



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 223/22

In the matter between:

**BIANCA STEPHENEY GROVES N.O.**

Applicant

and

**MINISTER OF POLICE**

First Respondent

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Second Respondent

**Neutral citation:** *Groves N.O. v Minister of Police* [2023] ZACC 36

**Coram:** Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Potterill AJ, Rogers J and Theron J.

**Judgment:** Potterill AJ

**Heard on:** 14 February 2023

**Decided on:** 14 November 2023

**Summary:** Section 43 of the Criminal Procedure Act discretion – warrant of arrest – discretion of arresting officer

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**ORDER**

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On appeal from the High Court of South Africa, Eastern Cape Division, Makhanda, the following order is made:

1. The applications for condonation and substitution are granted.
2. Leave to appeal is granted.
3. Save as set out in paragraph 4 below, the appeal is dismissed.
4. The costs order of the Regional Court is set aside and replaced with the following:  
“The plaintiff is to pay the costs of the first and second defendants.”
5. There is no order as to costs in this Court.

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**JUDGMENT**

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POTTERILL AJ (Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Rogers J and Theron J concurring):

*Introduction*

[1] The notions that the law is to be uniformly enforced in all places and at all times, and that all persons ought to be treated equally before the law, are central to the design of the Constitution. At the same time, law enforcement is, by its very nature, an exercise of discretion which is not a departure from the equality guarantee, but a part of it. We know that it is not always possible to carve out instructions for police officers that are suitable for every set of circumstances; discretion is thus the cornerstone of most of the decisions made by members of the police service. The exercise of police discretion is a regular feature of actions before the High Courts of South Africa in actions for unlawful arrest and detention.

[2] This matter concerns, first, whether a police officer has a discretion, when executing a warrant, not to arrest a suspect. Second, if there is such a discretion, what the discretion entails.

*Factual background*

[3] An undercover operation authorised in terms of section 252A<sup>1</sup> of the Criminal Procedure Act<sup>2</sup> (CPA) was conducted at the place of residence of Mr Robert Groves, the late husband of the applicant, Mrs Bianca Stepheney Groves. The investigating officer, Constable (Cst) Dietrich, sought the section 252A of the CPA approval and the undercover operative was Cst Zaayman. Cst Dietrich instructed Cst Zaayman to purchase three mandrax tablets at a certain location and showed him a photograph of Mr Groves. At the home of Mr Groves, there was a male person in a red T-shirt and another male person behind a tuckshop window. The male person in the red T-shirt asked Cst Zaayman where he came from and if he was a police officer. Upon Cst Zaayman answering that he was not a police officer, the male person in the red T-shirt directed him to the tuck shop window. At the window, Cst Zaayman bought the mandrax pills. The transaction was captured on video with the video recorder hidden in Cst Zaayman's shirt. Cst Zaayman told Cst Dietrich that he bought the drugs from Mr Groves.

[4] Cst Dietrich viewed the video footage, which happened to be of bad quality, but was nonetheless satisfied that a transaction for the purchase of mandrax pills had taken place. He did not rely on the footage to identify Mr Groves, instead relying on Cst Zaayman's oral report and his affidavit. At that stage, the video footage was only of importance for confirmation that a drug transaction had occurred. Based on Cst Dietrich's investigation, the latter's commanding officer, Lieutenant-Colonel (Lt Col) Grobler, applied to a Magistrate in terms of section 43<sup>3</sup> of the CPA for a

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<sup>1</sup> The provisions of the section deal with the authority of law enforcement officers, officials of the state and any other authorised persons to make use of traps and undercover operations and the admissibility of the evidence so obtained.

<sup>2</sup> 51 of 1977.

<sup>3</sup> Section 43 states that:

“(1) Any magistrate or justice *may* issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police—

(a) which sets out the offence alleged to have been committed;

warrant of arrest. As the arrest of Mr Groves was part of a larger operation in which a number of suspects were to be arrested, the task of arresting Mr Groves was assigned to Warrant Officer (W/O) Swanepoel. W/O Swanepoel did not have the docket with him and did not know the contents of the docket at the time of arrest.

