THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 131/2010

In the matter between:

THE MINISTER OF SAFETY AND SECURITY **Appellant**

and

TSHEI JONAS SEKHOTO **First Respondent**

OUPA MOSUWU JOSEPH MADONSELA
Also known as OUPA JOHANNES SIBEKO **Second Respondent**

Neutral citation: *Minister of Safety and Security v Sekhoto* (131/10) [2010] ZASCA 141 (19 November 2010)

Coram: Harms DP, Nugent, Lewis and Bosielo JJA and K Pillay AJA

Heard: 02 November 2010

Delivered: 19 November 2010

Summary: Arrest – without warrant – s 40(1) Criminal Procedure Act 51 of 1977 – jurisdictional requirements for valid arrest – discretion – onus.

ORDER

On appeal from: Free State High Court, Bloemfontein (Hancke, Kruger and Van Zyl JJ sitting as court of appeal from a Magistrates' Court):

The following order is made:

1 The appeal is upheld.

2 The order of the court below is set aside and replaced with an order in these terms:

(a) The appeal of the Minister of Safety and Security is upheld and the cross-appeal of the plaintiffs is dismissed.

(b) The order of the Magistrates' Court is amended to read 'absolution from the instance'.

JUDGMENT

HARMS DP (NUGENT, LEWIS AND BOSIELO AND K PILLAY AJA concurring)

INTRODUCTION

[1] Section 40(1) of the Criminal Procedure Act 51 of 1977 provides for an arrest by a peace officer without a warrant of arrest. The section appears to be clear but a number of high courts, including the court below, have added a gloss to the section purportedly based on the demands of the Bill of Rights. The Minister of Safety and Security, the appellant, with leave of the court below, argues that the gloss cannot be justified.

[2] The two plaintiffs (the present respondents) were arrested by police officers (who are 'peace officers')[1] without warrants of arrest. The first plaintiff, Mr Sekhoto,

[1] Under s 1 of the Act 'peace officers' include magistrates, justices, police officials, certain correctional officials and persons declared under s 334 (1) to be one.

was arrested on 15 July 2002 on suspicion of a contravention of s 2 of the Stock Theft Act 57 of 1959, which provides that a person who is found in possession of stock or produce, in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, is guilty of an offence. The second plaintiff, Mr Madonsela (also known as Sibeko), was arrested the following day on a count of stock theft.

[3] They were, until released on bail, detained for a period of ten days and were subsequently charged together with Sekhoto's father. The father was found guilty of stock theft but the plaintiffs were discharged at the end of the state's case.

[4] The plaintiffs thereafter sent the required notices of demand to the National Commissioner of Police in which they claimed payment of damages. Their complaint (as far is relevant for this judgment) was that their arrests without a warrant were 'unreasonable, unlawful and intentional'. The demand was not met and summons was issued in the Magistrates' Court for the district of Vrede for damages on three grounds, namely unlawful arrest, unlawful detention, and malicious prosecution. The claims in relation to detention and malicious prosecution were eventually dismissed and do not feature in the appeal. The particulars of claim in respect of the unlawful arrest claim echoed the terms of the letter of demand.

[5] The plea was based on a defence contained in s 40(1)(b) and (g) of the Act, which provide that a peace officer may without warrant arrest any person –

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1; or

(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.

[6] As was held in *Duncan v Minister of Law and Order,*[2] the jurisdictional facts for a s 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. For purposes of para (g) the suspicion must be that the arrestee was or is in unlawful possession of stock or produce as defined in

[2] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

any law relating to the theft of stock or produce.[3] The jurisdictional facts for the other paragraphs of s 40(1) differ in some respects but these are not germane for present purposes.

[7] It is trite that the onus rests on a defendant to justify an arrest. As Rabie CJ explained in *Minister of Law and Order v Hurley*:[4]

'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law.'

[8] Presumably because the plaintiffs bore an onus in respect of some of the issues in the case, especially in relation to the other claims, they testified first. It is apparent from the case as presented by both parties that the only issue between them in relation to this cause of action concerned item (iv), namely whether the peace officer had reasonable grounds for the arrest. The first plaintiff's evidence in chief, for instance, concluded with his 'contention' that he had been arrested without any reasonable grounds and the second plaintiff conceded at the conclusion of his evidence that the police had good reason for arresting him. The Minister's attorney applied for absolution from the instance at the end of the plaintiffs' case which the learned magistrate correctly refused on the ground that absolution was not available where the onus rested on a defendant.

