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Challenges and possible solutions concerning the inspection/investigation dichotomy in the context of transnational organised fisheries crime: A South African perspective

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ABSTRACT

This contribution aims to address transnational organised fisheries crime more effectively by addressing the fact that a number of prosecutions are unsuccessful as a result of non-compliance with constitutional imperatives originating from a failure to properly grasp the inspection/investigation dichotomy. The paper provides a short background to the intricacies of transnational organised fisheries crime with emphasis on their implications for investigations and prosecutions. In the context of South Africa, it discusses the powers of fishery control officers (FCOs) in terms the Marine Living Resources Act, 1998 (MLRA),[2] before turning to relevant case law. This discussion provides the background for a discussion on the correct exercise of the powers of FCOs and the impact of failures to correctly exercise legal powers. The final part of the essay looks at possible solutions to the challenges created by the dichotomy by proposing that a number of factors be considered to determine whether an inspection is in fact an investigation, or has evolved into one. It will also propose amendments to the legislation to remove the existing ambiguities and to increase the number of successful prosecutions by reducing fatal 'legal technicalities'.

1. Introduction

In most States, a distinction is drawn in the sphere of law enforcement and compliance monitoring between inspections and investigations, giving rise to different rights and obligations depending on whether the law enforcement action is an inspection or an investigation. It is also possible that an inspection could become an investigation and that distinction raises a critical question from a broader criminal justice perspective: at what point does an "inspection" or "audit" become an "investigation"? In some States, law enforcement officers have the power both to inspect and to investigate. In other States, certain law enforcement officers are expected to conduct the inspections, but investigations are undertaken by other agencies. In the former instance, it is necessary to determine in the course of the inspections when a routine inspection becomes an investigation. In the latter instance, the inspectors have to decide at which point they need to point out that the inspection has given rise to a reasonable suspicion that an investigation is required. Those issues are important because they have implications on whether documents, statements and any other evidence obtained as a result of an investigation may be used in criminal-law enforcement proceedings or must be excluded.

In essence, the purpose of an inspection or an audit is to confirm that the law has been obeyed, i.e. to ascertain compliance. When an inspection is undertaken, the officer does not normally do so in the belief that the law has been violated, but as a matter of routine. By contrast, the purpose of an investigation is to gather information and evidence to support the prosecution of a suspected violation of the law. Depending on whether an inspection is undertaken or a matter is investigated, different rules of law apply. [1]

2. The implications of the nature of fisheries crime for inspections and investigations

As already emphasised earlier in this Special Edition, the existence and impact of criminal activities carried out in the fishing industry have been of concern to international agencies, government enforcement officials and the research and NGO community alike for some time. In addition, the long-range movements of many fishing vessels, the

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difficulties experienced with monitoring the movement of those vessels and regulatory gaps in domestic legislation with regard to the identification of activities that might constitute fisheries crime, make the fisheries industry particularly susceptible to being used for transnational organised crime purposes [2].

Transnational fisheries crime is driven by greed and is often conducted by highly organised crime syndicates. This necessitates the involvement of specialised investigators and prosecutors, which are either part of the police or employed by other government agencies. In many instances, these investigators are not primarily concerned with the transgression of fisheries legislation, but with offences such as racketeering, corruption, fraud and forgery (also referred to as "document fraud" in some States). By contrast, fisheries enforcement officials are rarely equipped to deal with such offences, but as they are more often than not the first responders or the ones identifying the transgressions that may later provide evidence of the more "serious" crimes, their actions must be technically correct and they must cooperate effectively with other law enforcement agencies.

Another implication of the economic nature of the offences is that it necessitates the enactment of supplementary measures to forfeit the proceeds of the crime, either in the fisheries legislation or in separate legislation dealing with the forfeiture of the proceeds of crime. Asset forfeiture procedures are a highly specialised field and the task of carrying them out is usually the responsibility of a separate government agency or a separate division within a directorate for public prosecutions.

A third implication is that the crimes are usually deliberate acts, a fact which suggests that harsh sentences are more appropriate that a fine, which is seen as just another business expense unless it exceeds the economic advantage gained by non-compliance. In fact, because transnational fisheries crime is more often than not committed by commercial fisheries enterprises, sentences and other supplementary forms of punishment not only need to be an effective deterrent, but also need to level the economic playing field by. at the very least, eliminating any competitive disadvantage for those who comply with the law. However, the 1982 United Nations Convention on the Law of the Sea (LOSC) [3] does not allow for the option of direct imprisonment in the case of transgressions by foreign vessels in a coastal State's exclusive economic zone (EEZ) in the absence of an agreement between the coastal State and the flag State.[3]

3. Inspection versus investigation

The primary purpose of an inspection is to verify whether there is compliance with legislation and to take the steps necessary to have any problems rectified [4]. Sometimes, legislation requires the holder of an approval, certificate, permit or right to allow an inspection to take place, or one of the conditions attached to such an authorisation is that an inspection must be allowed to take place.[4] At the same time, inspections are often allowed to take place on premises where there are activities, materials or substances that are subject to a particular piece of legislation, irrespective of whether such activities, materials or substances require an authorisation. An example is routine inspections that can be conducted by police officers in terms of the Second-Hand Goods Act, 2009 (SHGA)[5] [5]. In all those cases, however, more often than not the inspections may not be conducted in private dwellings. This is problematical because, for instance and in South Africa at least, private dwellings are often used for the storage and processing of illegal abalone. Because an inspection is usually a routine visit or a spot check, no prior authorisation or permission is normally required. Ideally, there should be a programme of inspections, the schedule of which is determined taking into account the risk that the substance or activity poses and the compliance record of the individual, company or government department inspected. In some States, such as Canada, inspections may be prompted by the receipt of certain information [6] while in other States, such as South Africa, this is not the case.

By contrast, whenever the main purpose of law enforcement steps is to determine whether there exists a possibility of criminal liability, one is involved in an investigation [7]. The latter is conducted when there are reasonable grounds to believe that an offence has been committed and its purpose is to collect evidence to prove that the suspected violation has indeed occurred. Conducting a search is therefore a component of an investigation.[6] The legislation regarding the need for search warrants differs slightly from State to State but, normally, a search warrant is required unless there are pressing circumstances.[7] During a search, enforcement officers may seize and detain anything that they reasonably believe was used to commit an offence under the legislation in terms of which they conduct the investigation.