[5] Mr Groves was arrested on 26 September 2016 and on 28 September 2016 had his first court appearance. The Regional Court prosecutor, Ms Landman, did not accept the information provided by Mr Groves' attorney that Mr Groves had no outstanding cases against him and requested a postponement to obtain the SAP 69 (record of previous convictions) and profile of Mr Groves. The case was remanded to 3 October 2016 with Mr Groves to remain in custody. On 3 October 2016, the profile and SAP 69 were still unavailable and the Magistrate remanded Mr Groves in custody to 6 October 2016. On 6 October 2016, Ms Landman instructed her deputising prosecutor to consent to bail of R2 000 as she had received the profile. Mr Groves was then released on bail.

[6] Sometime later, Mr Groves' attorney informed the prosecutor that the video footage in fact showed that Mr Groves was not the person behind the tuckshop window, but the person in the red T-shirt. The prosecutor informed Cst Dietrich and the video footage was viewed on a large screen as a series of stills. Cst Dietrich determined that Mr Groves was the man in the red T-shirt and not the person that sold the drugs to

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(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant *shall* be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed." (Emphasis added.)

Cst Zaayman. The man behind the tuckshop window was identified as the brother of Mr Groves, who has very similar features to Mr Groves. Cst Dietrich wished to proceed with the charges against Mr Groves as he had, in Cst Dietrich's view, facilitated the transaction, which would allow for a conviction in terms of the Drugs and Drug Trafficking Act.<sup>4</sup>

[7] However, Cst Dietrich was overruled by the prosecution authorities and on 30 May 2018 the charges against Mr Groves were withdrawn. This led to Mr Groves pursuing claims in the Port Elizabeth Regional Magistrate's Court (Regional Court) for the unlawful and malicious arrest and detention against the first respondent, the Minister of Police (Minister), and for malicious prosecution against the second respondent, the National Director of Public Prosecutions (NDPP).

#### *Litigation history*

##### *Regional Court*

[8] In the Regional Court the claims for malicious, alternatively wrongful and unlawful, arrest and detention and malicious prosecution were dismissed with judgment granted in favour of the Minister and the NDPP.<sup>5</sup> Costs were awarded in their favour "on all the claims on an attorney and client scale to include counsel's fees, consultations, drafting of pleadings and trial fees and refreshers not exceeding three times the Regional Court tariff."

[9] The Regional Court accepted, on a preponderance of probabilities, the versions of Constables Zaayman and Dietrich and found that they had no malicious intent in identifying Mr Groves as the person selling the drugs. They genuinely but mistakenly believed that he was the man at the window selling the drugs when applying for the warrant of arrest. The pertinent question that the man in the red T-shirt asked

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<sup>4</sup> 140 of 1992.

<sup>5</sup> *Robert Andrew Groves v Minister of Police and Another*, unreported judgment of the Regional Court of Port Elizabeth, Case No ECPERC 1294/18 (11 December 2020).

Cst Zaayman, was whether he was a policeman, coupled with the video showing a drug transaction, gave Cst Dietrich reasonable and probable cause to obtain a warrant of arrest for Mr Groves. The finding was that there was no malicious or unlawful arrest.

[10] The claim for malicious detention for the period from 28 September 2016 to 6 October 2016 was dismissed, with the Regional Court finding that the prosecutor was entitled to postpone the matter in order to obtain the profile of Mr Groves. The Regional Court held that once the applicant was brought before Court, the authority of members of the police to detain the applicant was extinguished by the provisions of section 50 of the CPA.<sup>6</sup>

[11] The Regional Court held further that the prosecutor had acted in terms of the CPA and the prosecution directives to postpone the hearing and detain Mr Groves until the profile was obtained. From the record, it was clear that Mr Groves' attorney never applied for bail at his client's first appearance. The finding was that there was no malicious prosecution by the NDPP. The fact that there had been previous drug transactions at Mr Groves' place of residence and the possibility of him being a gang member, prompting the undercover investigation, rendered the action of Cst Dietrich to propose no bail reasonable and not malicious.

[12] During the trial, the issue of discretion was raised with W/O Swanepoel. He was asked in cross-examination whether he knew he had a discretion to execute the arrest of Mr Groves. He answered in the negative, but nonetheless asserted that he would still have effected the arrest had he known he had a discretion.

