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# POLICE OFFICERS’ DISCRETION AND ITS (IN)ADEQUACY AS A SAFETY VALVE AGAINST UNNECESSARY ARREST

## SUMMARY

The Supreme Court of Appeal has ended the recent uncertainty on whether there is a need for the fifth jurisdictional fact in the process of arrest. The result is that South African law is back at the well-known four jurisdictional facts that must be present before a lawful warrantless arrest may take place. This article assesses whether, after the demise of the fifth jurisdictional fact, police discretion can adequately protect the right to liberty. The discussion starts with a contextual background outlining the role of the jurisdictional facts and the emergence and demise of the fifth jurisdictional fact. This is followed by an outline of the legislative framework applicable to arrest, pointing out that the law bestows wide discretion on police officers in the exercise of their duties, including securing the court attendance of accused persons. Relying on relevant decided cases, it is submitted that the courts focus on the police discretion exercised at the point of arrest, not in the process preceding that stage (for example, the choice of method). The central submission is that, given that the only viable pre-court appearance protective mechanism against unnecessary arrests is the proper exercise of police discretion, focus on the exercise of discretion at the point of arrest is not the most prudent and/or effective approach in the quest to protect the right to liberty.

## 1. CONTEXTUAL BACKGROUND AND INTRODUCTION

The *Criminal Procedure Act* (hereafter, the “CPA”)<sup>1</sup> lists the methods that may be used to secure the court attendance of accused persons. One of these methods is arrest which may take place with or without a warrant. An arrest with a warrant takes place on the basis of a warrant issued and served in the manner prescribed by this statute and is, therefore, circumscribed by the terms of such warrant regarding its execution. Regarding a



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1 Sec. 40 of the *Criminal Procedure Act* 51/1977 regulates warrantless arrest, while sec. 43 thereof regulates arrest with a warrant.

warrantless arrest, the relevant provisions of the CPA have been interpreted by the court in *Duncan v Minister of Law and Order*<sup>2</sup> as entailing that there are four requirements that must be met, in order for the arrest to be lawful. These requirements – also known as jurisdictional facts – are: “(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”.<sup>3</sup> One of the contentious issues in the law of arrest in South Africa recently has been whether the *Duncan* jurisdictional facts are an adequate safety valve in light of the provisions of the *Constitution of the Republic of South Africa*, 1996.

The questioning of the adequacy of the *Duncan* jurisdictional facts led to the debate about the need or otherwise of the fifth jurisdictional fact.<sup>4</sup> The fifth jurisdictional fact refers to whether, additional to the *Duncan* jurisdictional facts, there should be another requirement to the effect that arrest should take place only if the other methods of securing the accused persons' court attendance – all of which are less intrusive, because they do not involve deprivation of liberty – would not be equally effective under the circumstances. The divisions of the High Court were sharply divided on the necessity of the fifth jurisdictional fact, and this led to uncertainty. One of the divisions of the High Court (the Gauteng High Court) even had two conflicting judgments on this issue, the one supporting the need for the fifth jurisdictional fact and the other rejecting it.<sup>5</sup> The uncertainty has now been removed, because the Supreme Court of Appeal has settled this issue by rejecting the fifth jurisdictional fact.<sup>6</sup>

Given that the law has firmly swung back to the pre-fifth jurisdictional fact era, the only viable avenue available in mitigating against the unnecessary and/or unjustified use of arrest seems to be police discretion.<sup>7</sup> Police discretion,

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

3 Hereafter referred to as “the *Duncan* jurisdictional facts”.

4 The issue was raised by Plasket (1998) who focused on arrest without a warrant and the use of discretion. The issue was later raised in *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131 and then in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T). The latter case is credited with the introduction of the fifth jurisdictional fact.

5 *Louw v Minister of Safety and Security* introduced the fifth jurisdictional fact, and this approach was rejected in *Charles v Minister of Safety & Security* [2006] JOL 17224 (W) soon thereafter.

6 *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA). The Constitutional Court had two opportunities to deal with this issue and appears to have steered away from dealing with it in both instances. In *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC), the court did not deal with the issue, reasoning that the facts of that case did not call for its determination. In *Raduvha v Minister of Safety and Security* 2016 (2) SACR 540 (CC), the court focused on the police's use of discretion, not the need or otherwise of the fifth jurisdictional fact. For a detailed discussion of the nature of the fifth jurisdictional fact and its demise, see Okpaluba 2017.

7 The CPA bestows the powers relating to arrest on peace officers which means that there are other officials who can exercise these powers. It should be stated that, while all police officers are peace officers, not all peace officers are police officers. This article focuses on police officers and their exercise of discretion. In

it is submitted, largely serves the purpose that the fifth jurisdictional fact served or was meant to serve. The purpose of the fifth jurisdictional fact was to ensure that arrest is used as a measure of last resort, signifying that this drastic intrusion into the right to liberty should not be used unless necessary and justified. It is interesting to note that this purpose of the fifth jurisdictional fact is a perfect paraphrase of one of the Police Standing Orders, where it is stated: "Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort."<sup>8</sup> It is clear that what the fifth jurisdictional fact sought to achieve is already provided for in the Police Standing Orders. The difference is that the Police Standing Orders do not have legal force and, therefore, the advantage of raising this stipulation that arrest be used as a measure of last resort to the status of a fifth jurisdictional fact would have given it a significant bite. Indeed, in some of the judgments dealing with unlawful arrest, resort to the presence or otherwise of the fifth jurisdictional fact determined the outcome.<sup>9</sup>

The debate about the necessity or otherwise of the fifth jurisdictional fact is, undoubtedly, worthy of deeper interrogation. This article restricts itself to only one aspect, namely police officers' use of their discretionary powers against the backdrop of the reality that the fifth jurisdictional fact has been jettisoned. The focus is on police officers' use of their discretionary powers. To appreciate the import of police officers' discretion and its exercise, it is apposite to contextualise discretion and how it applies to police action. Police officers exercise discretion in matters such as who to arrest;<sup>10</sup> who to subject to search,<sup>11</sup> and who to release on bail or warning.<sup>12</sup> Regarding arrest, police

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respect of other officials who can be peace officers, see sec. 1 of the CPA, read with sec. 334 of the same statute for the authority of the Minister to designate peace officer status.

