

## CASES / VONNISSE

### KNOWLEDGE OF THE EXISTENCE OF DISCRETIONARY POWERS IS AN IMPLIED PRECONDITION TO THE PROPER EXERCISE OF A DISCRETION TO ARREST WITHOUT A WARRANT\*

*Motabatshindi v Minister of Police*  
(South Gauteng High Court, Johannesburg  
(unreported) 2014-09-26 Case No A3017/2014)

#### 1 Introduction

This note aims to examine the findings of the South Gauteng High Court in *Motabatshindi v Minister of Police* (hereinafter “*Motabatshindi*”). In this case, which was an appeal from the Johannesburg Magistrates Court, the High Court was called upon to decide if the magistrate had correctly interpreted and applied the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (hereinafter “CPA”). The main bone of contention in the case was whether a police officer who admits that he was not aware that the section conferred discretionary powers on him could, nevertheless, be said to have properly exercised the discretionary powers conferred by the section where the magistrate found his actions to have been *bona fide*. Put in another way, the High Court was asked to pronounce if an unlawful exercise of power somehow becomes lawful just because the actor acted in good faith. In its examination of the judgment this note will start by providing a background overview of section 40(1)(b) of the CPA and the manner in which the section has been interpreted and applied. This will be followed by the facts of *Motabatshindi* in so far as they are relevant to the discussion. Thereafter, the judgment will be discussed in detail and critiqued against existing precedent.

---

\* This case note was written in loving memory of Nduduzo Nyawo from the office of State Attorney, Johannesburg who passed away in 2014. Mr Nyawo was the attorney for the Minister of Police in countless matters against the Wits Law Clinic, including the case discussed in this case note.

## 2 Overview of section 40(1)(b) of CPA

Section 40(1)(b) of the CPA empowers a police officer to arrest without a warrant any person whom he reasonably suspects of having committed a schedule 1 offence. The interpretation and application of this section has been, and continues to be, the subject of many court cases. This is fitting seeing that the section allows for a limitation of a person's most cherished right – the right to personal liberty – on the strength of nothing more other than mere suspicion (Nkosi “Balancing Deprivation of Liberty and Quantum of Damages” 2013 *De Rebus* 62; and *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 (GNP) par 18).

Mindful of the limitations the section places on the right to personal liberty and possibly the right to dignity, courts have correctly held that the section must be interpreted and applied restrictively (*Nombanga v Minister of Police, Transkei* 1992 (3) SA 988 (TkGD) 992E). This is in line with a long-standing rule of our common law which states that strict construction is to be placed upon statutory provisions which limit elementary rights (*Sigaba v Minister of Defence and Police* 1980 (3) SA 535 (TkSC) 541H). In *Dadoo Ltd v Krugersdorp Municipal Council* (1920 AD 530 552) Innes CJ, stated the rule as follows:

“It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole”.

Although it has been said that the mere suspicion required under the section must rest on reasonable grounds, a mechanism clearly intended to introduce a measure of control and oversight on the exercise of the power conferred by the section, it remains clear that the section bestows on police officers immense discretionary powers to interfere with personal liberty. Notwithstanding its intrusive nature, the power conferred by the section remains a valuable tool in the hands of the police officers to protect the community (*Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) 466D). It should be noted, however, that the power is open to abuse. To guard against it being abused, it has been said that the power can be exercised only in circumstances where the preconditions, often referred to as jurisdictional facts, exist (Nkosi “Wrongful Deprivation of Liberty – It is Not Just About the Warrant: *Domingo v Minister of Safety and Security*” 2015 *SALJ* 16). The jurisdictional facts must exist at the time the power is being exercised, if not, then any purported exercise of the power is invalid (*SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) 34H).

In the often-cited case of *Duncan v Minister of Law and Order* (1986 (2) SA 805 (A) 818G–H (hereinafter “*Duncan*”)) Van Heerden JA held that the jurisdictional facts for the exercise of the power to arrest without a warrant under section 40(1)(b) of the CPA were the following:

- The arrestor must be a peace officer;
- the arrestor must entertain a suspicion;

- the suspicion must be that the suspect committed an offence referred to in Schedule 1; and
- the suspicion must rest on reasonable grounds.