[13] In the Regional Court's judgment there was no explicit finding on whether W/O Swanepoel was obliged to exercise a discretion and whether he in fact did exercise a discretion before he arrested Mr Groves. The Regional Court did not refer to W/O Swanepoel's concession that he did not know he had a discretion whether to

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<sup>6</sup> Id at para 8.

execute the warrant. The Regional Court found W/O Swanepoel's execution of the arrest reasonable in light of the fact that the warrant was applied for, that there had been a briefing session, and that this was followed by the operation involving many officers with the purpose of bringing the suspects before a court. Based on the evidence before it, the Regional Court concluded that the applicant had failed to prove that there was no reasonable and probable cause to proceed with the arrest or that there was malice. In support of this finding, the Regional Court held that a diligent investigation was carried out prior to the warrant being issued and the arrest being effected. It held further that there was direct evidence implicating the applicant and that the arrest was not an isolated one which required the exercise of caution because it formed a part of a series of related arrests.<sup>7</sup>

[14] The Regional Court dismissed the malicious prosecution claim on the basis that various factors prompted the undercover investigation, that the applicant was on the scene on the day in question, and the applicant's conduct fell within the ambit of "dealing in drugs" as Mr Groves facilitated the transaction. Therefore, there was a reasonable and probable cause to place the matter on the roll.<sup>8</sup>

[15] The Regional Court made a punitive costs order after concluding that Mr Groves had deliberately orchestrated his claim to be successful. Significant reliance for this award was placed on the particulars of claim wherein Mr Groves had pleaded, falsely, in the Regional Court's view, that he had been arrested without a warrant on a false charge.

### *High Court*

[16] Mr Groves pursued an appeal to the High Court.<sup>9</sup> In the High Court's judgment, the concession of W/O Swanepoel that he was unaware that he had a discretion was

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<sup>7</sup> Id at paras 1-4.

<sup>8</sup> Id at paras 11-2 and at paras 4-5.

<sup>9</sup> *Robert Andrew Groves v Minister of Police and Another*, unreported judgment of the High Court of South Africa Eastern Cape Division, Makhanda, Case No CA 28/2021 (4 May 2022).

discounted with reference to his evidence that if he had known that he had a discretion he would still have arrested Mr Groves. The reasoning was further that—

“It is the substance of the evidence that assumes relevance in the inquiry as to the lawfulness of the arrest rather than the mere concept of the word ‘discretion’. [W/O] Swanepoel was cognisant that he was engaged in an operation; his decision to arrest hinged on the seriousness of the offence and the intention to bring the appellant before court. He was not ambivalent about this. His evidence signifies that he applied his mind before arresting the appellant and his decision to do so was rational.”<sup>10</sup>

[17] The High Court distinguished the matters of *Domingo*<sup>11</sup> and *Qunta*,<sup>12</sup> relied upon by the applicant, as in those matters no thought was given to the arrest. The High Court relied on *Zweni*<sup>13</sup> for support that in this matter thought was given to the arrest despite the arresting officer being unaware of his discretion.

[18] The High Court held that Mr Groves’ arrest was based on information that supported an honest belief that he was the one who had committed the offence. It concluded that Mr Groves had failed to prove malice because the prosecution, at the time of receiving the docket, had no knowledge of Cst Zaayman’s mistaken identity of Mr Groves.

[19] The High Court found that the Magistrate had assessed the evidence correctly, agreed with the credibility and factual findings and dismissed the appeal. The High Court was not persuaded that the Magistrate erred in its award of punitive costs, finding that the reasons for this award were fully ventilated in the judgment.

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<sup>10</sup> Id at para 28.

<sup>11</sup> *Domingo v Minister of Safety and Security* [2013] ZAECGHC 54.

<sup>12</sup> *Qunta v Minister of Police* [2013] ZAECGHC 53.

<sup>13</sup> *Zweni v Minister of Police* [2016] ZAECPEHC 65.



*Supreme Court of Appeal*

[20] Mr Groves approached the Supreme Court of Appeal for special leave to appeal. His application was dismissed with costs on 27 July 2022 on the grounds that the requirements for special leave to appeal were not satisfied.

*Condonation and substitution*

[21] The applicant sought condonation for the late filing of the record. There was no opposition to the application for condonation and this Court has no reason not to condone the late filing of the record. Condonation is thus granted.

[22] Mr Groves passed on while the matter was pending in this Court. Prior to the hearing, his wife, the appointed executrix of his estate, applied for substitution as the applicant. With no opposition thereto, this application is also granted.