- 8 South African Police Service "Arrest and the treatment of an arrested person until such person is handed over to the Community Service Centre Commander" Standing Order (G) 341, Consolidation Notice 15/1999.
- 9 For example, *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (WLD), *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (ECD), and *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (NPD). Even in *Minister of Safety and Security v Sekhoto*, the case that led to the Supreme Court of Appeal's rejection of the fifth jurisdictional fact, the Magistrate's Court and the High Court had relied on the need for the fifth jurisdictional fact in finding against the police. For the approach of the High Court in this regard, see *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB).
- 10 Secs. 40 and 43 of the CPA empower police officers to arrest people suspected of committing offences and, importantly for the purposes of this discussion, the sections confer discretion on police officers in that process. Every arrest, as will be shown later herein, is preceded by the arresting officer's exercise of discretion.
- 11 Sec. 22 of the CPA empowers a police officer to conduct a search without a warrant and sec. 21 thereof provides for a search with a warrant. Both sections allow for police officers' discretion in the process of effecting a search and seizure.
- 12 Read together, secs. 59 and 72 of the CPA empower commissioned police officers to release accused persons on bail or release them on warning in lieu of bail. Additional to this, police officers' input or recommendation is crucial in informing the decision of a prosecutor and/or the court when considering whether to grant

officers' discretion is so integral to the process that it can be stated, as a matter of law, that no lawful arrest can take place without the exercise of discretion on the part of the arresting officer.<sup>13</sup> However, discretion is not restricted to arrest, but it pervades the whole process of securing court appearance of accused persons. The courts are regularly called upon to decide on the manner in which police officers exercised their discretion in effecting arrest. The courts' focus, however, has been on assessing the discretion, as exercised at the stage of effecting arrest, and not much on the processes preceding this stage, despite those processes also involving the exercise of discretion.

The courts have mainly dealt with whether, in effecting arrest (with or without a warrant), police officers have exercised their discretion and, if they did, the discretion was exercised properly.<sup>14</sup> Thus, police officers are held to account for why they exercised their discretion in favour of arrest at the stage when the arrest was effected; not why they chose arrest as the method of bringing the suspect to court in the first place. They are also not made to account for the exercise of discretion in favour of effecting an arrest without a warrant instead of applying for a warrant.<sup>15</sup> This is important if one has regard to the process that precedes an arrest. When a police officer receives a criminal complaint or becomes aware of the commission of a crime, three important steps or stages follow.<sup>16</sup> The first is the assessment of the grounds supporting the allegation that the person being considered for arrest committed the offence. The key question is whether the suspicion that an offence has been

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bail or not. As a matter of fact, the prosecutor and the court are guided by the contents of the police docket in dealing with bail.

- 13 Where discretion was not exercised, the arrest and detention may be unlawful on that basis alone and the same goes for where it was wrongly exercised. For a discussion on the effect of failure to exercise discretion or the wrong exercise of the discretion, see Nkosi 2016.
- 14 A tiny minority of the cases is discussed later herein. Suffice it to state that the leading ones are *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC), *Minister of Safety and Security v Sekhoto*, and *Louw v Minister of Safety and Security*. The latter is important because, though the approach it took has been rejected by the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto*, it is the case that put the spotlight on the issue in its attempt to align the law of arrest with the *Constitution*. *Minister of Safety and Security v Van Niekerk*, *De Klerk v Minister of Police* and *Raduvha v Minister of Safety and Security* are the cases where the Constitutional Court was faced with the issue and, like many divisions of the High Court, endorsed – or at least did not temper with – the current legal position as far as police officers' discretionary powers are concerned.
- 15 In many of the cases, as will become apparent later in this discussion, the courts do not focus on the fact that arrest was effected without a warrant. The exception in this regard is the case of *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (WLD), where the court raised this issue and went on to provide, as one of its guidelines to police officers, that, even if a police officer decides that arrest is necessary in a given case, that arrest should be on the basis of a warrant, unless applying for a warrant would defeat the ends of justice (see *Gellman v Minister of Safety and Security*:par. 97).
- 16 There could be several other steps or considerations that precede the decision to arrest but these three are, without undermining the importance of any other steps, germane to this discussion.

committed is based on reasonable grounds,<sup>17</sup> and closely related to that would be whether those grounds point to the person being considered for arrest as the perpetrator. Once satisfied regarding the suspicion that a particular person has committed the offence, as the second step, the police officer has to decide what method to use to secure the court appearance of the suspect. If the police officer opts for arrest, the next question is whether to apply for a warrant or effect the arrest without a warrant (the third step). It should be added that it is apparently left to the police officer to make this decision with no constraints.<sup>18</sup> Be that as it may, arriving at the third step signifies that the police officer's mind is made up regarding the method to employ. One clear indication that the decision has been made would be when the police officer starts the process of applying for a warrant of arrest, as it would mean that the route opted for is arrest as the method to be applied.<sup>19</sup> From this rough exposition of the process, if accurate, there are at least three instances where police officers, who eventually effect arrest, exercise discretion, namely what method to employ; if arrest is chosen, whether with or without a warrant, and once the jurisdictional facts are present,<sup>20</sup> whether to effect the arrest or not. The courts have scrutinised the last instance and not so much the first two.

Based on these assertions and propositions, this article sets out to assess the role of police discretion in the arrest process. After this contextual background and introduction, the discussion turns to an outline of the applicable legislative provisions, followed by an exposition of discretion and its exercise as dealt with in several court judgments. In conclusion, it is submitted that focusing on police officers' discretionary powers in the process of arrest is an area deserving of attention, in order to minimise the problems currently

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17 The court in *Gellman v Minister of Safety and Security* placed considerable significance on this aspect even going as far as including (in its guidelines to police officers) that, where the case against the suspect is based only on a witness statement, corroborative evidence should be sought before arrest can take place (see *Gellman v Minister of Safety and Security*:par. 97).

18 As the court noted in *Sofika v Minister of Safety and Security* (2074/11) [2015] ZACMHC 44 (27 February 2015):par. 6: "[t]he CPA contemplates two methods of arrest – with and without a warrant – and defines the circumstances in which arrests can be made without a warrant. I am not aware of any authority for the proposition that a warrant of arrest has to be used as the preferred means of arresting a person and the failure to use this means, when it is possible to do so, vitiates an arrest made without a warrant even if s 40(1) empowers it. No such authority was cited to me".

19 The same can be said about arrest without a warrant, although the situation in that instance is not as clear-cut. The reason for this is that it is open to debate whether a police officer, who is assessing the existence of jurisdictional facts, has not already decided on arrest if those facts exist. It is open to debate because it could be soundly argued that the consideration of the jurisdictional facts may well be the process that is aimed at informing the choice of method. Nevertheless, the point about a warrant of arrest seems unassailable and it suffices for the purpose of the central argument in this paper, namely the discretion exercised in the choice of method in securing accused persons' court appearance, while crucial to the process, has evaded scrutiny.