[9] During the evidence of the peace officer, Mr van der Watt, a question arose as to the relevance of the cross-examination and the attorney for the plaintiffs confirmed that the issue was whether the police had grounds for their suspicion to arrest.

[10] The magistrate found that the Minister had established the listed jurisdictional facts for a defence based on s 40(1)(b) and (g). He nevertheless found in favour of the plaintiffs in the light of the absence of evidence on behalf of the Minister of another jurisdictional fact, which was laid down by Bertelsmann J in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) at 186a – 187e, where the learned judge said the following:

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[3] There is a related provision concerning the right to arrest in s 9 of the Stock Theft Act but it will not be necessary to consider it separately.
[4] *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F.

'I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith.

An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights. . . . [P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.'

[11] I shall refer to this as the fifth jurisdictional fact which, if justified, would by its very nature be a requirement for a valid arrest under all the paragraphs of s 40(1). For ease of reading I shall limit the discussion to a consideration of para (b) only.

[12] The Minister appealed to the full bench (which was constituted for purposes of the appeal of three judges) of the Free State High Court. The appeal was dismissed.[5] The court confirmed the approach of the magistrate by following the decision in *Louw*. The full bench judgment, it may be mentioned, was in line with a number of high court judgments that also followed the approach in *Louw*.[6] The only dissenting voice was that of Goldblatt J.[7] The Constitutional Court, in *Van Niekerk*,[8] declined the invitation to decide the conflict because a decision could not be justified by the facts of the case before it.

[13] There is judicial, academic and, according to media reports, public disquiet about the apparent abuse by some peace officers of the provisions of s 40(1) because they arrest persons merely because they have the 'right' to do so but where under the circumstances an arrest is neither objectively nor subjectively justifiable.[9] Paragraph (a), for instance, permits a peace officer to arrest a person who commits

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[5] Reported as *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB).
[6] *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (W); *Le Roux v Minister of Safety and Security* 2009 (2) SACR 252, 2009 (4) SA 491 (KZP); *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E); *MVU v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ).
[7] *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W).
[8] *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56, 2007 (10) BCLR 1102 (CC).
[9] Clive Plasket 'Controlling the discretion to arrest without a warrant through the Constitution' (1998) 11 *Suid-Afrikaanse Tydskrif vir Strafregspleging* 173. Compare *S v Van Heerden* 2002 (1) SACR 409 (T).

any crime in his or her presence. This may be used to arrest persons for petty crimes such as parking offences, drinking in public, and the like. There is in para (o) the right to arrest any person who is reasonably suspected of having failed to pay any fine, which is used to justify road blocks and arrest of persons who have failed to pay traffic fines. Some of the provisions even hark back to the days when gambling was a serious sin, possession of an infinitesimal amount of dagga attracted a minimum prison sentence and Prohibition was racially based.

INTERPRETATION PRINCIPLES

[14] It is unclear whether the courts below, in formulating the fifth jurisdictional fact, did so by direct application of provisions of the Bill of Rights, by developing the common law or by way of interpretation of s 40(1). Accordingly, it is appropriate to begin with a reference to the statement of Chaskalson P that the Constitution does not mean whatever we wish it to mean and, furthermore, that cases fall to be decided on a principled basis.[10]

[15] It is also necessary to be reminded of the manner in which statutes must be interpreted in the light of the Bill of Rights. I do not apologise for setting this out at length because it would appear that the different high courts have failed to have regard to these principles. Langa CJ, in *Hyundai,*[11] after quoting s 39(2) of the Constitution, which states, inter alia, that when interpreting legislation a court must promote the spirit, purport and objects of the Bill of Rights, said that it means that all statutes must be interpreted through the prism of the Bill of Rights. He made the following salient points relevant for present purposes:

(a) The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.[12]

(b) Judicial officers must prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided it can be reasonably ascribed to the section.

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[10] *Mistry v Interim Medical and Dental Council of SA* 1998 (4) SA 1127 (CC) para 3.
[11] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545, 2000 (10) BCLR 1079 (CC) paras 21-26.
[12] The principle is not new having been recognised in the Transvaal Republic in *The Argus Printing and Publishing Co Ltd v The State* (1897) 4 Off Rep 124.