These jurisdictional facts have been confirmed without any alteration or modification in countless subsequent cases over many years. In fact, in *Minister of Safety and Security v Sekhotho* (2011 (5) SA 367 (SCA) (hereinafter “*Sekhotho*”)) the Supreme Court of Appeal (hereinafter “SCA”) expressly rejected all attempts aimed at altering the jurisdictional facts as pronounced in *Duncan*, even in an instance where the alterations were said to have been mandated by the Constitution. Before *Sekhotho* various divisions of the High Court were attempting to alter the *Duncan* jurisdictional facts by reading into the jurisdictional facts constitutional protections in light of section 39(2) of the Constitution, which enjoins all Courts when interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights. These Courts reasoned that the *Duncan* jurisdictional facts were pronounced pre-Constitution and were based on a questionable statement of law set out in *Tsose v Minister of Justice* (1951 (3) SA 10 (A) (hereinafter “*Tsose*”)). The statement of law set out in *Tsose* was to the effect that, although an arrest was a harsher method of securing an accused person’s attendance at Court, there was no rule of law that obligated police officers to use or even consider a milder method if that method would have been equally effective. Verbatim the Court held:

“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” (17G–H).

In questioning this statement of law set out in *Tsose* in light of the Constitution which regulates the exercise of public power and guarantees the rights to personal liberty, various divisions of the High Court concluded that the Constitution required something more than just due compliance with the *Duncan* jurisdictional facts. Although no authority was cited by any of the High Courts for such a conclusion, it appears that the High Courts were in fact following in the footsteps of the Constitutional Court which in *Pharmaceutical Manufactures of South Africa: in re Ex parte President of the Republic South Africa* (2000 (2) SA 674 (CC)) had held that it was no longer required of public officials to only exercise their powers in good faith as the constitution required more than that. The Constitution, so held the Constitutional Court, placed further significant limitations upon the exercise of public power through the Bill of Rights and the founding principle enshrining the rule of law (par 83).

The High Courts accordingly held that there was a constitutional obligation on police officers to seek and to employ other means short of an arrest to bring suspects before courts, and where those less drastic means had not been considered, arrests effected under section 40(1)(b) of the CPA were wrongful on the basis that police officers had not considered less drastic means to achieve the same purpose (see *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T); *Gellman v Minister of Safety and Security*

2008 (1) SACR 446 (W); and *Minister of Safety and Security v Sekhotho* 2010 (1) SACR 388 (FB)). This, they held, was in line with the constitutional guarantee to freedom and security of a person. In *Le Roux v Minister of Safety and Security* (2009 (4) SA 491 (N)) Madondo J, for example, formulated the constitutional guarantee advocated by the High Courts as follows:

“The court must not only be content with the finding that the arrest of a suspect fell squarely within the parameters of s 40(1)(b) of the Act. It must look beyond the provisions of the section to the principles and provisions of the Constitution relating to the right to liberty and freedom in order to determine whether the arrest was justified. There is a duty on our courts to preserve the right to liberty against infringement” (par 30).

This was a radical departure from a long-held view that once the *Duncan* jurisdictional facts have been satisfied police officers had a discretion whether or not to arrest, and that, where they decided to arrest, such arrests would be lawful as courts could not interfere with a proper exercise of discretionary powers even if it was found that such an exercise of discretionary powers was inequitable (*Shidiack v Union Government* 1912 AD 642 651; *Sachs v Minister of Justice*; *Diamond v Minister of Justice* 1934 AD 11 34D; and *Farisani v Minister of Justice* 1987 (2) SA 321 (V) 325D–F). The only way in which such arrests could be challenged was if it was alleged and proved that the discretion was improperly exercised (*Divisional Commissioner of SA Police, Witwatersrand Area v SA Associated Newspapers Ltd* 1966 (2) SA 503 (A) 512). Under this approach the enquiry into the lawfulness of an arrest, effected under section 40(1)(b), ceased the moment it was found that the jurisdictional facts for the exercise of the power existed (*Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (T) par 10). This, the High Courts rejected, and instead required police officers to justify why less drastic means, listed in section 38 of the CPA to secure the attendance of suspects in criminal courts, had not been used.

In imposing an obligation on police officers to seek less drastic means to secure the attendance of suspects in criminal courts the feeling of the High Courts, as noted by the SCA itself in *Sekhotho*, was that some police officers were abusing the power to arrest without a warrant in that they were easily invoking the power to arrest without a warrant in instances where those arrests were neither objectively nor subjectively justified. Simply put, the feeling of the High Courts was that police officers were arresting people under the section “merely because they have the ‘right’ to do so” (par 13). Despite this valid concern by the High Courts the SCA criticised the High Courts for having added what it termed “a gloss” and a “fifth jurisdictional requirement” in the otherwise clear jurisdictional facts for an arrest under section 40(1)(b) of the CPA. The criticism levelled by the SCA was to the effect that it was unclear whether in formulating this fifth jurisdictional requirements the High Courts had done so by direct application of the Bill of Rights or by developing the common law or by way of interpretation of section 40(1)(b) (par 14). Harms DP, after analysing the constitution and section 40(1)(b) of the CPA, criticised the High Court as follows:

---

“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 *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” (par 22).