20 In respect of arrest with a warrant, a warrant would have been obtained. In respect of arrest without a warrant, the jurisdictional facts would have been met.

manifesting when it comes to arrest. The key problems relating to and/or resulting from arrest include the effect on the persons unlawfully arrested and the consequences often manifesting in civil claims against the police.<sup>21</sup> This is obviously not desirable, given that the claims against the police are a considerable drain on the fiscus in a country with many competing needs. While it can be expected that, given their type of work, the police will now and then attract civil liability, it is unjustifiable that such liability flows from the police's disregard and/or breach of key legal tenets. To minimise these problems and give effect to the spirit of sec. 12(1) of the *Constitution*, which protects the right to liberty, it is necessary to demand of the criminal justice system that arrest be a measure of last resort and, to this end, the spotlight should be turned on to the role of police officers' exercise of discretionary powers in the process. After all, police officers are the gatekeepers of the criminal justice system, especially where arrest as the method of securing accused persons' court attendance is involved.

## 2. EXERCISE OF DISCRETION: THE PARAMETERS

[P]eace 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.<sup>22</sup>

This excerpt comes from the *Sekhoto* judgment, where the Supreme Court of Appeal criticised several divisions of the High Court for having taken an unjustified direction in dealing with the statutory framework applicable to the powers of police officers in dealing with arrest.<sup>23</sup> The court took issue with the fact that a fifth jurisdictional fact had been added to the *Duncan* jurisdictional facts. The court also confirmed the parameters of police officers' discretion. It reaffirmed the longstanding approach that courts are not at liberty to interfere with a properly exercised discretion, even if the court is of the view that the decision produced by the exercise of that discretion is not an optimal one or even where the court's view is that the decision was a wrong one.<sup>24</sup> Police officers, the court noted, have the latitude to exercise their statutorily conferred

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21 For the costs of unlawful arrest, which result in civil claims against the police, see Naidu "Big payouts, little sanction in SAPS wrongful arrest cases", <https://www.iol.co.za/sundayindependent/news/big-payouts-little-sanction-in-saps-wrongful-arrest-cases-09b45ef6-df6c-44bb-a5f0-360a92a7450e> (accessed on 15 July 2021).

22 *Minister of Safety and Security v Sekhoto*:par. 39.

23 See, in particular, *Minister of Safety and Security v Sekhoto*:paras. 1, 12, 15, 22, 24, 31 and 54.

24 The court's approach is consistent with other cases on this aspect. For example, see *Ude v Minister of Home Affairs*:par. 8, where the court stated that, "once the decision-maker has demonstrated that the discretion has been properly exercised, a court will not interfere, even if it appears that the wrong decision was made".

discretion and the main test that the decision made by a functionary vested with discretion is subject to is that of rationality.<sup>25</sup> If the test of rationality is satisfied, the courts' hands are tied. When dealing with decisions made in the exercise of discretionary powers, the court does not ask the question whether the decision is the correct or right one under the circumstances. What the court should focus on is whether the decision, non-optimal, wrong, or incorrect as it may be, was one that fell within the decisions available to the decision maker which can be justified on the basis of rationality. Even though the courts' deferent approach is not peculiar to police officers' discretion but true for all situations where discretion is exercised, it is particularly significant, given the extent to which police officers' exercise of discretion when it comes to arrest makes the exercise of that discretion the key determinant in the deprivation of liberty. The police officer makes the judgment call regarding who to arrest and who to bring to court without arrest. While the critical role of police officers and the centrality of the exercise of their discretionary powers are plainly beyond any gainsaying, several cases<sup>26</sup> show that some police officers do not seem to exercise the discretion bestowed on them with the necessary diligence.

To fully appreciate the nature and scope of police officers' discretion, it is apposite to shortly examine its source. Sec. 38 of the *CPA* contains the methods recognised by law in securing court appearance of accused persons. The methods are summons, written notice, indictment, and arrest. The section does not rank the methods in terms of preference with the result that, it appears, they are equally available to police officers when they seek to secure court appearance of someone suspected of committing an offence. The section also does not stipulate the processes that must be followed in respect of each method. This is left to other sections of the *CPA*, namely sec. 40 (arrest without a warrant); sec. 43 (arrest with a warrant); sec. 56 (written notice), and sec. 144 (indictment). Each of these sections prescribes the scope and applicability of the method of securing attendance that it applies to. The sections deal with questions such as how and when the particular method may be used.

Sec. 40(1)(a) gives police officers authority to effect arrest without a warrant where a crime is committed in their presence. Sec. 40(1)(b) then gives the same authority where, even though the suspected crime is not committed in the presence of the police officer, the involved offence falls under Schedule 1 of the *CPA*. This is extended by sec. 40(1)(c)-(q) that lists other offences which, though not falling under Schedule 1, the reasonable suspicion of the commission thereof would permit arrest without a warrant. Sec. 43 then deals with arrest with a warrant and stipulates the process that must be followed,

25 This, of course, presupposes that the discretion was exercised honestly and in good faith.

26 Some of the cases, albeit a minority of the many cases on this subject, are discussed later herein. Suffice it to state that the cases discussed show either total absence of the exercise of the discretionary powers or improper exercise of such powers by police officers. *Le Roux v Minister of Safety and Security* is an example of a case where the police officer was not aware of the discretionary powers while *Gellman v Minister of Safety and Security* is an example of the police officer's improper exercise of discretionary powers.

in order for a warrant of arrest to be issued and served. Significant for the purposes of this discussion is that both sec. 40 and sec. 43 employ the word “may” and this has been interpreted as entailing that police officers are vested with discretion.<sup>27</sup> In respect of arrest without a warrant, the discretion becomes available once the *Duncan* jurisdictional facts have been met, while the existence of a warrant of arrest gives rise to the discretion in respect of arrest with a warrant.<sup>28</sup> To paraphrase, in a situation where a warrant of arrest has not been issued, an arrest may only take place if the offence was committed in the presence of the police officer or if the police officer – on reasonable grounds – suspects that the person to be arrested has committed an offence listed in Schedule 1 or in sec. 40(1)(c)-(q) of the *CPA*.<sup>29</sup> Once all the *Duncan* jurisdictional facts are present, the police officer is clothed with a discretion whether to effect the arrest or not.<sup>30</sup> This aspect of police officers' discretion has been dubbed “the discretion not to arrest”,<sup>31</sup> on which the courts have mainly focused.

While bestowing discretion on police officers, neither sec. 40 nor sec. 43 of the *CPA* provides guidelines regarding how the discretion is to be exercised. The court, in *Sekhoto*, reminded us of the rule applicable in such situations, by stating that “[w]here the statute is silent on how they [discretionary powers] are to be exercised that must necessarily be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution”.<sup>32</sup> In this regard, the overarching consideration has to be that the purpose of arrest

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27 For example, see *Gellman v Minister of Safety and Security*:par. 84.