(c) Legislation, which is open to a meaning which would be unconstitutional but is reasonably capable of being read 'in conformity with the Constitution', should be so read but the interpretation may not be unduly strained.

(d) There is a distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and objects of the Bill of Rights' and the process of reading words into or severing them from a statutory provision under s 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a).

(e) The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The second can only take place after the statutory provision, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.

(f) It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance.

THE CONSTITUTION

[16] The Bill of Rights guarantees the right of security and freedom of the person which includes the right 'not to be deprived of freedom arbitrarily or without just cause' (s 12(1)(a)). This right, although previously not entrenched, is not something new in our law.[13] That is why, as stated at the outset of this judgment, any deprivation of freedom has always been regarded as prima facie unlawful and required justification by the arresting officer. This explains the rule that a plaintiff need only allege the deprivation of his freedom and require of the defendant to plead and prove justification.[14]

[17] In terms of s 35(1), an arrested person has the right to be brought before court as soon as reasonably possible but not later than 48 hours after arrest (depending on court hours) and to be released from detention subject to reasonable conditions if the interests of justice so permit. The only other possibly relevant provision appears to be s 33, which deals with just administrative action, something I shall revert to in due course.

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[13] *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC) paras 24-25. See also *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA) para 14.

[14] *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) per EM Grosskopf JA.

[18] Our Bill of Rights is similar to, but not as detailed as, art 5.1 of the European Convention on Human Rights[15] while s 12(1)(a) is similar to s 9 of the Canadian Charter of Rights and Freedoms which states that 'everyone has the right not to be arbitrarily detained or imprisoned'.

FURTHER ANALYSIS OF SECTION 40(1)(b)

[19] The methods of securing the attendance of an accused in court for the purposes of trial are arrest, summons, written notice and indictment in accordance with the relevant provisions of the Act (s 38). The word 'arrest', which translates into Afrikaans as 'in hegtenis neem', has in this and related contexts always required an intention to bring the arrested person to justice.[16] I shall revert to this issue.

[20] There are two relevant provisions dealing with arrest. The first is s 40(1) which, as mentioned, authorises an arrest without a warrant. The other is s 43 which provides that a magistrate may issue a warrant for the arrest of any person upon the written application of an attorney-general (now a director of public prosecutions), a public prosecutor or a commissioned officer of police.

[21] The four express jurisdictional facts for a defence based on s 40(1)(b) have been set out earlier but to repeat the salient wording 'a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1'. Schedule 1 offences are serious offences.

[22] With all due respect to the different high court judgments referred to, applying all the interpretational skills at my disposal and taking the words of Langa CJ in

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[15] 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

> (a) the lawful detention of a person after conviction by a competent court;
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

[16] *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) paras 49-50 and the authorities referred to in *Macu v Du Toit* 1983 (4) SA 629 (A) at 645. Compare *Lawless v Ireland (No. 3)* [1961] ECHR 2.

Hyundai seriously, I am unable to find anything in the provision which leads to the conclusion that there is somewhere in the words a hidden fifth jurisdictional fact. And because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law.

[23] It may be convenient to interpose a further mention of s 43. As said, it deals with the issue of a warrant for arrest upon the written application of a director of public prosecution, a public prosecutor or a commissioned officer of police. The further jurisdictional facts for the warrant are that the application must set out (i) the offence alleged to have been committed (which need not be a Schedule 1 offence); (ii) that the offence was committed within the area of jurisdiction of the magistrate or that the suspect is known or is on reasonable grounds suspected to be within such area of jurisdiction; and (iii) that from information taken upon oath there is a reasonable suspicion that the suspect has committed the alleged offence. If the fifth jurisdictional fact is part of s 40(1)(b) it must also by parity of reasoning form part of s 43 but there is no way in which the wording of the section can be manipulated to achieve this result.[17]

[24] That leads to the next question, which none of the high courts has considered, namely whether s 40(1)(b), properly interpreted, is unconstitutional and, if so, whether reading in the fifth jurisdictional fact can save it from unconstitutionality. Absent a finding of unconstitutionality they were not entitled to read anything into a clear text.

[25] It could hardly be suggested that an arrest under the circumstances set out in s 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary.[18] And an unlawful arrest will not necessarily give rise to an arbitrary detention. The deprivation must, according to Canadian jurisprudence, at least be capricious, despotic or unjustified.[19]

[26] The provision is in terms similar to the first part of art 5.1(c) of the quoted

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[17] I can, accordingly, not see how, as stated in *Gellman* para 87 that 'the more conservative procedure of approaching a magistrate or justice of the peace to issue a warrant' could make any difference. A peace officer who is not a police officer is in any event not entitled to apply for a warrant of arrest.

