of the law of criminal procedure, as police officials faced with a claim for damages against an unlawful search cannot rely on the execution of their duties as a ground of justification.

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