28 See *Minister of Safety and Security v Sekhoto*:paras. 6, 22 and 23.

29 Interestingly, a paragraph in *Sibuta v Minister of Police* (3709/2016;3710/2016) [2020] ZAECGHC 6 (15 January 2020) gives the impression that determination of the reasonableness of the suspicion that the person to be arrested committed the offence is a matter of the arrestor's discretion. In this regard, the court stated: “It is trite that when arresting a suspect without a warrant the arresting officer exercises a discretion. The discretion is whether or not to arrest, the test being whether a reasonable and careful man in the position of Raats [the arresting officer], possessed of the same information, would have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of the offence of possession of a suspected stolen vehicle. In the exercise of their discretion the police officers effecting an arrest in terms of sec 40 (1) must always act reasonably” (*Sibuta v Minister of Police*:par. 78). It is submitted that this approach seems inconsistent with how the reasonableness of the suspicion is to be judged. The reasonableness or otherwise of the suspicion has always been regarded as a matter that does not fall within the discretionary powers of the arrestor. Besides, assessment of the reasonableness of the suspicion is a jurisdictional fact and it is only after the jurisdictional facts have been established that the arrestor is clothed with discretion. This much is clear from cases such as *Minister of Safety and Security v Sekhoto* and *Duncan v Minister of Law and Order*, which, as it happens, the court proceeded to refer to in the paragraphs immediately following its characterisation of the determination of reasonableness (see *Sibuta v Minister of Police*:paras. 79, 80).

30 For more in-depth discussion of these statutory provisions, see Joubert 2017:117-128 and Theophilopoulos 2020:151-161.

31 *Uide v Minister of Home Affairs*:par. 7.

32 *Minister of Safety and Security v Sekhoto*:par. 40.



is to secure court appearance of the arrestee, lest it be exercise of discretion for purposes not contemplated by the legislature<sup>33</sup> making it an improper exercise of the discretion. It is trite that discretion of public officials such as police officers cannot be unfettered, even if it is bestowed without accompanying limits or guidelines as to how the discretion is to be exercised. The reason for this is that police officers, as representatives of the Executive, exercise public power in the execution of their duties and the Constitutional Court has pronounced itself firmly on this in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA*.<sup>34</sup> The court laid the rule thus, “(r)ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries”.<sup>35</sup> Like any discretion vested in the executive or any public functionary, therefore, the discretion vested in police officers is subject to the test of rationality. Similarly, the courts are restricted in terms of the role they can play in dealing with police officers’ exercise of discretion, lest they break the cardinal rule, namely not to “substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested”.<sup>36</sup> The question has always been how far the courts can go in interfering with the exercise of the discretion by those in whom the discretion is vested. This important question constantly confronts the courts when dealing with the exercise of police officers’ discretion when effecting arrest.

The judgment in the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>37</sup> is widely regarded as the leading authority when dealing with the exercise of discretion. Even though the case was about the exercise of discretion by a regulatory authority,<sup>38</sup> the principles laid down in the case have been employed to deal with the exercise of discretion in many fields of law, including the law of arrest.<sup>39</sup> These principles are used to determine whether a court is permitted to interfere with a functionary’s decision, where the decision was made on the basis of the discretion. The *Wednesbury* principles can be summarised as requiring that the functionary vested with discretion must have knowledge of the existence of the discretion; actually exercise the discretion (real exercise of the discretion), and exercise it properly. Once these requirements are met, the scope of the court to interfere is limited. In *Barnard*, the court reaffirmed this stance, by stating that “[c]ourts ought to refrain from trying to circumscribe the parameters within which

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33 See *Barnard v Minister of Police* [2019] 3 All SA 481 (ECG);par. 55.

34 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA* 2000 (2) SA 674, 2000 (3) BCLR 241 (CC).

35 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA*;par. 90.

36 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA*;par. 90.

37 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) ([1947] 2 All ER 680).

38 This case was about whether the action of a licencing authority to restrict Sunday cinema attendance of children was *ultra vires*.

39 In this regard, see *Minister of Safety and Security v Sekhoto and Ulde v Minister of Home Affairs* (320/2008) [2009] ZASCA 34 (31 March 2009).

arrests should or should not be carried out".<sup>40</sup> In *Ulde v Minister of Home Affairs*, it was stated that, "once the decision-maker has demonstrated that the discretion has been properly exercised, a court will not interfere, even if it appears that the wrong decision was made".<sup>41</sup> The Constitutional Court has also endorsed this position, by stating that the court should not

substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.<sup>42</sup>

Regarding the grounds that may enable the court to interfere in the exercise of discretion, the court stated the following in *Wednesbury*:

It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question.

In *Sekhoto*, the court again endorsed the *Wednesbury* principles and reaffirmed the additional consideration (or requirement) that needs to be factored in, namely that the exercise of the discretion must be objectively rational in line with the requirements of the Bill of Rights. In so doing, the Supreme Court of Appeal was following the findings of the Constitutional Court in *Pharmaceutical Manufacturers*, where the Constitutional Court had not only endorsed the *Wednesbury* principles, in general, but had gone further to find that the *Constitution* required more. The core requirement is that "[d]ecisions must be rationally related to the purpose for which the power was given".<sup>43</sup> The new approach based on the *Constitution* is, therefore, significantly different from the previous position, as expounded in *Shidiack v Union Government*<sup>44</sup> and other cases that were decided before the advent of the *Constitution*. There the main considerations were *bona fides* and honesty in the exercise of the discretion, but these are no longer sufficient to exclude the court's competence to interfere with the exercise of discretion.

According to *Wednesbury*, therefore, there are three situations where a court interference is permissible. The first one is when the authority or functionary vested with the discretion has contravened the law in the exercise

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40 *Barnard v Minister of Police*:par. 39.

41 *Ulde v Minister of Home Affairs*:par. 8.

42 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA*:par. 90.

43 *Minister of Safety and Security v Sekhoto*:par. 36, quoting from *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA*.

44 *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642.

of the discretion. The second is if there is such a level of unreasonableness in the exercise of the discretion that no reasonable authority or functionary would have made such a decision. The third situation is where the fundamental principles that guide the exercise of discretion have been breached. In sum, these fundamental principles are that the discretion must be exercised honestly; in good faith; reasonably; not with disregard to public policy, and there must be real exercise of the discretion. Real exercise of discretion includes that, where the statute conferring the discretion has, expressly or by implication, provided for matters that should be considered in the exercise of the discretion, such matters must be taken into account. The functionary exercising the discretion should not consider irrelevant matters. These principles require of the functionaries exercising discretion to apply their minds in arriving at the decision.<sup>45</sup>

To summarise the legal position regarding police officers' exercise of discretion from the authorities referred to earlier, as a general rule, courts are not permitted to interfere with decisions of police officers in deciding whether to effect arrest or not. However, there are exceptions to this general rule. The exceptions include where the police officer did not act honestly or in good faith, breached the law, or disregarded the *Wednesbury* principles governing the exercise of discretion. Overall, the decision has to pass the objective test of rationality. The upshot, therefore, is that police officers are given the latitude to, in the words of the Supreme Court of Appeal, act as they "see fit"<sup>46</sup> within the bounds of rationality. But is that sufficient a safeguard to protect individuals' rights entrenched in the *Constitution*? Would it not be ideal for the discretion of police officers to be restricted such that arrest is a measure of last resort and, even then, it should be on the basis of a warrant of arrest, unless necessity dictates otherwise?<sup>47</sup> It is submitted that this would not only be ideal, but a show of adherence to the spirit and the letter of the *Constitution* (in particular, sec. 12(1)) and the relevant international instruments<sup>48</sup>). Even

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45 This requirement was emphasised in *Ulde v Minister of Home Affairs*, where the court stated: "Our courts have over the years stated these standards as imposing an obligation on the repository of a discretionary power to demonstrate that he has 'applied his mind to the matter.'" The court went on to quote from *Northwest Townships (Pty) Ltd v The Administrator of the Transvaal*, to the effect that "failure by the person vested with the discretion to apply his mind to the matter (includes) capriciousness, a failure on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and the application of wrong principles".