In *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others*, [8] the South African Constitutional Court pointed out that the court *a quo* [9] had drawn a distinction between warrantless routine inspections for the purpose of ascertaining compliance (actions that are usually simply described as an "inspections"), on the one hand, and "targeted" inspections (actions that are usually described as "investigations"), on the other hand, the latter being prompted by a specific suspicion of wrongdoing.[8] The court ruled that warrantless routine inspections generally meet constitutional muster and are therefore valid.[9] At the same time, the court ruled that statutory provisions which provide for warrantless targeted inspections are, by contrast, unconstitutional and invalid.[10] In confirming the order of the court, the Constitutional Court followed a slightly different approach in its reasoning. Indeed, Cameron J remarked that:

The distinction the High Court drew between routine and non-routine searches seems … to be inapposite and possibly misleading. This is because it does not fully cohere with the distinction Magajane[11] drew between searches undertaken for enforcement, as opposed to those undertaken to supervise compliance. Under the Magajane dichotomy, a warrant may well not be necessary for compliance searches motivated by an assessment of general risk factors.[12]

The effect is that compliance searches aimed at assessing general risk factors are supervisory in nature and generally do not require search warrants as the objective is not to investigate instances where crimes have been committed or where there is a suspicion that a crime had been committed.

[3] See article 73.

[4] See, for example, Section 117 of the Nova Scotia Environment Act S.N.S. 1994–95 in terms of which "[i]t is a condition of every approval, certificate of qualification or certificate of variance that the holder must forthwith on request permit inspectors to carry out inspections authorised pursuant to this Part of any place, other than a dwelling place, to which the approval, certificate of qualification or certificate of variance relates." Section 13(2)(b) of the MLRA determines that permits will be issued subject to conditions and section 51(2)(k) enables a fisheries control officer to conduct an inspection to establish whether such conditions are complied with.

[5] See section 28.

[6] Government of Canada: Chapter 6: 1.

[7] See, for example, section 22 of the South African Criminal Procedures Act, 1977 (Act 51 of 1977), section 39 of the Canadian Fisheries Act of 1985, section 140 of the Kenyan Fisheries Management and Development Act, 2016 (Act 35 of 2016) and Section 5 of the Namibian Marine Resources Act, 2000 (Act 27 of 2000).

[8] At para 12.

[9] At para 13.

[10] At para 15.

[11] *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC), which is discussed further down, dealt with the question whether legislation authorising warrantless inspections of premises for the purpose of obtaining evidence for criminal prosecutions infringes on the constitutional right to privacy.

[12] At para 64.

Goods may also be seized when a routine inspection "becomes" an investigation at the point where a reasonable suspicion of non-compliance is reached during the inspection. This occurs when an enforcement officer discovers something that provides reasonable grounds to suspect that an offence has been committed. At that point, the officer must indicate that this is the case and the inspection becomes an investigation into the alleged offence. This conversion of an inspection into an investigation has very important implications which have an impact on the admissibility of the evidence gathered and any objects seized in such circumstances. In South Africa, for example, section 35 of the Constitution grants specific rights to arrested, detained and accused persons, [10] which have been extended to suspects by case law, [11] and a failure to give effect to these rights can be fatal for the prosecution.[13]

In other words, as long as a law enforcement officer conducts a routine inspection, there is no duty on that officer to comply with section 35. However, as soon as the inspection becomes an investigation, there are suspicions of wrongdoing and therefore a suspect. In the *Orrie*-case, it was decided that suspects could lay claim to the rights afforded by section 35, namely the rights[14] –

to remain silent;[15]
to be informed promptly of the right to remain silent and of the consequences of not remaining silent;
not to be compelled to make any confession or admission that could be used in evidence against that (this would include an entity represented by a person); and
to choose, and to consult with a legal practitioner, and to be informed of this right promptly.[16]

In that case, the question was whether a statement made by the accused should be held to be inadmissible. The defence contested the admissibility of the statement, initially on the ground that the accused had not been made aware that he was a suspect and had not been made aware of his right to remain silent and his right to legal representation. At a later stage, it was put by the defence that, had he known that he was a suspect and 'had rights', the accused would have remained silent and waited for his lawyer.

According to the court, 'it stands to reason that a person must be informed that he or she is a suspect, or at least be aware thereof, in order that he or she can properly consider and exercise his or her rights before interacting with law enforcement agencies.[17] In order to determine whether a statement is admissible, the following questions arise:[18]

a) Was the accused a suspect and, if so, was he informed of his status as a suspect?
   In casu, the accused was not directly informed that he was a suspect, but the court ruled that "[a]ny person of normal intelligence in the accused's position would have realised that he was regarded as a suspect …".[19] The effect is that a failure to inform a person that he or she is a suspect is not necessarily fatal to the State's case under circumstances where the suspect should have realised that he or she was a suspect.
b) If the accused was a suspect, was he entitled to the rights of an arrested or detained person? This question had earlier come to the fore in *S v Sebejan and Others* [12] where the view was expressed that suspects are entitled to fair pre-trial procedures, including the rights which would accrue to an accused when arrested. This view failed to receive support in a number of cases, [13] but in *Orrie* the court found the reasoning in *Sebejan* persuasive, especially in view of *S v Zuma* [14] where it was held that all courts hearing criminal matters must give content to the notion of "basic fairness and justice."
c) Was the accused adequately informed of his constitutional rights? This involves an evaluation of evidence that is placed before a court.
d) In light of the answers to the above questions, is the statement admissible against the accused? This would include an inquiry whether evidence, albeit obtained unconstitutionally, may nevertheless be admitted on the basis of fairness.

Section 35(5) provides that evidence obtained in a manner violating 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'. In other words, there will be times 'when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted', [15] keeping in mind that fairness does not require formalistic repetition, which may "indeed constitute a clog on the … efficient performance of police duties" [16].

4. Inspection, search and seizure

4.1. Introduction

Police forces do not normally conduct compliance inspections, though there are some exceptions.[20] Their main mandate is crime prevention and the investigation of crimes which have allegedly been committed.[21] This is unlike officials from various other agencies within government, including the FCOs appointed in terms of section 9 of the MLRA, who do have the power to conduct routine inspections in order to enable them to effectively monitor compliance within their respective sectors. In some instances, those officials *also* have powers of investigation and, as already alluded above, it is in those cases of dual powers that the exercise of those powers can become a challenge.