[18] *R v Latimer* [1997] 1 SCR 217 para 22; *R v* Mann [2004] 3 SCR 59; 2004 SCC 52 para 20.

[19] See the authorities quoted in *Regina v Orr* 2008 BCPC 367 and *Regina v Dupuis* 2003 BCSC 1846 para 17.

European Convention. The same statutory provisions are to be found in Canada and live comfortably with its Human Rights Charter.[20] One finds the same position in the UK where art 5 of the Convention forms part of its municipal law.[21] Lord Hope of Craighead noted that:[22]

'It is now commonplace for Parliament to enable powers which may interfere with the liberty of the person to be exercised without warrant where the person who exercises these powers has reasonable grounds for suspecting that the person against whom they are to be exercised has committed or is committing an offence. The protection of the subject lies in the nature of the test which has to be applied in order to determine whether the requirement that there be reasonable grounds for the suspicion is satisfied.'

[27] I do not wish to suggest that one or more of the other paragraphs of s 40(1) may not be overbroad and require a reading in or down. The issue does not arise in this case.

DISCRETION

[28] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution.[23] In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this court in relation to s 43 in *Groenewald v Minister of Justice.*[24]

[29] As far as s 40(1)(b) is concerned, H J O van Heerden JA said the following in *Duncan* (at 818H-J):

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohammed v Duke* [1984] 1 All E R 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the

[20] Criminal Code RSC 1970 s 495(1)(a): 'A peace officer may arrest without warrant (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence.'
[21] Human Rights Act 1998 s 1. See further *Brogan v United Kingdom* [1988] ECHR 24 and *Brannigan and McBride v United Kingdom* [1993] ECHR 21.
[22] In *O'Hara v Chief Constable of the RUC* [1996] UKHL 6, [1997] AC 286, [1997] 1 All ER 129.
[23] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247, 2005 (6) BCLR 529 (CC) para 36.
[24] *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883G-884B.

grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case.'

[30] He proceeded to say that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator. This brings me back to the fact that the decision to arrest must be based on the intention to bring the arrested person to justice. It is at this juncture that most of the problems in the past have arisen. Some instances were listed in the judgment of the court below, namely an arrest to frighten or harass the suspect, for example, to appear before mobile traffic courts with the intent to expedite the payment of fines (*S v Van Heerden* 416g – h*)*; to prove to colleagues that the arrestor is not a racist (*Le Roux* para 41); to punish the plaintiff by means of arrest (*Louw* at 184j); or to force the arrestee to abandon the right to silence (*Ramphal* para 11). To this can be added the case where the arrestor knew that the state would not prosecute.[25]

[31] The law in this regard has always been clear.[26] Such an arrest is not bona fide but *in fraudem legis* because the arrestor has used a power for an ulterior purpose. But a distinction must be drawn between the object of the arrest and the arrestor's motive. This distinction was drawn by Schreiner JA in *Tsose*[27] and explained by G G Hoexter J in a passage quoted with approval by this court in *Kraatz* at 507C-508F*.* Object is relevant while motive is not.[28] It explains why the validity of an arrest is not affected by the fact that the arrestor, in addition to bringing the suspect before court, wishes to interrogate or subject him to an identification parade or blood tests in order to confirm, strengthen or dispel the suspicion.[29] It would appear that at least some of the high court judgments under consideration have not kept this distinction in mind.

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[25] *Sex Worker Education and Task Force v Minister of Safety and Security* 2009 (2) SACR 417 (WCC).
[26] *Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A).
[27] *Tsose v Minister of Justice* 1951 (3) SA 10 (A).
[28] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277, 2009 (1) SACR 361, 2009 (4) BCLR 393 (SCA) paras 37-38.
[29] *Duncan* at 818B-C. See also *R v Storrey* (1990) 1 SCR (Supreme Court of Canada) and compare *Williams v R* [1986] HCA 88, (1986) 161 CLR 278 (High Court of Australia).