46 *Minister of Safety and Security v Sekhoto*:par. 39.

47 This is an approach taken in *Louw v Minister of Safety and Security* and *Gellman v Minister of Safety and Security*. It should be stated, however, that the Supreme Court of Appeal took a different approach in *Minister of Safety and Security v Sekhoto*.

48 The relevant international instruments include the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A (III) (UDHR) (in particular art. 9); the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (in particular art.

then, a proper exercise of discretion should include the stage of choosing which method to employ, as opposed to focusing on the exercise of discretion at the stage prior to arrest. A look at some of the cases that served before the courts pertaining to police officers' use of discretion, it is suggested, lays the basis for this submission.

### 3. DISCRETION AND ARREST THROUGH THE LENS OF COURT JUDGMENTS

Several courts have engaged with the exercise of discretionary powers of police officers in the context of delictual claims resulting from unlawful arrest and detention and, in many of these cases, the manner in which the discretionary powers were exercised became decisive in the outcomes of the cases. In *Pallourios v Minister of Safety and Security*,<sup>49</sup> the plaintiffs instituted a delictual action against the Minister of Safety and Security for unlawful arrest and detention. The salient facts were that the plaintiffs were suspected of having committed the crimes of extortion and intimidation.<sup>50</sup> A police officer called them to the police station and, while there, they were arrested by another police officer (the arresting officer) who was in possession of a warrant for their arrest.<sup>51</sup> The officer who arrested the plaintiffs testified that he was not aware that the plaintiffs had been telephoned to come to the police station. He just saw them there and executed the warrant. The court rejected this testimony.<sup>52</sup> Anyway, what is important is that the court was faced with the question as to whether the arresting officer had exercised his discretion properly in arresting the plaintiffs. The court noted the following significant part of the arresting officer's testimony: "The second defendant repeatedly stated when testifying that he carried out the instructions of the prosecutor when he arrested the plaintiffs. The issue of a discretion whether to

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9(1)), and the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) (in particular art. 6). The international instruments, in a nutshell, proscribe arbitrary detention. In *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (NPD), the court interpreted the instruments as entailing that it is not sufficient to focus on the lawfulness or otherwise of the arrest and detention. In other words, while an arrest may be lawful in the sense that it complies with the national law, it may still be found to be arbitrary. For a detailed discussion on the broader interpretation of 'arbitrariness' in the context of arrest and detention, see Laurent Marcoux, Jr. 'Protection from Arbitrary Arrest and Detention Under International Law' 5 B.C. Int'l & Comp. L. Rev. 345 (1982) 350 <http://lawdigitalcommons.bc.edu/iclr/vol5/iss2/3>.

49 *Pallourios v Minister of Safety and Security and Another* (20924/2012) [2016] ZAGPPHC 973 (25 November 2016).

50 *Pallourios v Minister of Safety and Security and Another*:par. 8.

51 While the case was pleaded as one based on arrest without a warrant, it turned out later that the arrest was based on a warrant. This led to the plaintiffs changing their argument with the effect that they relied on the lack of use of discretion by the arresting officer (see *Pallourios v Minister of Safety and Security and Another*:paras. 12-15).

52 *Pallourios v Minister of Safety and Security and Another*:par. 22.

arrest or not, according to him, did not arise.”<sup>53</sup> The court considered the fact that the plaintiffs had come to the police station when called to do so, despite the fact that the police officer who called them had arrested them some time back and the fact that their addresses had been verified. These, according to the court, showed that they were not a flight risk. The court found that “the arrest was unlawful in circumstances where the second defendant did not exercise his discretion at all”.<sup>54</sup> The court confirmed that, where a discretion has not been exercised, the arrest is unlawful. The arresting officer seemed to labour under the impression that, where he was following instructions of the prosecutor to effect an arrest, authority a prosecutor lacks in any case, the issue of discretion did not arise. The arresting officer is the person in whom the discretion is vested, and he is the one who must exercise the discretion. It was pertinently wrong for him to subject his discretion to the control of the prosecutor or worse to regard the instructions of the prosecutor as taking away his discretion.

Wrong as the arresting officer was, he is not alone in this thinking, because this also happened in the case of *Ramphal v Minister of Safety and Security*,<sup>55</sup> where the arresting officer was instructed by the prosecutor to effect the arrest. The arresting officer was under the impression that the prosecutor had the authority to do so and, consequently, did not exercise any discretion in effecting the arrest. In this case, the arresting officer had requested a statement from the arrestee who refused to provide one. Then a prosecutor instructed the arresting officer to effect an arrest and the arresting officer complied. What is interesting about *Ramphal* is that the Minister of Police’s plea to the claim was that the arresting officer was acting on instructions from the prosecutor,<sup>56</sup> implying that such an instruction has some legal standing. The court rejected this stance, by stating that “[n]o provision of s 40(1) of the Criminal Procedure Act 51 of 1977, or of any other statute, authorises the arrest of a person on the instruction of a public prosecutor”.<sup>57</sup> This was the court’s first ground for finding the arrest to be unlawful. The second ground was that the arresting officer “failed to appreciate that he had a discretion”.<sup>58</sup> This means that he could not have exercised the discretion. The third ground was that the purpose of effecting the arrest, in this case, was to coerce the arrestee into making a statement.<sup>59</sup> In short, this arrest fell foul of the law, then it was for a wrong purpose (in other words, for the purpose not intended by the enabling statute) and, as if that was not enough, no discretion was exercised, because someone who does not appreciate the existence of a discretion cannot exercise one.

In *Gellman*, the court dealt with the issue of discretion and, it should be added, it dealt with the issue in more detail than the other cases, even going as

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53 *Pallourios v Minister of Safety and Security and Another*:par. 25.

54 *Pallourios v Minister of Safety and Security and Another*:par. 27.

55 *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (ECD).