In rejecting the attempts of the High Courts to read in constitutional guarantees into the *Duncan* jurisdictional facts, *Sekhotso* effectively cemented the *Duncan* jurisdictional facts. The question to be asked is whether the *Duncan* jurisdictional facts constitute a closed list of jurisdictional facts that must exist for a valid arrest under section 40(1)(b), or is it possible to read into those jurisdictional facts other facts and factors which may constrain the power conferred by the section? This question will be considered in light of the unreported judgment handed down by Windell J, of the South Gauteng High Court in *Motabatshindi*.

### 3 Facts

This was an appeal from the Johannesburg magistrates' court where the appellant, following her alleged wrongful arrest and detention, vicariously sued the Minister of Police for damages. The Minister of Police relied on section 40(1)(b) of the CPA as justification for the arrest. At the hearing of the matter the arresting officer testified that he was given a docket by his commander which docket had instructions that he had to arrest the appellant on or before a particular date. The docket also had a statement made by the appellant's employer alleging that the appellant had stolen an amount of R 12 607 from the employer's premises (par 9). Armed with this information the arresting officer then attended at the appellant's place of employment and arrested the appellant. During the hearing of the matter the arresting officer also testified that he did not know, or he was not aware that he had a discretion whether or not to arrest. This concession by the arresting officer was particularly important in light of the fact that there was an instruction on the docket instructing him to arrest, and so the appellant argued that in effecting the arrest the arresting officer never applied his mind nor exercised any discretion, but merely followed his commander's instructions on the docket. Notwithstanding this argument by the appellant, the magistrate found it inexcusable that the arresting officer did not know that he had a discretion, but in the same breath, the magistrate held that the arresting officer's conduct was "*bona fide* and as such in accordance with the law" (par 14). The magistrate then dismissed the appellant's claim against the Minister of Police.

Feeling aggrieved the appellant then approached the High Court where she argued that the magistrate had misdirected herself and or erred in paying scant regard to the arresting officer's concession that he did not know that he had a discretion to exercise. Because the arresting officer did not know that he had a discretion to exercise, so argued the appellant, then he could not have exercised any discretion and as such his actions, seen in the light of the commander's instructions on the docket, were invalid and fell

short of the standard set by section 40(1)(b) of the CPA. In support of her argument the appellant relied on the cases of *Domingo v Minister of Safety and Security* ((CA429/2012) [2013] ZAECGHC 54 (hereinafter “*Domingo*”)), where it was held that an arresting officer who arrested on a warrant without recognising that he had a discretion whether or not to arrest had not exercised his discretion and as such the arrest, though on a warrant was wrongful (par 6 and 7) and in *Qunta v Minister of Police* ((CA114/2012) [2013] ZAECGHC 53 (hereinafter “*Qunta*”)), where the court on similar facts held:

“Furthermore, and by his own admission, he was unaware that he was vested with a discretion whether or not to effect an arrest. It follows as a matter of logic that consequently, he would not have exercised it” (par 16).

In addition to these two High Court cases, the appellant also referred the High Court to the decision of the SCA in *Ulde v Minister of Home Affairs* (2009 (4) SA 522 (SCA) (hereinafter “*Ulde*”)), where an illegal immigrant was detained pursuant to a blanket policy decision to detain illegal immigrants for purposes of deportation. In *Ulde* the appellant, like *Motabatshindi* challenged his detention and Home Affairs relied on section 34(1) of the Immigration Act 13 of 2002 as justification for the arrest and detention. Section 34(1) operates similarly to section 40(1)(b) of the CPA in that it too confers on an immigration officer a discretion of the same kind as that of a police officer acting under section 40(1)(b) of the CPA. In this case the SCA held:

“By assuming that he had an obligation to detain the appellant ... was not exercising any discretion – he was carrying out what he believed to be a ‘blanket policy’ which by definition precludes the exercise of a discretion” (par 10).