4.2. Inspection, search and seizure in terms of the Marine Living Resources Act (MLRA)

4.2.1. Introduction

While the MLRA [17] has provisions that are similar to some provisions of the South African Criminal Procedure Act, 1977 (CPA),[22] and other pieces of environmental legislation,[23] many of its provisions are unique to its geographical area of application, namely, the marine environment. As a result, the powers of inspection, search and seizure differ according to the maritime zone in which they are exercised.[24]

Many provisions of the LOSC relating to the maritime zones have been incorporated into South African law by means of the Maritime

[13] This issue will be revisited below.
[14] Only the rights relevant for this discussion are mentioned.
[15] The rights listed in paras (a) to (c) are afforded to arrested persons in terms of section 35(1)(a)-(c).
[16] The right is afforded to detained and accused person by sections 35(2) (b) and 35(3)(f) respectively.
[17] Page 6 par 2.
[18] *S v Orrie* 2.
[19] *S v Orrie* 4.
[20] See, for example, section 28(4) of the SHGA, which directs police officials to conduct at least one comprehensive annual inspection of every registered premises. Another example of where police officials may be required by specific legislation to perform inspections, is where they are designated to perform the functions of liquor officers under eg section 73 of the Western Cape Liquor Act, 4 of 2008.
[21] See section 205(3) of the South African Constitution.
[22] Act 51 of 1977.
[23] See, for instance, section 51(3) of the MLRA, which is in essence the same as section 22 of the CPA. It is worth pointing out that section 22 has also been incorporated into the National Environmental Management Act, 107 of 1998 (NEMA), by means of section 31H(5).
[24] See e.g. section 52 of the MLRA which provides for powers of FCOs beyond South African waters.

Zones Act, 1994 (MZA).[25] [18] This means, for instance, that, in South African law like in international law, the waters beyond the outer limit of the EEZ and which are not "subject to the particular jurisdiction of another state" are the high seas.[26] The waters landward of the outer limit of the EEZ, together with the continental shelf in relation to the sedentary species, are referred to in the MLRA as the "South African waters" and include "tidal lagoons and tidal rivers in which a rise and fall of the water level takes place as a result of the tides".[27] The Act applies to all persons and fishing vessels, South African or not, within the South African waters.[28] The MLRA also applies to all South African registered fishing vessels while they are beyond the South African waters, "including waters under the particular jurisdiction of another state".[29]

Moreover, the powers of inspection, search and seizure in terms of the MLRA may be exercised beyond the South African waters in relation to a foreign vessel when FCOs are exercising the right of hot pursuit in accordance with article 111 of the LOSC.[30] In addition, the Act confers jurisdiction upon the South African courts over any citizen or person ordinarily resident in South Africa who has committed an act or omission outside of the South African waters.[31]

4.2.2. Inspections in terms of the MLRA

The FCOs' power to stop fishing vessels and inspect them without a warrant is not limited to searching catches and gears as well as inspecting permits and any other books or documents.[32] Indeed, FCOs may also, for instance, order the master of a vessel to take it to a port or harbour within South Africa for the purpose of carrying out a search.[33] A FCO may take samples of any fish found during an inspection or search.[34]

The FCOs also have the power to inspect fish processing establishments, which include "any vehicle, vessel, premises or place where any substance or article is produced from fish by any method", and to enter and inspect at all reasonable times "any other place where fish or fish products are kept or stored",[35] including restaurants.

FCOs do not have any general power of inspection regarding motor vehicles and aircraft.[36] Neither do they have the authority to establish roadblocks.[37]

4.2.3. Searches in terms of the MLRA

FCOs may search vessels, vehicles, aircraft and premises with a warrant. The MLRA does not explicitly empower FCOs to apply for a warrant, but it seems to be implicit in the power to execute such a warrant.[38]

FCOs may also search a vessel, vehicle, aircraft or residential or non-residential premises without a warrant:

- with consent[39]; or
- where there are "reasonable grounds to believe that a warrant would be issued", but the delay caused by applying for a warrant would defeat the object of the search.[40]

As far as vessels, vehicles and aircrafts (but not premises) are concerned, a FCO may stop, enter and search them based on a reasonable suspicion that it is being used or is involved in the commission of an offence.[41]

4.2.4. Seizures under the MLRA

FCOs may carry out seizures without a warrant, irrespective of whether they are conducting inspections or searches. This power may be exercised:

- with consent[42]; or
- where there are reasonable grounds to believe that a warrant would be issued, but that the delay that may be caused by applying for a warrant would defeat the object of the seizure.[43]
- They may also seize:
- any vessel,[44] vehicle or aircraft where there is are reasonable grounds to believe that it has been or is been used in the commission of an offence under the MLRA, or where the FCO knows of has reasonable grounds to suspect that it has been seized or forfeited in terms of the MLRA;[45] or
- any fish or fish product where there are reasonable grounds to suspect that it has been taken or produced in the commission of an offence or which are possessed in contravention of the MLRA;[46]
- any substance or device where there are reasonable grounds to suspect that it has been used, possessed or controlled in contravention of the provisions on prohibited fishing methods or prohibited gear;[47]
- any log book, chart or document where there are reasonable grounds to believe that it shows (with or without other evidence)

[25] Act 15 of 1994. Of particular relevance here are Sections 3, 4 and 7, which relate to the internal waters, the territorial waters and the exclusive economic zone respectively. Of less relevance are the contiguous zone, the maritime cultural zone and the continental shelf (set out in Sections 5, 6 and 8 of the MZA respectively).

[26] Section 1 of the MLRA, which is in line with international terminology and article 86 of the LOSC.

[27] Section 1 of the MLRA.

[28] Section 3(1)(a). The MLRA only governs the marine living resources and, therefore, only applies in relation to fishing matters. While the term "marine living resources" is not defined, the word "fish" is defined in Section 1 of the Act as "the marine living resources of the sea and the seashore, including any aquatic plant or animal whether piscine or not, and any mollusc, crustacean, coral, sponge, holothurian or other echinoderm, reptile and marine mammal, and includes their eggs, larvae and all juvenile stages, but does not include sea birds and seals".

[29] Section 3(1)(b) of the MLRA.

[30] Section 52 of the MLRA.

[31] Section 70(1)(b) of the MLRA.

[32] Section 51(2) of the MLRA.

[33] Section 51(2)(j) of the MLRA.

[34] Section 51(2)(m) of the MLRA.

[35] Section 51(2)(l) read with s 1.

[36] See further below.

[37] This is unlike some other environmental enforcement officials, such as the environmental management inspectors appointed in terms of sections 31A and 31C of NEMA.

[38] Section 51(3)(a) and (c)(i) of the MLRA grants powers to FCOs to search and seize without a warrant in certain circumstances. The circumstances are identical to that being found in the 22 of the CPA, namely with consent of the person in control, or where the FCO *"has reasonable grounds to believe that a warrant will be issued, if he or she were to apply for such a warrant, and the delay caused by the obtaining of such a warrant would defeat the object of the entry or search"* [emphasis added]. This creates the impression that it must imply that a FCO can apply for a search warrant. On a strict interpretation one can argue that this provision would be non-sensical if a FCO did not have the power to apply for a warrant. If a FCO cannot apply for a warrant, then they cannot have *"reasonable grounds to believe that a warrant will be issued"*. The counter argument is that the MLRA does not explicitly provide for the power to apply for search warrant, and that FCOs can only execute a warrant (eg a warrant obtained by a member of the police).