56 *Ramphal v Minister of Safety and Security*:par. 7.

57 *Ramphal v Minister of Safety and Security*:par. 9.

58 *Ramphal v Minister of Safety and Security*:par. 10.

59 *Ramphal v Minister of Safety and Security*:par. 11.

far as setting guidelines that should be followed in the exercise of discretion. This case emanated from a wage dispute between the appellant and one of his employees. The appellant, an attorney, owned and ran a factory. As a result of the dispute, the employee damaged some property of the appellant (granite slabs). She also attacked the appellant, by throwing a granite slab at him, but missed.<sup>60</sup> In response, the appellant pointed a gun at the employee who fled, leaving some of her belongings on the premises. The employee then reported the matter to the police.

A police officer (the arresting officer) telephoned the plaintiff, requesting him to present himself to the police station to make a statement. The appellant informed the police officer that he was busy and could not go to the police station. Instead, he invited the arresting officer to his factory. The arresting officer and a colleague went to the factory.<sup>61</sup> It is noteworthy that, when the police officer requested his colleague to accompany him to the appellant's factory, he told the colleague that it was for the purposes of effecting an arrest.<sup>62</sup> After the visit to the factory and on the request of the police officers, the appellant followed the police officers to the police station driving his own car.<sup>63</sup> At the police station, he was arrested. After the arrest, the appellant requested to be taken back to the factory to release his employees and secure the premises.<sup>64</sup> His request was granted. He was thereafter kept in custody until he appeared in court. The charges were later withdrawn.<sup>65</sup> The appellant sued the Minister of Police for unlawful arrest and detention in the Magistrate's Court and his claim was dismissed,<sup>66</sup> hence the appeal to the Gauteng High Court. The High Court phrased one of the issues<sup>67</sup> it had to determine as "whether a peace officer who has reasonable grounds for suspecting the commission of a Schedule 1 offence, can effect a warrantless arrest when there are no exigent circumstances that would prevent the peace officer from obtaining a warrant before effecting the arrest."<sup>68</sup>

The respondent (the Minister of Safety and Security), through his legal representative, recorded his interpretation as that "a policeman always has the right to effect a warrantless arrest whenever there are reasonable grounds of suspicion".<sup>69</sup> This response by the Minister of Police, as the court pointed

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60 *Gellman v Minister of Safety and Security*:par. 7.

61 *Gellman v Minister of Safety and Security*:par. 13.

62 *Gellman v Minister of Safety and Security*:par. 14.

63 *Gellman v Minister of Safety and Security*:par. 26.

64 *Gellman v Minister of Safety and Security*:par. 27.

65 *Gellman v Minister of Safety and Security*:par. 33.

66 *Gellman v Minister of Safety and Security*:par. 35.

67 The other issue, equally important but not germane to this discussion, was whether the police officer "could have 'reasonably suspected' the Appellant of having committed" the offence (*Gellman v Minister of Safety and Security*:par. 64). The court decided this issue in favour of the appellant and this could have disposed of the case but the court decided to proceed with the issue of discretion because of its "concern about the increasing prevalence of warrantless arrests" (*Gellman v Minister of Safety and Security*:par. 66).

68 *Gellman v Minister of Safety and Security*:par. 65.

69 *Gellman v Minister of Safety and Security*:par. 86.

out, does not show enough appreciation for the discretionary powers that the legislature vests in police officers considering whether to effect an arrest or not. The court pointed out that, if police officers always have this right, that would undermine the provisions of sec. 43 (the section dealing with arrest with a warrant) in that, to paraphrase the court, there would be no need for police officers to go through the process of that section if the easier way of arrest without a warrant is equally open to them.<sup>70</sup> The court, therefore, emphasised the existence of police officers' discretion in dealing with arrest. It even went further and laid down guidelines that should guide police officers in effecting arrests.

The court listed seven guidelines to which the police should preferably adhere in considering an arrest.<sup>71</sup> These guidelines can be divided into two categories. The first category<sup>72</sup> does not focus on discretion, but on the jurisdictional facts, in particular the jurisdictional fact requiring that there must be reasonable grounds for the belief that an offence has been committed before arrest can take place. In this regard, the court called upon police officers to consider the evidence at their disposal critically and, where the only available evidence is a statement by a witness, corroborative evidence should be sought. The court added that seeking corroborative evidence may not be necessary where the officer witnessed the offence. It should be noted that the court, in this instance, seems to have conflated the provisions of both sec. 40(1)(a) and sec. 40(1)(b), because, where a police officer witnesses an offence, that would probably mean that it is an offence committed in the presence of the officer, thereby enabling the officer to act in terms of sec. 40(1)(a). It is difficult to think of a situation where a police officer would have witnessed an offence while it was not committed in that police officer's presence.

The second category<sup>73</sup> focuses on discretion. The court calls on police officers to consider whether arrest is necessary and, if it is necessary, whether the ends of justice would be defeated if a warrant is first applied for. Further, police officers should always be guided by their standing orders, as failure to follow relevant standing orders may, in itself, render the arrest unlawful. Thus, the court requires of police officers to exercise their discretion in favour of not using arrest but, where arrest is necessary, to obtain a warrant of arrest before effecting the arrest. Strictly considered, the court's guidelines are merely a summary of what police officers should be doing in the exercise of their discretion anyway, but some of them are not doing. Right there lies the rub. Some police officers do not follow the law in that they do not exercise their discretion, to borrow from the *Wednesbury* terminology, within the four corners of the principles guiding the use of discretion.

*Mvu v Minister of Safety and Security*<sup>74</sup> followed an approach that differs from the other cases and, at the very least, opens new frontiers in dealing with

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70 *Gellman v Minister of Safety and Security*:par. 85.

71 *Gellman v Minister of Safety and Security*:par. 97.

72 *Gellman v Minister of Safety and Security*:paras. 97.1-97.4.

73 *Gellman v Minister of Safety and Security*:paras. 97.5-97.7.

74 *Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ) (2009 (6) SA 82). This approach had been followed in *Van Rensburg v City of Johannesburg*

the (un)lawfulness of arrest and detention. In this case, the plaintiff (a police officer) was arrested on a charge of malicious injury to property. The charge had been laid by his two daughters whose cell phones he had damaged, because he did not approve of them owning cell phones. The arrest unfolded in this way.<sup>75</sup> The arresting officer telephoned the plaintiff informing him that a criminal complaint had been laid against him. The plaintiff travelled to the police station where he was arrested and incarcerated. He was released on warning the following day. He instituted a claim against the Minister of Police on the basis that the arrest and detention were unlawful. The court found against the plaintiff on the claim based on the unlawfulness of the arrest because, the court found, the arresting officer was protected by the provisions of sec. 40 of the *Act*.