It is not entirely clear why the Court was not persuaded by any of these cases especially because the questions of law were similar, but in dismissing the appellant’s appeal, Windell J restated the *Duncan* jurisdictional facts as well as *Sekhotho* and held:

“The court *a quo* correctly in my view accepted [the arresting officer’s] version of the events preceding the arrest. In the *bona fide* exercise of the arrestor’s discretion, a Court cannot adopt an armchair critic’s posture if the arrest is not predicated or motivated by ulterior motive or illegality” (par 28)

But the problem with Windell J’s conclusion is that in light of the arresting officer’s evidence, no discretion had been exercised to begin with by virtue of the fact that the arresting officer on his own admission was not aware that he was enjoined to exercise any discretion. To that end Windell J conflated *bona fides* and discretion.

#### **4 Analysis and discussion of the case**

*Motabatshindi* was incorrectly decided by both the magistrate’s court as well as the High Court as it was decided on the basis that the arresting officer’s *bona fides* somehow brought his actions within the ambit of the protection afforded by section 40(1)(b) of the CPA. Windell J’s judgment is incorrect for at least four reasons. One: the arresting officer pointed to section 40(1)(b) of

the CPA as justification for his actions. In saying the arrest and detention were wrongful the appellant was in fact challenging the exercise of the arresting officer's powers under the section. To resolve and properly adjudicate on the dispute the Court was in fact required to determine whether the requisite jurisdictional facts were present at the time the appellant's right to liberty was interfered with. Such a determination necessarily required the court to interpret the provisions of the section in order to decide whether the power had been duly and properly exercised (*Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (AD) 347G). This the Court did not do.

Had the Court engaged in this simple exercise of interpreting the section in light of the evidence tendered by the arresting officer, then the Court would have realised that the *bona fides* of the arresting officer is not a precondition for the exercise of the power under the section because the section simply required the arresting officer to exercise his discretion on reasonable suspicion. Nowhere does the section make mention of *bona fides*. However, even if the arresting officer's *bona fides* were to be an issue the Court had to consider first if the discretion had been exercised then as a second issue: whether or not the discretion was exercised in good faith. This is what the appellant had asked the Court to consider. The question the Court ought to have asked itself is: can an arresting officer who is not even aware that he has a discretion to exercise, exercise such a discretion? Chetty J, in *Domingo* and in *Qunta*, supported by the SCA in *Uide* has twice held not.

Two: Windell J failed to pay sufficient attention to the fact that the facts of the case further revealed that the arresting officer considered himself duty-bound to arrest the appellant by virtue of the instruction issued by his commander whose instruction was on the docket. The instruction was precise as it read: "1) Inform the complainant that you are an investigating officer; 2) arrest and charge the suspect before 29 June 2010; 3) place the matter on the court roll" (par 9). With such precise instructions which were fully carried out by the arresting officer, the appellant argued that the arresting officer (in arresting her) was not exercising any discretion but was executing the instructions of the commander. In *Ramphal v Minister of Safety and Security* (2009 (1) SACR 211 (E) (hereinafter "*Ramphal*")), on similar facts, where an arrest had been effected on instructions, albeit from a prosecutor. Plasket J in declaring the arrest wrongful held:

"*Ramphal's* arrest is invalid on account of two further grounds as well. The first is that, as [the arresting officer] was under the impression that he was duty-bound to carry out ... [the] instruction, he failed to appreciate that he had a discretion. His failure to appreciate that he had a discretion meant that when he arrested *Ramphal* he failed to apply his mind and acted irregularly" (par 10). (Footnotes omitted)

Plasket J's judgment in *Ramphal* should be taken in context as it differs from which was said in *Bhika v Minister of Justice* (1965 (4) SA 399 (W) (hereinafter "*Bhika*")) in that in *Ramphal*, the arrest was based on an invalid instruction from a prosecutor who was not empowered to issue the instruction in the first place (par 9), whereas in *Bhika* the instruction similar to

the present case was valid in that it came from another officer who appears to have been empowered to issue the instruction. On those facts the *Bhika* court held that the arrest was in fact an act, not of the arresting officer, but that of the officer who ordered the arrest (400G). Because Windell J did not pay sufficient attention to the whole evidence of the arresting officer the *Bhika* issues were not even mentioned. Even if they were, however, *Motabatshindi* would have still been entitled to damages on the basis that the commander, whose duty it was to justify the arrest, was never brought before court. On every consideration of the facts and the relevant legal issues in *Motabatshindi* Windell J ought to have found the appellant's deprivation of liberty unlawful as it did not fall within the ambit of the section relied on as justification for the arrest and detention.