[39] Section 51(3)(a)(i).

[40] Section 51(3)(a)(ii).

[41] Section 51(3)(b).

[42] Section 51(3)(c)(i)(aa).

[43] Section 51(3)(c)(i)(bb).

[44] Including its gear, equipment, stores and cargo.

[45] Section 51(3)(c)(ii).

[46] Section 51(3)(c)(iii)

[47] Section 51(3)(c)(iv). The section refers to the contravention of sections 44 and 45 which deal with prohibited fishing methods and prohibited gear.

the commission of an offence in terms of the MLRA.[48]

The final provision allows seizure of "anything", where there are reasonable grounds to believe that it might be used as evidence in proceedings in terms of the MLRA.[49]

4.3. Handling of Seized Items under the MLRA

The MLRA has very specific provisions on the handling of seized items. Those provisions deal comprehensively with the release,[50] treatment,[51] disposal[52] and forfeiture[53] of those items. Where such items are seized by FCOs in terms of section 51 of the MLRA, that provision applies instead of the provisions contained in the CPA. This means inter alia that members of the SAPS do not have the authority to release vessels, vehicle and aircraft seized in terms of the MLRA. This may only be done by a court upon an application lodged in terms of section 62(1) of the MLRA,[54] which provides that seized vessels, vehicles and aircraft may be released by a court upon an application pending the outcome of judicial proceedings, provided that security is provided.[55] It is important to note, in this regard, that section 62(1) requires that the application be brought before the criminal court that will hear the matter. Section 62(1) requires further that the application be brought by "the master, owner, charterer or agent of the owner or the charterer of the vessel". This means that the accused or the person in whose possession the vessel, vehicle or aircraft was before it was seized, cannot bring such an application unless he or she is one of the abovementioned persons.[56] In terms of section 62(2), the court determines the amount of security by adding to the value of the vessel, vehicle or aircraft, the maximum fine for the alleged offence as well as the foreseeable costs and expenses, but it can also determine a lesser amount where there are special and exceptional circumstances for doing so.[57] An order for forfeiture of the vessel, vehicle or aircraft operates as an order for forfeiture of the security[58] and security may also be applied for the payment of a fine after discharge for forfeiture.[59]

Fish may be returned to the person from whom it was seized upon payment of security to an amount equivalent to the value of the fish.[60] The Minister is not required to return catches and will in all likelihood refuse to do so in cases, such as abalone-related cases, where possession of the fish would be unlawful. The MLRA authorises the sale of confiscated fish, but the proceeds must be paid into a suspense account pending the outcome of the case.[61] The Act also allows live fish to be returned to the sea.[62] Moreover, the Act provides that, in a case where the owner of a vessel, vehicle, aircraft or thing (or the person having the possession, care or control of it at the time of its seizure) is convicted of an offence in terms of the Act and a fine is imposed, "it may be detained until all fines, orders for costs and penalties imposed in terms of th[e] Act have been paid".[63] The State is not liable for any loss, damage to or deterioration in the condition of confiscated items.[64]

5. The courts' views on inspections versus investigations

5.1. Introduction

It is clear from the provisions set out above, that the MLRA confers wide-ranging powers on FCOs. In the course of the exercise of these powers, FCOs as well as officials of agencies other than the police who become involved in the fisheries value chain (such as health inspectors, labour inspectors, revenue and customs officials and immigration officers) frequently conduct routine inspections and gather evidence, which may subsequently become useful in the prosecution of activities related to organised crime. This is not a challenge in cases where an official lawfully entered (or boarded) during a routine inspection and then found evidence of non-compliance. In those cases, the inspection simply leads to a charge, perhaps preceded by searches conducted after finding a wrongdoing during the initial inspection, and all the evidence gathered remains admissible because the initial entry or boarding was lawful. However, where an official has a reasonable suspicion of wrongdoing, fails to obtain a search warrant (when it is required) and nevertheless proceeds with a warrantless "inspection", the entry or boarding is unlawful and the evidence gathered is likely to be inadmissible. In other words, when the correct procedures as stipulated by the criminal-justice legislation and regulations are not applied in gathering evidence, including when the rights of the suspects are not respected, criminal cases cannot be successfully prosecuted and serious criminals will escape prosecution and a possible conviction. It is crucial to prevent this from occurring and we analyse below the views of the courts in selected jurisdictions, in order to determine whether, and if so how, instances of non-compliance with the various procedural requirements of the criminal justice system can be eliminated. The cases are not fisheries-specific, but illuminate the practical implications of the inspection/investigation dichotomy and shed light on how to ensure that enforcement officers' actions during an inspection do not prejudice a potential criminal investigation and prosecution.

5.2. The Jarvis case

In the Canadian case of *R v Jarvis*, [19] Revenue Canada began an inquiry, in the form of an audit, following a "lead" (typewritten tip-off) that Jarvis underreported the sales of his late wife's art in his tax returns for 1990 and 1991. The lead was referred to the Business Audit Section of Revenue Canada and not its Special Investigations Section as it should have been in terms of internal policy.[65] The auditor to whom the matter was referred dealt with the matter as a compliance audit and interviewed Jarvis without informing him of his rights under the Canadian Constitution and the fact that he could possibly face criminal charges. During the audit the auditor obtained a substantial amount of information from Jarvis and she then referred the whole file to the Special Investigations Section to determine "whether further investigations with a view to possible prosecution for tax evasion was merited".[66] The result was that Jarvis was charged tax evasion and eventually the matter ended up in the Supreme Court of Canada. Although on the facts, the court did not find that the auditor used her audit powers to gather information for an investigation, the findings of the court with regard to the point at which inspections (audits) become investigations are very relevant. The Supreme Court stated that, where, from the outset, the predominant purpose of a particular inquiry is the

[48] Section 51(3)(c)(v).
[49] Section 51(3)(c)(vi).
[50] Section 53(1).
[51] Section 64.
[52] Section 63.
[53] Sections 63 (perishable goods) and 64.
[54] See also see Section 4 of the MLRA and section 19 of the CPA in this regard.
[55] This type of applications were often heard at the Environmental Court at Hermanus and various other courts, in abalone-related cases where vessels or vehicles were seized.
[56] Nor can an accused do so in a case where the vehicle is subject to a hire purchase agreement because the financial institution with which the accused has entered into that agreement is the owner in such a case.
[57] See section 62(2) of the MLRA.
[58] See section 68(3) of the MLRA.
[59] See section 65(b) of the MLRA.
[60] See section 63(1)(a) of the MLRA.
[61] See section 63(1)(a) of the MLRA.
[62] See section 63(2) of the MLRA.
[63] Section 64(4) of the MLRA.
[64] Section 66.
[65] At para 6 and 7.
[66] At para 22.