*Submissions in this Court*

[23] On 17 October 2022 the Chief Justice issued the following directions:

- “1. Does a peace officer who makes an arrest on the strength of a warrant issued in terms of section 43(1) of the Criminal Procedure Act 57 of 1977, and who is not the person who applied for the warrant, have a discretion whether or not to make the arrest? The submissions should address the differing roles, and any related discretionary powers, of the person who applies for the warrant of arrest, the person who issues the warrant, and the person who executes the warrant.
2. If a peace officer who makes an arrest on the strength of a warrant issued in terms of section 43(1) of the Act has a discretion, how, if at all, does the discretion differ from the discretion that vests in a peace officer in terms of section 40(1) of the Act?
3. If a peace officer who makes an arrest on the strength of a warrant issued in terms of section 43(1) has a discretion, and the officer makes the arrest without being aware that he or she has a discretion, is the arrest without more unlawful or must it be shown that an officer aware of the discretion could not properly have exercised the discretion in favour of making the arrest?

4. Flowing from the question in 3, and in the context of a claim for damages for wrongful arrest, what is the legal significance, if any, of the fact that the peace officer who made the arrest in ignorance of the discretion would and could properly have exercised the discretion in favour of making the arrest?"

[24] The parties' made submissions in response to these directions together with their general submissions. I will thus consider these submissions collectively.

*The applicant*

[25] On jurisdiction, the applicant submits that the matter raises constitutional issues which are derived from his right to personal liberty in terms of section 12(1)(a) of the Constitution, and to be released in terms of section 35(1)(e) and (f) of the Constitution if the interests of justice permit. She further argues that Mr Groves had a constitutional right to be adequately compensated for the infringement of these rights, which issue engages this Court's jurisdiction. Furthermore, the applicant submits that the punitive costs orders granted against Mr Groves constitutes a constitutional issue. She further contends that the matter raises arguable points of law, given the subject matter of the case and the "impacts and consequences [being] substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest."

[26] On the question of leave to appeal, the applicant has abandoned the claim for malicious prosecution but persists with the claims for malicious, alternatively, wrongful and unlawful, arrest and detention. It is argued that it is in the interests of justice to grant leave to appeal because the High Court's judgment, through deviation from the normal requirements relating to claims of this nature, has created precedent which has no basis in law and does not align with constitutional principles. Moreover, that the High Court's judgment misapplied binding pronouncements of courts and that this Court should conclusively resolve the matter to avoid further legal uncertainty.

[27] On the merits, the oral argument was distilled to the narrow issue of the arrest being unlawful because W/O Swanepoel did not know he had a discretion and therefore

could not have exercised a discretion. Support for this argument was found in *Sekhoto*,<sup>14</sup> wherein reliance was placed on *Groenewald*<sup>15</sup> for the proposition that even when a warrant is issued in terms of section 43 of the CPA a discretion exists and must be exercised. *Sekhoto* has been followed in a plethora of cases dealing with arrests on the strength of a warrant.<sup>16</sup> According to the applicant, the High Court judgment has resulted in legal uncertainty and is in direct conflict with this Court's jurisprudence in *Zealand*.<sup>17</sup>

[28] The applicant's argument is that *Sekhoto* makes it clear that the discretion vested in a peace officer in terms of section 43(1) of the CPA does not differ from the discretion vested in a peace officer who makes an arrest without a warrant in terms of section 40(1) of the CPA. The discretion has to be exercised in accordance with the demands of the Bill of Rights and must be justified in terms thereof.

[29] The applicant also argues that Cst Dietrich should not have initiated the application for the warrant of arrest, because the identity of the person selling the mandrax was patently wrong. More so, if Cst Dietrich had critically analysed the video footage, he would have exercised his discretion not to initiate a warrant of arrest for Mr Groves because he did not sell the drugs. Additionally, it was argued that Cst Dietrich knew Mr Groves and his facial features, but proceeded to put patently wrong information before the Magistrate.

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<sup>14</sup> *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; [2011] 2 All SA 157 (SCA).

<sup>15</sup> *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883G-884B.