[32] But this is not the only relevant factor for exercising the discretion to arrest. The reference in *Duncan* to *Holgate-Mohammed* is in this regard significant. This judgment provided the basis for the three *Castorina* questions formulated for determining the legality of an arrest without a warrant by Woolf LJ:[30] (a) did the arresting officer suspect that the person arrested was guilty of the offence; (b) were there reasonable grounds for that suspicion; and (c) did the officer exercise his discretion to make the arrest in accordance with *Wednesbury* principles?

[33] The first two questions are in substance the same as three of the four jurisdictional facts set out in s 40(1)(b). Relevant in the present context is the question whether the discretion was exercised 'in accordance with *Wednesbury* principles', a reference to the judgment of Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, [1948] 1 KB 223.

[34] These principles are in substance no different from those formulated by Innes ACJ in *Shidiack v Union Government*:[31]

'Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would be; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. . . . There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.'

[35] This court has also accepted that these traditional common-law grounds of review should be used to test the legality of the exercise of discretion to arrest.[32]

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[30] *Castorina v Chief Constable of Surrey* [1996] LG Rev Rep 241 249 quoted for instance, *Cumming & Ors v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844 and *Commissioner of Police of the Metropolis v Raissi* [2008] EWCA Civ 1237. See also *Lyons v Chief Constable of West Yorkshire* [1997] EWCA Civ 1520.

[31] *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651-652.

[32] *Groenewald* at 883H-884B. So, too, *Ulde v Minister of Home Affairs* 2009 (4) SA 522 (SCA) para 7.

[36] Because this dictum of Innes ACJ pre-dates the Bill of Rights it required reconsideration and was qualified when Chaskalson P held that the Bill of Rights required that the exercise of discretion must also be objectively rational. He said the following:[33]

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.'

[37] English courts also accept that, in the light of the European Convention on Human Rights, the exercise of discretion to arrest must be rational.[34] In this regard Sir Thomas Bingham MR accepted the submission of counsel, Mr David Pannick QC, as to the test for irrationality which was formulated in these terms:[35]

'The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'

[38] Although this approach tends to suggest that the 'executive discretion' of a peace officer is 'administrative' and may therefore be regulated by s 33 of the Bill of Rights, which guarantees the right to just administrative action, I am somewhat loath to hold as much simply because it could mean that the provisions of the Promotion

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[33] *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA* 2000 (2) SA 674, 2000 (3) BCLR 241 (CC) paras 85-86.
[34] See *Cumming v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844.
[35] In *R v Ministry of Defence; Ex parte Smith* [1995] EWCA Civ 22, [1996] 1 All ER 257, [1996] QB 517.

of Administrative Justice Act 3 of 2000 would apply and this could imply that if the discretion was 'incorrectly' exercised the claimant would only in exceptional circumstances be entitled to 'compensation' and not damages.[36] But even if this Act does not apply it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily.[37]

[39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached. [38]

[40] This does not tell one what factors a peace officer must weigh up in exercising the discretion. An official who has discretionary powers must, as alluded to earlier, naturally exercise them within the limits of the authorising statute read in the light of the Bill of Rights.[39] Where the statute is silent on how they are to be exercised that must necessarily be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution, in the manner described by Langa CJ in *Hyundai.*

[41] In this case the legislature has not expressed itself on the manner in which the discretion to arrest is to be exercised and that must be discovered by inference. And in construing the statute for that purpose the section cannot be viewed in isolation, as the court below appears to have done.

[42] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice the arrest is only one step in that process. Once an arrest has been effected the peace officer must bring the arrestee

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[36] *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; [2005] 3 All SA 33 (SCA) dealt with the problems with the definition of 'administrative action'. See also *Pharmaceutical Manufacturers Association of SA*.

[37] *Masetlha v President of the RSA* 2008 (1) SA 566 (CC) para 23.

[38] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, 2007 SCC 41 para 73 adapted for present purposes. Compare *Al Fayed v Commissioner of Police of the Metropolis* [2004] EWCA Civ 1579 para 82.

[39] *Paul v Humberside Police* [2004] EWCA Civ 308 para 30: 'although Article 5 of the European Convention of Human Rights does not require the court to evaluate the exercise of discretion in any different way as it evaluates the exercise of any other executive discretion, it must do so in the light of the important right to liberty which is at stake.'

before a court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court.

[43] The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging ─ and in some cases stringent ─ statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstances. I need not elaborate for present purposes save to mention that the Act requires a judicial evaluation to determine whether it is in the interests of justice to grant bail, that in some instances a special onus rests on a suspect before bail may be granted and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. It is sufficient to say that if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.