determination of penal liability and once the predominant purpose of a routine compliance audit becomes an investigation into criminal liability, the taxpayer's rights (such as the right against self-incrimination and the right to be protected from unreasonable search and seizure) are engaged. [20] The court added that, "in essence, officials 'cross the Rubicon' when the inquiry … engages the adversarial relationship between the taxpayer and the state".[67] In that regard, the Court explained that the determination of when the relationship has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant factors.[68] The Court, however, went on to recognise that "mere suspicion that an offence has occurred" does not transform an audit into an investigation, nor is a decision to refer the matter to Special Investigations determinative. The Court listed several factors which could assist in ascertaining whether the predominant purpose of an inquiry is to determine penal liability, but stated that, "apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of the circumstances, and make a determination as to whether the inquiry … engages the adversarial relationship between the state and the individual."[69] The factors are:[70]

(a) "Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
(c) Had the auditor transferred his or her files and materials to the investigators?
(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?
(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?"

Jarvis does little to clarify the issue of precisely when an audit or inspection becomes an investigation. However, from the perspective of the person who is the subject of an audit, it is clear that it is important for such a person to obtain from an auditor the assurance, verbally or in writing, that he or she is not conducting a criminal investigation or, alternatively, a confirmation that any information or documents sought are for the purposes of conducting a compliance audit and not for the purposes of a criminal investigation. If there is any doubt about the intentions of the auditor, then the taxpayer may wish to insist on exercising his or her rights not to be questioned or to be inspected other than by way of a search warrant or other compulsory power, until the auditor makes his or her position clear [21]. Conversely, it can be argued that an inspector should provide the assurance, verbally or in writing, that he or she is not conducting a criminal investigation or, alternatively, a confirmation that any information or documents sought are for the purposes of conducting a compliance audit, and not for the purposes of a criminal investigation. In addition, should auditors or inspectors have any doubt as to their own intentions, they should inform the subject of the inspection or audit of his or her rights not to be questioned or to be inspected other than by way of a search warrant or other compulsory power.

The South African FCOs face similar challenges, but their scenarios may differ quite markedly. During inspections or searches at sea, the situation is such that, where there is a reasonable suspicion of non-compliance, the FCO not only have the power of warrantless inspection, but are also authorise to search without a warrant on the basis of the exception created in section 51(3)(a)(ii) of the MLRA (which is almost identical to the exception created in s 22 of the CPA) when they are in a position where they have reasonable grounds to believe that a warrant will be issued if they were to apply for such a warrant, and the delay caused by the obtaining of such a warrant would defeat the object of the entry or search. In such cases, the geographical obstacles will almost always allow for that option. The situation is, however, quite different where a vessel is entering a port or is already docked. While the inspector may board such a vessel on a warrantless routine inspection (in the absence of a reasonable suspicion of non-compliance), they are not authorised to do so where there is such a suspicion because they require a search warrant. The same applies of course to an inspection or search of a fish processing establishment.

The practical implication can further be illustrated with a reference to the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing ("the FAO PSM agreement"), which came into force in 2016. In terms of article 12(3)(b)-(c), South Africa, as a party to the Agreement, must, "in determining which vessels to inspect, … give priority to… requests from other relevant Parties, States or regional fisheries management organizations that particular vessels be inspected, particularly where such requests are supported by *evidence of IUU fishing or fishing related activities*…; and other vessels for which there are *clear grounds for suspecting* that they have engaged in IUU fishing or fishing related activities in support of such fishing" [emphasis added].

This is exactly what FCOs are not allowed to do in terms of South African law. In cases where there are "clear grounds for suspecting" that a vessel has been fishing illegally, the FCO must first obtain a search warrant because evidence or suspicion is already present and, therefore, the FCOs are engaged in targeted inspections. While South Africa would still be able to fulfil its obligations under the FAO PSM Agreement, irrespective of the use of terminology, this makes the process more cumbersome (obtaining a warrant is a challenging and time-consuming process). However, as will become clear in the discussion below, failure to obtain a search warrant in such cases will mean that any evidence gathered will have been obtained unlawfully, and therefore will become inadmissible.[71]

5.3. The Magajane case

The South African Constitutional Court case of *Magajane v Chairperson, North West Gambling Board* [22] raised the question whether legislation authorising warrantless inspections of premises for the purpose of obtaining evidence for criminal prosecutions is consistent with the constitutional right to privacy.[72] In this case, an inspector of the Gambling Board received information that illegal gambling was taking place at certain premises and, after setting up undercover operations, led a "raid" on the premises without a warrant to enter, search or seize property.[73]

Magajane sought leave to appeal against the dismissal of his constitutional challenge[74] against the provisions of section 65 of the North West Gambling Act, 2001 [23]. This challenge was on the ground that the provision violated his right to privacy by authorising inspectors to search his commercial premises and to seize items without a warrant. While the section authorised inspections of both licensed and

[67] At para 88.
[68] At para 93.
[69] At para 93.
[70] At para 94.
[71] Section 35(5) of the Constitution.
[72] At para 1.
[73] At para 2.
[74] In the High Court and Supreme Court of Appeal.

unlicensed premises, he confined his challenge to inspections of unlicensed premises.[75]

The court recalled that it had been established in *Mistry v Interim National Medical and Dental Council of South Africa* [24] that "the scope of a person's privacy extends only to those aspects to which a legitimate expectation of privacy can be harboured".[76] The court added that a regulated business' right to privacy is attenuated the more its activities are "public, closely regulated and potentially hazardous to the public".[77] The Court also stressed that, when assessing whether the statute authorising the regulatory inspection could have achieved its desired ends through less damaging means, a court had to "determine whether the legislation could have required a warrant, … whether a warrant requirement would frustrate the state's regulatory objectives and whether in the absence of a warrant the legislation provides sufficient guidance to inspectors as to the limits of the inspections".[78]

The court held that section 65 served the worthy goal of ensuring enforcement of the statute's regulation of the gambling industry.[79] It further stated that, although the owner or occupier of a gambling business generally had a low reasonable expectation of privacy within the gambling premises, the provisions relating to unlicensed premises were aimed at collecting evidence for criminal prosecution and, for that reason, constituted significant intrusions on the right to privacy.[80] This is because the breadth of the provisions gives inspectors too much discretion in their searches, thereby endangering the privacy of property owners and occupiers who are not adequately informed of the limits of the inspection. According to the court, section 65 could promote enforcement of the Act and more appropriately protect the privacy rights of the subjects of searches by requiring inspectors to obtain warrants before searching unlicensed premises.[81]