<sup>16</sup> See *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E); *Brown v National Director of Public Prosecutions*, unreported judgment of the Western Cape Division of the High Court, Cape Town, Case No 1800/2011 (1 August 2011); *Theobald v Minister of Safety and Security* 2011 (1) SACR 379 (GSJ); *Qunta v Minister of Police*, unreported judgment of the Eastern Cape Division of the High Court, Grahamstown, Case No CA 114/2012 (5 June 2013); *G C Domingo v Minister of Safety and Security*, unreported judgment of the Eastern Cape Division of the High Court, Grahamstown, Case No CA 429/2012 (5 June 2013); *Weitz v Minister of Safety and Security*, unreported judgment of the Eastern Cape Division of the High Court, Grahamstown, Case No 487/11 (22 May 2014).

<sup>17</sup> *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (4) SA 458 (CC).

[30] The applicant also submits that W/O Swanepoel should have exercised his discretion not to arrest Mr Groves because he was arrested at home, he was not a flight risk and he had an aerial<sup>18</sup> around his leg from a bullet wound. The applicant further submits that the fact that W/O Swanepoel did not know that he had a discretion made it clear that he did not exercise a discretion, and it follows that the arrest and detention were unlawful.

[31] Section 44 of the CPA, which deals with the execution of warrants, reads that “[a] warrant of arrest issued under any provision of this Act may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof.” On behalf of the applicant, it is argued that the use of the word “may” grants the officer who has to execute a warrant a discretion that must be exercised. If no discretion was exercised, the arrest becomes unlawful. The applicant persisted in this argument despite the wording of section 43(2) of the CPA:

“A warrant of arrest issued under this section shall direct that the person described in the warrant *shall* be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.” (Emphasis added.)

[32] In response to the questions posed in the directions, the applicant argues that in this case, Cst Dietrich was the one who applied for the section 252A of the CPA trap on 15 August 2015, which was approved on 16 August 2015. However, it was Lt Col Grobler that applied for a warrant of arrest, which was authorised by the Magistrate on 23 September 2016, yet Lt Col Grobler was never called as a witness on behalf of the Minister. Lt Col Grobler was in a position to testify as to how he used his discretionary powers to apply for the warrant of arrest, and whether he was satisfied that the information contained in the police case docket was sufficient to apply for the warrant of arrest. It is thus argued by the applicant that the Minister’s case suffers from a fundamental evidentiary deficiency in this regard.

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<sup>18</sup> My understanding of the word aerial is that it is a brace for the leg.

[33] In respect of Cst Dietrich's role in the application for the warrant of arrest, the applicant submits that it is clear that the information he received was patently wrong, and despite the fact that he knew Mr Groves before the incident and knew exactly what he looked like, Cst Dietrich failed to properly view the video footage, which would have clearly shown to him that no drugs were actually sold by Mr Groves. It is submitted that this clearly evinces that Cst Dietrich failed to properly exercise his discretion.

[34] The applicant further submits that it then stands to reason that, even where a warrant for the arrest of a suspect has been lawfully obtained in terms of section 43 of the CPA, this in and of itself does not necessarily justify an arrest to secure the attendance of the suspect in court.

[35] On costs, the applicant argues that the punitive costs order was unsubstantiated and unjustified because Mr Groves was entitled to institute a claim for his arrest and detention. If this Court upheld this order it would not only impact on Mr Groves' estate, but also on members of the general public, who would be hesitant to approach a Court to claim damages for an infringement of a constitutional right and possibly run the risk of being burdened with substantial legal costs.

*The Minister and the NDPP*

[36] For ease of reference where I refer to the respondents, it is collectively to the Minister and the NDPP. The respondents submit that, save for the issue of discretion raised by the applicant and covered in the directions, none of the other issues raised attract this Court's jurisdiction. The respondents argue that the other issues raised merely assert the alleged incorrect application of the law and alleged incorrect factual findings, thus not engaging this Court's jurisdiction.<sup>19</sup>

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<sup>19</sup> See *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) (*EFF*).

[37] The respondents proceed to submit that the constitutional rights the applicant relies on to assert jurisdiction were never the main focus of the matter. The respondents contend that in argument before the High Court, Mr Groves advanced the following grounds in support of the contention that his arrest and detention were unlawful: (a) the arresting officer failed to exercise a discretion before arresting him; (b) a warrant of arrest was not produced despite demand; and (c) he was not brought to court as soon as reasonably possible. The respondents submit that this is how the findings of the trial court were attacked in respect of the arrest.