[44] While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer).[40] The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively

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[40] A police officer of higher rank may release a suspect on bail but even then only under limited circumstances: theft, for instance, is excluded from his powers (s 59). It appears to be incongruous for to expect a peace officer to make a fully informed decision on whether or not to arrest in a case like the present where a superior officer may not even release the person, if arrested, on bail.

trivial, where the circumstances are such that it would clearly be irrational to arrest. This case does not call for consideration of what those various circumstances might be. It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case ─ which ordinarily attract sentences of imprisonment and are capable of attracting sentences of imprisonment for 15 years ─ clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial.

ONUS

[45] If the proper exercise of discretion is a jurisdictional fact for arrest it would follow ineluctably that the arrestor has to bear the onus of alleging and proving that the discretion was properly exercised. Having found that the approach in *Louw* conflated jurisdictional facts with discretion[41] it is necessary to consider the question of onus afresh. In this regard I shall first consider the law as it was prior to the adoption of a Bill of Rights and then consider whether the position since its adoption should be changed.

[46] In *Groenewald* (at 884) an arrest pursuant to a warrant for arrest was in issue. The plaintiff assumed that it was for the defendant to prove that the warrant had not been issued *in fraudem legis* and was therefore content to rely, as in this case, on his evidence that he had not committed the crime. This court rejected the submission and held that once the jurisdictional facts have been established it is for the plaintiff to prove that the discretion was exercised in an improper manner. This approach was adopted in *Duncan* (at 819B-D) as being applicable to attacks on the exercise of a discretion under s 40(1)(b).

[47] All this and more has already been stated by Hefer JA in *Dempsey.*[42] I do recognize that the context was somewhat different and that he was dealing with motion proceedings and not trials.

[48] As to the general principle, he said:

'Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation, and is thus justified. And if it is alleged that the opinion was *improperly* formed, it is for the party who

[41] Compare *Pharmaceutical Manufacturers Association of SA* paras 79-81.
[42] *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 37B-39F.

makes the allegation to prove it. There are in such a case two separate and distinct issues, each having its own *onus* (*Pillay v Krishna and Another* 1946 A D 946 at p 953). The first is whether the opinion was *actually* formed; the second, which only arises if the *onus* on the first has been discharged or if it is admitted that the opinion was actually formed, is whether it was *properly* formed.'

[49] Does the Constitution require another approach? I think not.[43] A party who alleges that a constitutional right has been infringed bears the onus. The general rule is also that a party who attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof. This is the position whether or not the right to freedom is compromised. For instance, someone who wishes to attack an adverse parole decision bears the onus of showing that the exercise of discretion was unlawful. The same would apply when the refusal of a presidential pardon is in issue.

[50] Onus in the context of civil law depends on considerations of policy, practice and fairness and if a rule relating to onus is rationally based it is difficult to appreciate why it should be unconstitutional.[44] Hefer JA also raised the issue of litigation fairness and sensibility. It cannot be expected of a defendant, he said, to deal effectively in a plea or in evidence with unsubstantiated averments of *mala fides* and the like, without the specific facts on which they are based, being stated. So much the more can it not be expected of a defendant to deal effectively with a claim (as in this case) in which *no* averment is made, save a general one that the arrest was 'unreasonable'. Were it otherwise, the defendant would in effect be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding that the *onus* has not been discharged, may ensue. Such a state of affairs, said Hefer JA, is quite untenable.

[51] The correctness of his views in this regard is illustrated by the judgment of the court below (para 35) where the court listed matters it thought the arrestor should have given attention to without his having had the opportunity to say whether or not he had done so. This amounts to litigation by ambush, something recently decried by this court.[45]

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[43] *Ulde v Minister of Home Affairs* (para 8) did not decide the issue of onus.
[44] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) paras 37-38.
[45] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163.