Basically, the court restricted itself to the *Duncan* jurisdictional requirements which, it found, had all been satisfied. It is noteworthy that the court did not deal with the issue of discretion which arises once the jurisdictional facts have been established. It could well be that such an approach was not justified by the pleadings, as this is not clear from the judgment. However, the court did something that distinguished its approach for many other cases. After considering and dismissing the claim based on the unlawfulness of the arrest, it went further and considered the unlawfulness of the detention and found in favour of the plaintiff. In other words, while the arrest was lawful, the detention was not because, as the court explained, the arresting officer could have released the plaintiff on warning.<sup>76</sup> At the risk of stating the obvious, the court dealt with discretion, albeit in respect of detention but not in respect of the arrest. This approach finds support in *Raduvha*, where Boshielo AJ stated that “arrest and detention are separate legal processes. The fact that both result in someone being deprived of his or her liberty, does not make them one legal process.”<sup>77</sup> He also went on to deal with arrest and detention separately but, in conclusion, he made one finding to wit: “I conclude that both the applicant’s arrest and detention were in flagrant violation of her constitutional rights in section 28(2) and 28(1)(g) and thus unlawful.”<sup>78</sup> This approach, it is clear, makes it possible for the court to find differently on the (un)lawfulness of the arrest and that of the detention. In many cases, the two concepts (arrest and detention) are treated together with the usual finding being that the “arrest and detention” was/were unlawful, because the arresting officer did not exercise the necessary discretion. Willis J, the presiding judge in *Mvu*, described his approach as enabling “one to get a better grip on an issue which has been debated in the law reports in recent cases”.<sup>79</sup> What makes this approach even

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2009 (1) SACR 32 (W) two years earlier, even though, in *Van Rensburg v City of Johannesburg*, the judge did not go into any detailed discussion except to state that, while the arrest was lawful, the detention was not lawful.

75 For a detailed exposition of the facts, see *Mvu v Minister of Safety and Security*: paras. 2-5.

76 *Mvu v Minister of Safety and Security*: par. 13.

77 *Raduvha v Minister of Safety and Security*: par. 39.

78 *Raduvha v Minister of Safety and Security*: par. 71.

79 *Mvu v Minister of Safety and Security*: para.10. The issue that the judge is referring to is the one of the fifth jurisdictional fact that was started in *Louw* and brought to



more enticing is the decision in *Mtshemla v Minister of Police*,<sup>80</sup> where the arrest was made by a civilian who then delivered the arrestee to the police station. The Minister of Police could not be held liable for the arrest, but for the detention.

What is clear from the above judgments is that, in many instances, arrest was effected unnecessarily and it all seems to boil down to police officers' improper exercise of discretion. In two of the cases (*Pallourios* and *Mvu*), the arrestees presented themselves to the police station<sup>81</sup> and, in the one case (*Pallourios*), the addresses had been verified, while in the other (*Mvu*), the arrestee was a police officer. In both cases, the arresting officers did not exercise discretion, because they thought they did not have any. In *Gellman*, the arresting officer seemed to have been aware of the discretion, but there is no indication that he exercised it. Had he applied his mind to the issue, as required, he could not have arrived at a decision to arrest someone who was an attorney and also ran a factory, which the arresting officer had visited. Put differently, the facts available to the arresting officer pointed to someone who would attend court and, importantly, there is no indication of any factor or consideration that could have driven the arresting officer to his conclusion (arrest). Moreover, as the court pointed out, the arresting officer seemed to have decided to arrest right from the beginning, because, when he requested his colleague to accompany him to the appellant's factory, he stated the purpose as to effect an arrest.

Notwithstanding some differences in approach, analysis and outcomes in the few cases discussed in this article, it is clear that the courts adhere to the *Duncan* jurisdictional facts. This is a uniform approach in all the cases and, based on the principle of legal precedence, all the courts, except the Constitutional Court, are bound to follow this approach until the Supreme Court of Appeal revisits the issue. However, the same cannot be said of the process that comes after the establishment of the jurisdictional facts. Some courts deal with police officers' discretion as that arises after the establishment of the jurisdictional facts, while others do not. This could possibly be the result of the fact that the pleadings do not raise the issue and the courts follow the lead of the Supreme Court of Appeal in *Sekhoto*, where the court simply did not consider this issue, because it had not been pleaded nor canvassed in evidence. The reason why it was dealt with in *Pallourios*, despite it not having been raised in the pleadings, was that it was canvassed during the trial.

The arresting officers involved in these cases seem to miss the point that arrest is to secure accused persons' court appearance. Arrest, of course, is not the only method to secure accused persons' court appearance. If statutes have to be interpreted in favour of liberty (*in favorem libertatis*), would the exercise of police officers' discretion regarding, first, which method to use to secure a suspect's court attendance and, secondly, once arrest has been

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an abrupt end in *Minister of Safety and Security v Sekhoto*.

80 *Mtshemla v Minister of Police* 2020 (2) SACR 254 (ECM).

81 The same happened in the case of *De Klerk v Minister of Police*, where, despite the appellant presenting himself to the police station, he was still arrested and detained.

opted for the arrest be on the basis of warrant so that there is oversight<sup>82</sup> over the process? This could be done without reading in a fifth jurisdictional fact into the test. The reason for this is that this approach would accept the *Duncan* jurisdictional facts as they are and then proceed to apply them in favour of individual liberty when it comes to dealing with the police officer's discretion which, in any case, arises after the jurisdictional facts have been established. The same approach could, *mutatis mutandis*, be applied to arrests with a warrant, where it could be helpful at two stages in the process. First, it can be applied when the magistrate or justice considers an application for a warrant of arrest. Such magistrate or justice would have to ask the question: Is arrest necessary in this case or can the same result be achieved by using other methods?<sup>83</sup> Secondly, at the stage when police officers armed with a warrant of arrest are exercising discretion whether to arrest or not. In *Ulde*, though dealing with a different statute,<sup>84</sup> the court stated the following:

Bearing in mind that we are dealing here with the deprivation of a person's liberty (albeit of an illegal foreigner's), the immigration officer must still construe the exercise of his discretion *in favorem libertatis* when deciding whether or not to arrest or detain a person under s 34(1) – and be guided by certain minimum standards in making the decision.<sup>85</sup>

There is no reason why this approach should not be applicable when it comes to arrest and detention in terms of the CPA. The current approach does not seem to demand that the discretion of police officers choosing a method of securing an accused person's attendance do so *in favorem libertatis*. The same goes for the stage of effecting an arrest. The courts, as recently shown in *Barnard*, maintain a deferent stance towards police officers' exercise of discretion. Even the Constitutional Court has expressed sentiments to this effect in *Van Niekerk*:

It should be borne in mind that should the Minister wish to provide greater guidance to police officers concerning their powers of arrest under section 40 of the CPA, he has executive and legislative options available to him ... I conclude therefore that nuanced guidelines already exist.<sup>86</sup>

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82 Before a warrant of arrest is authorised, it would have been subjected to a process that involves the participation of other role players such as a commissioned police officer or a prosecutor (who applies for the warrant) and the magistrate or justice who considers the application (see sec. 43). The point is that this process ensures that it is not only the decision of the arresting officer that determines the fate of the suspect.