The court held that section 65, to the extent that it authorises searches of unlicensed premises, indicates a statutory purpose of facilitating raids aimed at collecting evidence for criminal prosecution. The provision empowers inspectors to inspect any unlicensed premises based on suspicion that gambling is taking place therein or that gambling objects are located within the premises.[82] This constitutes enforcement, not compliance, as the catalyst for the inspection is a suspicion of illegality.[83] Section 65 was accordingly held to constitute an unreasonable limitation of section 14 of the Constitution and therefore to be unconstitutional.[84]

5.4. The Gaertner case

In the case of *Gaertner & Others v Minister of Finance & Others*, [25] officials from the South African Revenue Service (SARS) searched a company's premises as well as a home and copied documents and computer data under section 4(4) of the Customs and Excise Act, 1964 (CEA).[85] In terms of that provision, no warrant was required for the searches. The directors of the company sought orders declaring the relevant part of Section 4 to be unconstitutional to the extent that it permitted targeted non-routine searches to be conducted without judicial warrant and declaring the searches to be unlawful by virtue of the way they were conducted.[86]

The court declared sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the CEA constitutionally invalid. The declaration was not retrospective and was suspended for a period of 18 months in order to allow the legislature to make remedial changes to the Act. In addition, in order not to create a lacuna in the legislative scheme in the interim, the High Court read certain provisions into the Act. Before the Constitutional Court, [26] all the parties agreed that Section 4 was inconsistent with the Constitution and should be declared invalid as it infringed the right to privacy.[87] However, the parties disagreed on the extent of the invalidity and on how the reading-in should be formulated.[88] The applicants argued that the section was overly broad in that it allowed for non-routine or targeted searches by SARS without judicial warrant.[89] SARS argued that, in the light of the extensive control it exercises over registered or licensed premises in terms of the Act, there can be no reasonable expectation of privacy in relation to those premises or business records.[90] In a unanimous judgment,[91] the Constitutional Court held that Section 4 infringed the right to privacy unjustifiably.[92] The section was overly broad as it did not define the premises that could be searched without a warrant, nor did it give guidance to the inspectors on the manner in which the searches had to be conducted. The Court suspended the declaration of invalidity for six months to allow Parliament time to remedy the constitutional deficiency in the Act. As an interim measure, and to allow SARS to ensure compliance with the Act, the Court read in a warrant requirement in the cases where SARS officials wished to search private residences for purposes of the Act.[93]

5.5. The Estate Agency Affairs Board case

In *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others,* [27] briefly introduced earlier, the Constitutional Court followed in essence the *Gaertner* decision,[94] but the motivations for its conclusions require closer scrutiny.

As noted above, the Constitutional Court decision confirmed an order of the Cape Town High Court that declared section 32A of the Estate Agency Affairs Act, 1976 (EAAA), [28] and section 45B of the Financial Intelligence Centre Act, 2001 (FICA), [29] constitutionally invalid. The two sections providing for warrantless inspections or searches were the subject of the High Court decision that was referred to the Constitutional Court. The latter concluded that, although the provisions of the two Acts were "less conspicuously at odds with constitutional rights than those in *Gaertner*",[95] the boundaries set in the provisions for warrantless inspections — or "searches", the term used by the Court — "though more perceptible" were "barely more adequate".[96]

The Court remarked that section 32A of the EAAA did not sufficiently circumscribe the discretion of an inspector regarding the place and scope of the search. The term "any place" could include a private home[97] and the statute gave no limiting guidelines as to how searches and seizure could be carried out. For the latter reason, the Court found the Act to be deficient in failing to guide the manner in which searches should be conducted.[98] As far as it is concerned, section 45B, although being a post-1996 amendment to the original text of FICA and more carefully drafted, also failed to pass constitutional scrutiny.

[75] At paras 33 and 78.
[76] At para 44.
[77] At para 50.
[78] At para 50.
[79] At para 94.
[80] At para 95.
[81] At para 95.
[82] Section 65(1)(a).
[83] At para 84.
[84] At para 95.
[85] Act 91 of 1964.
[86] At 89F.
[87] At para 21.
[88] At paras 25 and 26.
[89] At para 25.
[90] At para 30.
[91] Written by Madlanga J.
[92] At para 43.
[93] At para 88.
[94] At para [33] ("This case requires no reinvention. The terrain has recently and closely been traversed in *Gaertner*").
[95] At para 35.
[96] At para 36.
[97] At para 36.
[98] At paras 37 and 41.

"The fundamental reason in each case is their initiating premise: that all the searches they authorise require no warrant. In this, they afford no differentiation as to the nature of the search or the nature of the premises searched".[99]

The Court concluded that both provisions went too far in authorising warrantless searches in circumstances where no justification did exist for not requiring a warrant. The Constitutional Court therefore had no difficulty in confirming the conclusion of the court *a quo* that both provisions be declared incompatible with the Constitution and therefore invalid.

Importantly, in the context of this discussion, the Constitutional Court did not, however, endorse the High Court's view that all non-routine searches, without qualification, are proscribed unless a warrant is obtained, and that a formulation allowing for such a warrantless search is therefore necessarily be unconstitutional. This assumption, the judgment continued, "is one that should be tested in due course, after the Legislature has had the chance to formulate, if it can, a statutory basis on which warrantless searches, triggered by suspicion, can take place without constitutional affront".[100]

However, the judgment went further and described the distinction drawn in the court *a quo* between routine and non-routine searches as "inapposite and possibly misleading".

"This is because it does not fully cohere with the distinction *Magajane* drew between searches undertaken for enforcement, as opposed to those undertaken to supervise compliance. Under the *Magajane* dichotomy, a warrant may well not be necessary for compliance searches motivated by an assessment of general risk factors. This is the very point *Gaertner* avoided deciding, and which is not necessary for us to decide in these proceedings."[101]

It must be noted that, throughout its judgment, the Constitutional Court did not distinguish between "routine inspections" and "searches", but rather used the term "search" both when it referred to "search to supervise compliance" and "search for the purpose of enforcement." However, the view that "a search to supervise compliance" is nothing other than an "inspection" appears not to be quite correct.

Typical empowerment provisions in fisheries legislation, such as the powers of FCOs found in section 51 of the MLRA (as outlined in detail in paragraph 4.2.1) and the sections thereafter, might lead to the conclusion that, at least as far as vessels are concerned, the distinction drawn between an inspection (in the sense used throughout this essay) and a search does not reflect the weaknesses identified in the legislation that was the subject of the cases discussed above. The MLRA provisions clearly distinguish between an inspection and a search. They set out the circumstances under which an inspection, or "warrantless search", can be conducted, and also authorise a search based on a warrant.[102] The provisions further cover the situation where a search can be conducted without a warrant as part of an inspection,[103] and the Regulations promulgated under the MLRA contain detailed prescriptions on how a vessel may be stopped and boarded [30].