[52] One can test this with reference to the rules of pleading. A defendant who wishes to rely on the s 40(1)(b) defence traditionally had to plead the four jurisdictional facts in order to present a plea that is not excipiable. If the fifth fact is necessary for a defence it has to be pleaded. This requires that the facts on which the defence is based must be set out. If regard is had to para 28 of the judgment of the court below it would at least be necessary to allege and prove that the arrestor appreciated that he had a discretion whether to arrest without a warrant or not; that he considered and applied that discretion; that he considered other means of bringing the suspect before court; that he investigated explanations offered by the suspect; and that there were grounds for infringing upon the constitutional rights because the suspect presented a danger to society, might have absconded, could have harmed himself or others, or was not able and keen to disprove the allegations. But that might not be enough because a court of first instance or on appeal may always be able to think of another missing factor, such as the possible sentence that would be imposed.[46]

[53] English courts accept that a plaintiff bears the onus in relation to the third *Castorina* question namely whether the discretion was exercised 'in accordance with *Wednesbury* principles'. The question of onus was neatly summed up by Latham LJ in *Cumming* in these words:[47]

'It is accepted, as I have already indicated, that in determining whether or not the police have acted within the powers conferred by this sub-section, the three *Castorina* questions modified if necessary by the European Convention on Human Rights are the appropriate questions for the court to determine. It is also accepted that it is for the police to prove on the balance of probabilities that the arresting officer suspected that the person arrested was guilty of the offence, and that there were reasonable grounds for that suspicion. It is also accepted that if those two questions are answered affirmatively, the burden is on the arrested person to establish that the discretion was unlawfully exercised.'

This view as to onus is also supported by the approach of Canadian courts. [48]

TSOSE REVISITED

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[46] Held in *MVU* para 12 to be a requirement.
[47] Paragraph 26. See also *Al Fayed* (at para 83) which is to the same effect.
[48] *Collins v Brantford Police Services* 2001 CanLII 4190 (ON CA). There ma y be a statutory basis for this but it has not to my knowledge been held to be unconstitutional. The same appears to apply to Australia: *Trobridge v Hardy* [1955] HCA 68, (1955) 94 CLR 147.

[54] The present debate arose in the high courts by reason of the last sentence (which I italicise below) of a dictum by Schreiner JA in *Tsose* (at 17G–H) which reads:

'An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such an arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal. . . .

What I have said must not be understood as conveying approval of the use of arrest where there is no urgency and the person to be charged has a fixed and known address; in such cases it is generally desirable that a summons should be used. *But there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.*'

[55] De Vos J[49] said obiter that the statement could not be reconciled with the Bill of Rights and Bertelsmann J followed her. Neither referred to the cases discussed above as to the nature of the discretion or the onus and, accordingly, did not state the pre-constitutional jurisprudence correctly.

[56] Schreiner JA dealt with the contention relating to the arrestor's motive in the light of the findings of the court of first instance and the court of second instance[50] under a differently worded statute.[51] He had already found that an arrest without the intention to bring the suspect to justice would have been unlawful.[52] And as indicated in *Duncan* in some detail, the true import of Schreiner JA's reasoning was misconceived because his attention was focused on the facts before court and he did not purport to codify the law.[53] However, it is not necessary to say more about the dictum because, in isolation, it did not reflect the pre-constitutional law in full and to the extent that it has to be it has now again been qualified.

CONCLUSION

[57] The case can be disposed of on a simple basis, namely, that the proper exercise of Van der Watt's discretion was never an issue between the parties. The

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[49] *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131, 2004 (2) SA 342 (T).
[50] *Tsose v Minister of Justice* 1949 (4) SA 141 (W) and *Minister of Justice v Tsose* 1950 (3) SA 88 (T).
[51] Compare *Duncan* 817I-818F.
[52] Compare *Duncan* 817C-H.
[53] At 818E-819E.

plaintiffs, who had to raise it either in their summons or in a replication, failed to do so. The issue was also not ventilated during the hearing. This means that since the magistrate had found that the four jurisdictional facts required for a defence under s 40(1)(b) were established by the appellant (a finding upheld by the court below) their claims had to be dismissed.

[58] Mr Maleka SC with Ms Bester, for the appellant, did not ask for costs, also not in the courts below. The court wishes to express its appreciation for the contribution of Ms Wright who, since the plaintiffs were not represented on appeal, argued their case as amicus curiae in the best traditions of the bar.

[59] The following order is made:

1 The appeal is upheld.

2 The order of the court below is set aside and replaced with an order in these terms:

(a) The appeal of the Minister of Safety and Security is upheld and the cross-appeal of the plaintiffs is dismissed.

(b) The order of the Magistrates' Court is amended to read 'absolution from the instance'.

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L T C Harms
Deputy President

APPEARANCES

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