83 Sec. 43 of the Act, which deals with warrant of arrest, does not require the magistrate or justice to enquire whether arrest is necessary (in other words, the magistrate or justice does not have to enquire whether the accused person's court appearance can be secured through other methods).

84 *Immigration Act 13/2002*.

85 *Ulde v Minister of Home Affairs*:par. 7.

86 *Minister of Safety and Security v Van Niekerk*:paras. 25-26.

The court came to this conclusion after considering the police standing orders<sup>87</sup> on arrest and detention which, it must be said, are both impressive and commendable. They, among other things, explain that arrest is a drastic infringement and should be used as a measure of last resort. The court, in *Van Niekerk*, made an important observation. It referred to the United States case of *Atwater*. The court stated that, "(i)n the light of the values of the Constitution and the provisions of section 40 of the CPA and the Standing Orders, it is clear that South African law would not justify an arrest on the facts in *Atwater*".<sup>88</sup> The *Atwater* case was about a person who was arrested for "not fastening her seatbelt and that of her children".<sup>89</sup> The court's observation about the circumstances of that arrest and that the facts would not justify arrest in South Africa is an interesting one. It seems accurate at the theoretical level but, as the cases discussed earlier show, the accused in *Atwater* could easily have been arrested in South Africa notwithstanding the provisions of the *Constitution*, the *CPA* and the standing orders on which the court based its view. The constitutional and legislative framework the court refers to seems to be undermined by the many cases of unlawful arrest and detention that come to court. This may be an indication that some police officers do not live up to the expected standard. At least in one case, *Le Roux*,<sup>90</sup> a police officer informed the court that she was not aware of the guidelines. While accepting that the ignorance of one police officer cannot be used to judge the entire police service, this was an admission that, viewed with the occurrence of infringements of the right to liberty, should scream for attention.

The point is that, despite the applicable legal principles and guidelines, individuals' rights are still being infringed in the process of arrest. While police officers' disregard of the applicable law is a substantial part of the problem, there are other contributors. As shown in this discussion, the improper exercise of discretion is one major contributor. However, there are two other major contributors that often evade scrutiny. The first is the absence of a legal requirement that arrest should only be resorted to as a measure of last resort. It is true that police standing orders<sup>91</sup> make this requirement, but it may be necessary to elevate this to a legal requirement.<sup>92</sup> The second is that police do not have a convenient mechanism at their disposal to secure accused persons' court attendance, where an offence falls outside the parameters of sec. 56. There is no provision that a police officer may simply warn a suspect to appear in court or before the police officer for further processing of the

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87 Police Standing Orders (G) 341 (see fn. 8 above).

88 *Minister of Safety and Security v Van Niekerk*:par. 25.

89 *Minister of Safety and Security v Van Niekerk*:par. 25.

90 *Le Roux v Minister of Safety and Security*:par. 25.

91 Standing Order (G) 341 (see fn. 8 above).

92 The approach of India is a good example in this regard. Sec. 6 of the Code of Criminal Procedure (Amendment) Act 5 of 2009 empowers police officers to issue a notice to a suspect instead of arrest. The significance of this notice, and this distinguishes it from notice to appear in the South African statute, is that it calls upon the person to appear before the police officer, not the court. The other difference is that, as discussed, notice in the South African statute is limited to minor offences that would attract a fine, while in the Indian statute, it is available even for serious ("cognizable") offences.

case.<sup>93</sup> The result is that police, in such a situation, have to go through the process of summons. This is outside their competence. A prosecutor must prepare a summons and that summons should then be issued by the clerk of the court.

#### 4. CONCLUSION

The above discussion sought to show that police officers are vested with wide discretionary powers in the arrest process. The discretionary powers are bestowed by the CPA without guidelines regarding how the discretion should be exercised. This leaves the exercise of these discretionary powers to the general principles applicable to exercise of discretionary powers which, as reaffirmed in *Sekhoto*,<sup>94</sup> is the default position where a statute bestowing discretionary powers does not provide guidelines. Thus, the *Wednesbury* principles as modified become applicable with the result that the courts cannot easily temper with police officers' use of discretion, unless such exercise went beyond the four corners of these principles. This largely leaves persons suspected of committing crimes at the mercy of police officers in terms of how they are brought to court. Given that arrest is one of the methods allowed by sec. 38 of the CPA and there is no requirement that the least intrusive method be applied, that arrest be used as a measure of last resort or that arrest be effected with a warrant, police officers are at liberty to choose any of the methods the law avails to them. However, the cases discussed earlier show that police officers do not always exercise their discretionary powers *in favorem libertatis*.<sup>95</sup> Moreover, in some instances, they are not even aware of the discretion available to them, let alone exercise it.<sup>96</sup>

It is submitted that the fifth jurisdictional fact served as a safety valve during its short span of existence, in that it required of arresting officers to use arrest as a measure of last resort. It appears that proper exercise of discretion can serve the same purpose if proper guidelines are given. The current guidelines are contained in Police Standing Orders, but that does not solve the problem, because the standing orders are not legally binding and this means that police officers can ignore or contravene them without effect on the (un)lawfulness of the arrest. What may be necessary, therefore, is for the standing orders to be elevated to a legal requirement and, it seems, the legislative route is the only remaining option. This is because, on the one hand, judicial intervention in the

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93 The only warning that the Act provides for is warning that can be given in lieu of bail (sec. 72). However, that is only applicable once an arrest has been effected. This does not solve the problem.

94 *Minister of Safety and Security v Sekhoto*:par. 40.

95 The cases of *Gellman v Minister of Safety and Security* and *Pallourios v Minister of Safety and Security and Another*, to mention just two of the several cases where arrest was effected unnecessarily, demonstrate this point.

96 This can be seen in cases such as *Le Roux v Minister of Safety and Security* and *Ramphal v Minister of Safety and Security*, where, respectively, the arresting officer was not aware of the available discretionary powers and the arresting officer was under the impression that an instruction from a prosecutor removed the need to exercise discretion on the part of the arresting officer.

form of the fifth jurisdictional fact has failed and, on the other, police officers cannot be relied on to safeguard the right to liberty through the exercise of their discretion. It seems untenable that the right to liberty should be left to the mercy of police officers in this manner. It is interesting to note that police management seems to appreciate the value the *Constitution* places on the right to liberty, as is clear from the standing orders that call upon police officers to use arrest as a measure of last resort.<sup>97</sup> However, that appreciation sounds hollow if not translated into action.

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97 See fn. 8 above.