In practice there are less legal challenges surrounding the nature of the premises searched in the case of vessels at sea than in the case of premises onshore, due to the different physical environments involved. The right to privacy is jealously guarded in the case of a private residence or home, as is clear from *Estate Agency Affairs Board*.[104] In the case of vessels, however, the sea environment is, almost without exception, not conducive to the existence of circumstances allowing for a warrant to be obtained should there be a reasonable suspicion of an offence in progress. Accordingly, vessels may lawfully be stopped and boarded for a routine inspection (or a "search to supervise compliance" to use the terminology in *Estate Agency Affairs Board*) or where a reasonable suspicion of an offence in progress exists and vessels searched (a "search undertaken for enforcement" in the terminology of *Estate Agency Affairs Board*) without a warrant because the delay in obtaining the warrant would defeat the object of a search (an exception which was also fully accepted in *Estate Agency Affairs Board*).[105]

The above approach might, however, be an overly simplistic view for a number of reasons. Section 51 of the MLRA refers, on the one hand, to "premises" for which a warrant is required and, on the other hand, to "vessels" and "fish processing establishments or any other place where fish is kept or stored" in which warrantless inspections can be conducted.[106] Nowhere does the legislation specifically refer to residential premises. This lack of a specific provision relating to residential premises in FICA was one of the reasons why the FICA provisions were struck down as being unconstitutional in *Estate Agency Affairs Board*.[107] One could of course argue that premises other than residential premises would in any event require a search warrant under these provisions, but the situation is not a simple as that.

Firstly, commercial fishing vessels become the "homes" of the master and crew of the vessels who might spend months at a time in their cabins or in other on-board lodgings. There does not seem to be any logical reason to limit *their* right to privacy any more than in the case of individuals of a domestic residence. There are specific and confined areas on vessels that become "home" to crew members for extended periods of time. One would therefore expect that such crew members should also have the right not to have their home searched without a warrant.

The implications are even more drastic when it comes to the inspection of "fish processing establishments or any other place where fish or fish products are kept or stored". In the highly organised transnational illegal abalone trade, for example, the use of residential premises to process (clean, and either dry or freeze) and store abalone is a common occurrence.[108] To further complicate matters, such houses are often used for day-to-day living as well. As a result, it is unclear whether such premises are to be regarded as "fish processing establishments or other place where fish or fish products are kept or stored" and, as such, able to be subjected to inspection without a warrant. This is a crucial issue, but there is unfortunately no High Court judgment on the issue in South Africa and the only indication of the courts' view comes from regional court level prosecutions, where the general view is that such places must be viewed as residential premises requiring a search warrant to inspect.[109]

The provisions of section 51 of the MLRA are fairly clear in so far as the distinction between an inspection and an investigation (or a "search to monitor compliance" and a "search to take enforcement action") is concerned. They also distinguish clearly between "inspect" and "enter and search". They do not, however, specifically deal with the question left unanswered in *Estate Agency Affairs Board*, namely: is there scope for a constitutionally valid warrantless inspection or search in circumstances where such an inspection or search is not merely a routine activity?

This question is a very relevant one from a practical perspective and the fact that such a possibility was left open in *Estate Agency Affairs Board* is to be welcomed. In fact, the Constitutional Court envisaged the possibility of a "warrantless search triggered by suspicion" that could possibly take place without constitutional affront, and remarked that a

[99] At para 40.
[100] At para 62.
[101] At para 64.
[102] MLRA sections 51(3)(a) and (b).
[103] Section 51(2)(j) and (m) of the MLRA, for example, empowers an FCO to order the master of a vessel to take it to a harbour or a port in South Africa for the purpose of carrying out a search and to take samples, and these searches and sampling would be part of "routine inspections".
[104] At para 73 Orders 5 and 6.
[105] See the reading in by the Court in its order in para 73. Order 5.
[106] Section 51(1) and 51(2)(l) of the MLRA. respectively.
[107] At para 73 Order 6.
[108] Personal experience, P Snijman.
[109] Personal experience, P Snijman.

"warrantless suspicion-based search — even where the suspicion is based on generalised risk factors, rather than an individualised suspicion — in a regulated field like estate agency" might not necessarily be unconstitutional.[110]

In other environmental-law pieces of legislation with similar provisions distinguishing between warrantless "routine inspections" to ascertain compliance and entries and searches based on a reasonable suspicion of criminal activity,[111] this issue has proven to be problematic and, to date, a watertight solution has not been found. It relates more to the situation of individualised suspicion than targeted inspections, which are generally accepted as being constitutional. There are often situations where a real suspicion exists, but there is insufficient ground for a warrant, for example where a "hotline" receives an anonymous call reporting criminal activity at a specific site — whilst the call would not be sufficient evidence to obtain a warrant, the enforcement official nevertheless has a suspicion of wrongdoing. The question is whether, in the absence of the possibility of obtaining a search warrant, such an official can use the warrantless inspection as a way of ascertaining whether the information is correct. A related issue is whether, if that is not a possibility, the official must simply ignore the information and wait for the next "routine" inspection. Logic dictates - surely not. Such a situation should be treated as an investigation with the purpose of determining penal liability and the party who is being investigated should be informed as such from the outset and all constitutional rights respected.

6. Conclusion: towards a solution

States view marine living resources as part of their natural resources and employ legislative instruments to protect, regulate and manage them. The enforcement and administration of statutes and other regulatory measures form the purposes of the exercise of government authority by means of regulatory agencies. The primary means of measuring the levels of compliance with the regulatory framework are inspections and investigations, of which the inspection is the functional backbone [31] as it is the primary method used to measure compliance. It is a preventative measure, but also serve to ensure that conditions are complied with. In a number of cases, the authority to inspect has been challenged in court on the basis that it violates constitutionally guaranteed rights. The basic question evolves around the inspection/investigation dichotomy and whether, or at what stage, a warrant is required.

In the course of inspections, the powers of the FCOs are broad and compliance-based – the focus is not enforcement. An investigation, however, triggers an adversarial relationship between the State and the object of the investigation and raises rights-related issues. For that reason, it is important for an inspector to keep in contact with the person or company that is the basis of the inspection while determining if and when an inspection becomes an investigation. That is the moment when routine procedures becomes targeted ones and when the rules of the game change because the rights of the subject of the inspection/investigation can be infringed.

