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MEMORANDUM

TO: SAUL BETZOV

FROM: CLIVE PLASKET  
CHEADLE THOMPSON & HAYSOM

RE: POLICE POWERS

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A. Introduction

1. We have been instructed to draft a memorandum concerning the rights and duties of persons in respect of police actions, such as arrest, detention and searches. We have included a discussion on the right of an arrested person to bail.
2. We have not dealt specifically with the Military Police because they have essentially similar powers to the police in respect of work related to the Defence Act 44 of 1957, and the same powers as the police when acting in terms of the emergency regulations.
3. This memorandum is intended as no more than a brief outline. The law relating to the exercise of police powers is rather complex so it is suggested that the services of a lawyer be engaged if a person experiences problems in this regard. It is also suggested that a

lawyer be instructed to act for a person who has been arrested or charged.

B. Entry, Search and Seizure

4. Police may enter, search and seize on the authority of a search warrant issued in terms of section 21 of the Criminal Procedure Act 51 of 1977.
5. The warrant must state what article or articles are the subject matter of the search and may not be licence for a 'fishing expedition' on the part of the police. Its purpose is to authorise the seizure of the article or articles in question and to authorize the search for such article or articles.
6. When police want to search it is important to ask the policeman in command if he has a warrant and, if so, to insist on receiving a copy of it, as provided for in section 21(4) of the Act.
7. Most searches are, however, conducted without warrant. Such an operation could be conducted in terms of any of a number of statutes. The Criminal Procedure Act itself makes provision for searches without warrant.

8. Section 22 of the Act provides that a policeman may search without warrant in two situations: (a) if the person concerned consents to the search ; and (b) if the policeman believes 'on reasonable grounds' that a warrant would be issued for the search but the delay occasioned by obtaining it 'would defeat the object of the search'.
9. If a policeman seeks to rely on section 22, it is important, in the absence of consent, to try to ascertain why he believed that a warrant would have been issued and what circumstances led him to believe that the object of the search would have been defeated if he had tried to obtain a warrant.
10. Apart from the Criminal Procedure Act, the police will often rely on the emergency regulations to justify a search.
11. Regulation 5 provides for the power to enter, search and seize, without warrant, if a member of a force forms the opinion that to do so is 'necessary for the safety of the public, the maintenance of public order or the termination of the state of emergency'.

12. Once again, it is advisable to try to ascertain the grounds upon which such a member of a force formed the opinion that the search was necessary.

13. Note that a member of the security forces for the purposes of the regulations includes a member of the police, the SADF and the prisons service.

14. In brief terms, the following procedure is recommended when police wish to search:

(a) the person dealing with the police should ask for the names and to see the identity documents of the policemen involved and especially the policeman in command;

(b) he or she should ask for the search warrant authorising the search or, if no warrant exists, the legal authority in terms of which the police claim the right to enter, search and seize and their reasons for wishing to do so;

(c) details should be written down if possible;

(d) someone should accompany the police when they search;

(e) insist on an inventory of articles seized.

C. Arrest and Detention

15. The police have wide powers to arrest, either in terms of the Criminal Procedure Act or security legislation, such as the Internal Security Act 74 of 1982 or the emergency regulations.
16. An arrest in terms of the Criminal Procedure Act may be made with or without warrant, so an arrested person should ask for a copy of the warrant if there is one. This will give the reasons for the arrest. In an arrest without warrant, section 39(2) provides a right to the reasons (cause) for the arrest. An arrestee should insist on knowing why he or she is being arrested. The courts have held that an arrestee is entitled to be told more than that he or she is being arrested for theft, murder or assault.
17. It is also important to find out the names and ranks of the policemen involved in the arrest. Request to see their identity documents and find out the police station to which the arrestee will be taken. If it is possible, all of these details should be taken by a person other than the arrestee.

18. An arrested person has an immediate right to a lawyer, except in the case of an arrest in terms of section 29 of the Internal Security Act or an emergency regulations arrest. The person arrested should utilise this right by insisting on telephoning a lawyer unless he or she knows that someone else will do so.

19. There is no obligation on an arrestee to make a statement. In fact, everyone has a right to remain silent. (Section 29 of the Internal Security Act takes away this right in a circuitous way by providing that a detainee will only be released when he or she has answered questions satisfactorily.) It is, as a general rule, best to refuse to make a statement until a lawyer has been consulted.

D. Roadblocks

20. The police have been granted very wide powers to search at road blocks.

21. A person coming upon a road block is best advised to stop (as one is obliged in law to do) and to submit to a personal search or vehicle search. The police have power to search persons and vehicles without a warrant.

22. The procedures to be followed in other searches and seizures should be followed at road blocks.

E. General Rights and duties

23. Any person, when confronted by a policeman, has the right to demand of the policeman his or her name and rank and the production of identity. This is so even if the policeman is in uniform.

24. The converse of this is that a member of the police has the right to ask any person for their name and address. Refusal to comply with such a request is a criminal offence. It is, however, important to remember that this is all the policeman can demand.

F. Bail

25. When a person has been arrested he or she must be taken to a police station as soon as possible and must be brought to court within 48 hours of arrest. (This period is extended when the 48 hours would expire on a day which is not a court day or after 16h00 on a court day, to 16h00 on the next court day.)

26. So if X is arrested at midday on a Thursday, he could only be brought to court on the following Monday.
27. The requirement of bringing an arrestee to court within 48 hours obviously does not apply to arrests in terms of the detention provisions of the Internal Security Act and the emergency regulations.
28. When a person is brought to court, he or she has a right to apply for bail. The purpose of bail is to allow the person to be released pending a trial but subject to a financial inducement to secure his or her attendance in court for trial.
29. In asking for bail, the arrestee must try to convince the magistrate that he or she will not abscond and will stand trial.
30. Factors of importance in this regard are whether the arrestee has a permanent address and permanent employment. If the view is expressed by the prosecutor or the magistrate that the arrestee may leave the country before trial, the arrestee may wish to suggest the surrender of his or her passport.



31. The amount set as bail should be within the means of the arrestee so it will be important for the court to know something of his or her financial means.
32. Usually, the prosecutor will suggest an amount. If it is too high, the arrestee should suggest a more acceptable amount.



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CLIVE PLASKET  
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