Three: Windell J ought to have realised that the arresting officer on every reading of his evidence had in fact misconstrued the statutory provisions on which he sought to justify his actions. This would not have been the first time that such a misconception had occurred as something similar occurred in *S v Purcell-Gilpin* (1971 (3) SA 548 (RAD)), where a private citizen sought to justify his actions of wrongfully shooting at a lorry driven by another by relying on the provisions of section 48(1) of the then Rhodesian Criminal Procedure and Evidence Act. This section was the equivalent of section 42 of the CPA which empowers a private citizen to effect an arrest. When prosecuted for his wrongful acts in shooting at the lorry, the private citizen argued that he was entitled to an acquittal because he *bona fide* believed he was acting lawfully in trying to arrest the occupants of the lorry (551A).

The Court found that the private citizen's actions did not meet the jurisdictional facts of that section and as such dismissed the defence raised by the private citizen. Important for purposes of this argument is that in dismissing the private citizen's contentions the Court held:

"If the essential elements of the section of the statute giving the right of arrest are absent, however, the question of the [private citizen's] *bona fides* in believing he has a right of arrest becomes irrelevant because it arises from a mistake of law" (553C).

In *Motabatshindi* the essential element required to be present for the defendant to escape liability for wrongful arrest was the proper exercise of discretionary powers bestowed by section 40(1)(b) of the CPA. This essential element was clearly missing for the arresting officer was not aware that he had a discretion to exercise. It followed from his lack of knowledge of the discretionary powers he was vested with, that no discretion had been exercised, let alone in a proper manner. Simply put, because the arresting officer who was the repository of the discretionary powers conferred by section 40(1)(b) was not aware that he had those discretionary powers to begin with, he could not have exercised those discretionary powers in a manner consonant with the enabling section, that is, in an objectively reasonable manner rationally related to the purpose for which the power exists (see *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of RSA* 2000 (2) SA 674 (CC) par 85). For this reason, the arresting officer's *bona fides* could not have, and did not bring,



his actions within the purview of the section, and as such Windell J should have found in favour of the appellant.

Lastly, it is now settled law that knowledge of wrongfulness on the part of an arresting officer is not required to sustain a claim for wrongful arrest, as wrongfulness is presumed in the mere act of interfering with a person's liberty (*Ramsay v Minister of Police* 1981 (4) SA 802 (A) 818; and *Boswell v Union Club of South Africa* 1985 (2) SA 162 (D) 167H–I). To that end it is not entirely clear why Windell J allowed herself to be sidetracked by the arresting officer's *bona fides* because those were at all relevant times irrelevant. The question before court was always whether or not on the objective facts before court the actions of the arresting officer were lawful, and nothing positively influenced his *bona fides* or otherwise. An unlawful act cannot be lawful merely because it was perpetrated by someone who was *bona fide*. Jones J in *Minister of Correctional Services v Tobani* (2003 (5) SA 126 (E)) neatly states the irrelevance of *bona fides* as thus:

“The detention of a person is either justified by the laws which regulate detention ... or it is not. So fundamental is the right to personal liberty that the lawfulness or otherwise of a person's [arrest and] detention must be objectively justified, regardless of the *bona fides* of the gaoler and regardless of whether or not he was aware of the wrongful nature of [his actions]” (133F–G).

For all these reasons Windell J ought to have found in favour of the appellant. Having said all this, can it be said that knowledge of discretionary powers constitutes a precondition for the exercise of the power to arrest without a warrant under section 40(1)(b) of the CPA? An answer to this question is not only academic but is of practical significance to both police officers and those who are affected by arrests effected under the section. If knowledge or awareness of the existence of a discretion bestowed by the section is a precondition to the exercise of the power, then it must follow that arrests effected in instances where the police officer did not know that he had a discretion, are unlawful because the police officer would not have complied with the preconditions prescribed by the section.

An answer to this question creates an avenue for those who are affected by arrests effected under the section to challenge those arrests by showing that, because the police officer did not know or was not aware that he had a discretion, he therefore did not comply with the precondition for the exercise of the power to arrest under the section. Chetty J in *Domingo* and in *Qunta* resolved the issue on logical grounds, without elevating it to the *Duncan* jurisdictional facts for the exercise of the power under section 40(1)(b) of the CPA. It should be remembered that in *Sekhotho Harms DP*, concluded that “[a]bsent a finding of unconstitutionality, [the High Courts] were not entitled to read anything into a clear text” (par 24).