The main factors to keep in mind to determine whether *a bona fide* inspection has turned into an investigation and whether an adversarial relationship exists ab initio, (to determine whether an investigation was conducted under the disguise that it was an inspection – in which case an adversarial relationship already existed and in which case a warrant would be required) can be summarised as follows: [32]

(a) Did the authorities take a decision to proceed with a criminal investigation and was the purpose of the inspection to gather further evidence?
(b) What was the origin of the decision? As a point of departure, it should be accepted that, in the case where any person submitted a written or verbal complaint or provided information, the action triggered would be considered an investigation and not an inspection.
(c) Was the general conduct of the authorities consistent with that of officials conducting a criminal investigation?
(d) If there was an initial inspection, did the inspector transfer his or her files and materials to investigators?
(e) Could the inspector be perceived to be gathering evidence for the investigators?
(f) Is the evidence sought relevant only to the determination of penal liability?
(g) Are there any other circumstances or factors that can lead to the conclusion that the compliance inspection had in reality become a criminal investigation?

In addition to the tangled net of legal and interpretational issues that officials must navigate, national legislation often contributes towards uncertainties and gaps, making life difficult for those entrusted with protecting the State's natural resources. In South Africa, for example, a number of amendments to the MLRA would go a long way towards strengthening the hand of the FCOs.

(a) The MLRA does make provision for the execution of a search warrant, but does not explicitly state that an inspector can apply for such a warrant. A section should be included authorising any fishery control officer to apply for and execute a warrant for the purposes of the MLRA.
(b) The provisions for warrantless searches and seizures in the South African Police Service Act, 1995, [34] must extend to FCOs. In terms of those provisions, police officials may, without a warrant, search any person, premises, place, vehicle, vessel or aircraft or any receptacle, and seize any article that is found and may lawfully be seized.[112] The aim of such a search is to exercise control over the illegal movement of people or goods across the borders of South Africa [35] and it should allow for searches to be conducted by FCOs:

(i) at any place in South Africa within 10 kilometres, or any reasonable distance, from any border between South Africa and any foreign state;
(ii) in the internal and territorial waters of South Africa;[113]
(iii) inside South Africa within 10 kilometres of or any reasonable distance from such territorial waters; or
(iv) at any airport or within any reasonable distance from such an airport.

(a) An FCO may apply to the National or Provincial Commissioner of Police for written authorisation in terms of the South African Police Service Act,[114] to establish a roadblock or checkpoint beyond the 10-kilometre distance referred to in the previous paragraph. At such a roadblock an FCO should, within his mandate, have all the powers of a member of the South African Police Service. This means that

[110] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* at para 62.

[111] See e.g. section 31K of NEMA that provides for 'routine inspections', and section 31J(7) that, by reference and incorporation of SAPS powers in terms of the CPA, grants the power to apply for, and execute search warrants.

[112] Section 13(6).

[113] The contiguous zone, which is the area beyond the territorial waters within a distance of 24 nautical miles from the baseline, as determined by Section 5 of the Maritime Zones Act 15 of 1994, is not directly relevant to fisheries, but in this zone the South Africa can make and enforce legislation relating to any fiscal, customs, emigration, immigration or sanitary law.

[114] Section 13(8).

any vehicle stopped in the roadblock, may be searched without a warrant, and a reasonable suspicion is not required.

(b) The MLRA[115] does provide for inspection without a warrant of a fish processing establishment, or any other place where fish or fish products are kept or stored (e.g. restaurants, fish shops and supermarkets), but not private dwellings. Two issues arise here. Firstly, private dwellings in general must be excluded, based on the right to privacy. Secondly, reality is that, especially with regard to abalone, private dwellings or facilities on private property, zoned for residential purposes, are often used to process or store illegally harvested abalone on a big scale. In such instances, there should be no objection on constitutional grounds to such a dwelling, or the part of such a dwelling that is used for commercial fish processing or storing, being inspected. While it is accepted that private property and the right to privacy is almost sacrosanct, [33] [116] it is also true that criminals often abuse this right. When evaluating the legality of searches without a search warrant, the courts should consider the concept of "actual" or "predominant" use of the property to determine whether a person has a legitimate expectation of privacy.[117] It is accepted that a regulated business' right to privacy is attenuated the more its business is public, closely regulated and potentially hazardous to the public.[118] In Magajane (*supra)* the court also stated that, the owner or occupier of a business premises generally had a lower reasonable expectation of privacy. Where private property is used as a processing plant or a storage facility, the "actual" or "predominant" use of the property should be the indicator of the levels of privacy that could be expected. In South Africa it is not a foreign concept. Municipalities employ the concept when determining the rates payable on property. A property could be zoned as "private", but if the actual or predominant use is for business purposes, business rates do apply. The MLRA should be amended to include a definition of "private dwellings" in terms of which the "privacy" of the dwelling or a part thereof is dependent on its actual or predominant use.

(c) The MLRA also does not provide for inspectors to inspect vehicles, vessels (e.g. a inflatable boat towed by a vehicle) or containers at border posts. Both commercial fish products, as well as recreational fishermen, often cross borders to neighbouring countries, and back into South Africa. The same applies to airports (there have many occasions where abalone have been transported by plane to other countries). Currently the inspectors usually accompany police or customs officials that have the power to do such inspections, but cannot do so on their own.

(d) FCOs should be permitted to conduct without a warrant inspections of fishing vessels -

(i) that are routine in nature;
(ii) that may target specific activities or specific sectors;
(iii) at the request of another country based on South Africa's obligations in terms of an international or regional agreement;
(iv) at the request of an international or regional fisheries organisation; or
(v) may be done based on a complaint, report or request received.

A provision such as this will make is much easier for South Africa to comply with its international obligations, such as inspections i our obligations. It also attempts to cover the "grey" situation, and which was left open as a possibility in *Estate Agency Affairs Board*, that in certain cases such type of inspections might be constitutional. In the proposal above it allows that a complaint or report (e.g. from a member of the public) received, will not have the result that a search warrant is now required to do an inspection. The purpose of such an inspection (which must be performed as an inspection, and not a search) is to ascertain whether there is substance in the complaint or report. In addition, the fact that any fishing vessel may in any event be inspected, makes it a bit absurd to argue that a search warrant must be obtained to inspect a fishing vessel if such an inspection is based on a complaint, report or request received. Also note that this power is limited to fishing vessels, and does not include vessels in general. The term "fishing vessel" should however be defined sufficiently broadly, to include any vessel that is used in any fishing-related activity.

[115] Section 51(2)(l).

[116] See *Thalappalam Service Cooperative Bank Limited v State of Kerala* (2013) 16 SCC 82 where the judge stated that "Recognising the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights under Section 8(j), as already indicated." at para 64. In SA a distinction is also drawn between residential and non-residential premises, with residential premises almost always excluded from the possibility of conducting an inspection without a warrant, placing a "higher value" on the right to privacy where residential, as opposed to non-residential premises, are concerned.

[117] *Mistry v Interim National Medical and Dental Council of South Africa (supra)*.

[118] At para 50.

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