## **5 Knowledge or awareness of discretionary powers is a precondition for the proper exercise of those discretionary powers**

The starting point is to realise as was done by Harms DP in *Sekhotho* that an official who is bestowed with discretionary powers is constrained to exercise those powers within the limits of the authorising statute (par 40). Ascertaining the limits of a statute calls for the interpretation of the applicable provisions in the context of the statute in its entirety. Interpretation involves ascribing meaning to the provisions of the statute (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par 18). But a statute is made up of both expressed provisions as well as those provisions which may be read into the statute by necessary implication where this is reasonable and necessary (*Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) par 192).

The interpretation of section 40(1)(b) of the CPA does not readily lend itself to a conclusion that knowledge or awareness of discretionary powers on the part of an arresting officer is a precondition to the exercise of the powers bestowed by the section, as there is no express provision to that effect. However, if one considers that discretionary powers are by their nature characterised by an element of choice between competing alternatives, then it follows that a repository of discretionary powers must as a matter of logic at the very least be aware of the choices and the alternatives the statute bestows on him. If he is not aware, then he is not exercising the power according to the behest of the statute, let alone in a proper manner directed by the statute. In *Union Government v Union Steel Corporation Ltd* (1928 AD 220) Stratford JA, suggested that in those circumstances the functionary may be guilty of misreading the enabling statute which would cause a court of law to set aside any decision taken under that misreading of the statute. The Court held:

“If a discretion is conferred by statute upon an individual and he fails to appreciate the nature of that discretion through misreading of the Act which confers it, he cannot and does not properly exercise that discretion. In such a case a court of law will correct him and order him to direct his mind to the true question which has been left to his discretion” (234).

Our courts have always recognised that a proper exercise of discretionary powers involves an application of the mind by the functionary. It is for this reason that the legal position has always been that an exercise of discretionary powers could be set aside where it is shown that the functionary has not applied his mind (*Granville Estates (Pty) Ltd v Ladysmith Town Council* 1974 (3) SA 44 (A) 50F-H; and *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A) 597H). In *Northwest Townships (Pty) Ltd v The Administrator of the Transvaal* (1975 (4) SA 1 (T)) for example, the Court expressly held that an exercise of discretionary powers could be set aside by a court where it is shown that there has been “a failure [on the part of the functionary] to direct his thoughts to the relevant data or the relevant principles ...” (8F–G).

---

Likewise, as seen in cases like *Domingo* and *Qunta*, arrests effected in circumstances where police officers were not aware that they possessed discretionary powers are wrongful to the extent that police officers could not have applied their minds to necessity of those arrests in light of the other alternative means set out in section 38 of the CPA to bring before criminal courts those who are suspected of having committed crimes. An application of the mind requires knowledge or awareness on the part of the functionary of all available alternatives, including those facts that must exist before the power is exercised. It is for this reason that it is submitted that knowledge or awareness of discretionary powers is an implied precondition for the proper exercise of the power to arrest under section 40(1)(b) of the CPA.

## **6 Conclusion**

As entrenched as the *Duncan* jurisdictional facts are in matters pertaining to the exercise of discretionary powers under section 40(1)(b) of the CPA, this note submits, however, that those jurisdictional facts do not constitute a closed list of factors that constrain the power to arrest without a warrant. There could be other factors like knowledge and awareness of the existence of discretionary powers on the part of an arresting officer which could be read into the section by necessary implication. Where the need arises to read into the section, such factors which constrain the exercise of the drastic powers to arrest without a warrant, courts should not hesitate to take the opportunity as that would on the one hand, afford protection to individual liberty and, on the other hand send a message to holders of discretionary powers like the police that the exercise of discretionary powers can never be without accountability.

Requiring police officers to appreciate the existence and nature of their discretionary powers does not unnecessarily hinder them in the performance of their duties, but shows them that in our constitutional democracy, rooted in the rule of law, no exercise of discretionary powers is ever without accountability. Police officers must account for the way in which they exercise their discretionary powers, and they can only account where there is an enforceable legal duty to be knowledgeable and mindful of the existence, the nature and extent of those discretionary powers. It is in this light that Windell J's judgment is most disappointing as it failed to ensure through an award of damages and consequential costs that the arresting officer accounts for his failure to observe the provisions of the enabling statute in order to properly source and exercise the power to arrest without a warrant.

Thulani Nkosi

*Wits Law Clinic, University of the Witwatersrand, Johannesburg*