[38] The respondents argue that the same applies to the attack on the findings in respect of the further detention (after Mr Groves' first court appearance). The respondents aver that the applicant's attack is a factual one, premised purely on whether or not the respondents' officials acted maliciously and without reasonable and probable cause when prosecuting him. Furthermore, the respondents contend that if one considers the grounds of appeal and criticism of the High Court's judgment, it is evident that the applicant seeks to challenge factual findings and the alleged incorrect application of the law and, for this reason alone, the respondents submit the matter does not deserve this Court's attention.

[39] The respondents argue that the prospects of success on the merits of the appeal are weak, because the Regional and High Court judgments are correct on the merits and there was no misapplication of the law leading to legal uncertainty. Therefore, they submit that leave to appeal should be dismissed.

[40] On the merits, the respondents submit that an officer executing a warrant in terms of section 43 need not exercise a discretion. The warrant in fact mandated W/O Swanepoel to arrest Mr Groves. The respondents make this argument despite the judgment of *Sekhoto* having found that, as in a section 40(1)(b) of the CPA, the officer effecting an arrest in terms of section 43 of the CPA is not obliged to effect the arrest. The respondents aver that in *Sekhoto* the Supreme Court of Appeal relied on *Groenewald* for this reasoning. However, on a proper perusal of the *Groenewald*

judgment, it is apparent that the Court did not at all consider whether the arresting officer had a discretion to arrest on the strength of a warrant of arrest, but rather whether the warrant was obtained *in fraudem legis* (a fraudulent circumvention of the law). The respondents contend that the High Court's reliance on the *Zweni* judgment was correct in that W/O Swanepoel did take into account the seriousness of the offence and intended to bring Mr Groves before a court.

[41] The respondents further argue that the role of a person authorising the warrant and that of an officer executing the warrant must be distinguished. In this matter the Magistrate was required to exercise a discretion on the facts presented in order to issue the warrant. It is the respondents' submission that a person in the position of W/O Swanepoel only has a limited discretion to ensure that the person described in the warrant is arrested, informing the arrested person of his rights and bringing the arrested person before a lower court.<sup>20</sup>

[42] With regard to the interpretation of the word "may" in section 44 of the CPA, it is argued by the respondents that the word, correctly interpreted, refers to who may execute the warrant, that being a peace officer, and it does not confer a discretion when executing the warrant.

[43] As regards to the directions issued by this Court, the respondents submit that the person applying for an arrest warrant must, in addition to ensuring that all the jurisdictional requirements are met, also ensure that all relevant evidence is placed before the Magistrate in order for him or her to properly exercise their discretion whether or not to issue a warrant of arrest. The respondents argue that the Magistrate's role is to exercise a discretion in considering whether to issue a warrant, in that they must satisfy themselves that the alleged offence is an offence in law and that it is of such a nature and gravity as to justify the issuing of a warrant. Concerning the role and duty of the peace officer who is required to effect an arrest on the strength of a warrant

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<sup>20</sup> See *Minister of Justice v Ndala* 1956 (2) SA 777 (T) at 779-780.

issued in terms of section 43(1) of the CPA but who did not apply for the said warrant, the respondents submit that the peace officer's role is limited to: (a) ensuring that the person arrested is the one described in the warrant of arrest; (b) informing the arrested person of their rights; and (c) bringing them before a lower court.

[44] The respondents further argue that where a Magistrate has issued a warrant, the arresting officer is executing the order of the Magistrate, who applied their judicial discretion as to whether or not to issue the warrant. It is contended that where the Magistrate issues the warrant, they do so with the full knowledge that the person mentioned in the warrant, in all probability, will be arrested as they have directed. Thus, there is no need to expect an arresting officer who did not apply for the warrant to be still clothed with a discretion to arrest. The arresting officer in all probability is not appraised with the factual foundation upon which the warrant was issued. Furthermore, the respondents submit that section 44, as read with section 43(2) of the CPA, is clear in that the arresting officer has no discretion to exercise, their mandate to effect the arrest.

[45] In respect of costs, the respondents submit that the punitive costs order was correctly confirmed by the High Court. The amendment of the particulars of claim shortly before the commencement of the trial from a case based on a warrantless arrest to one based on a warrant evidenced the orchestration of the claim. The conduct of Mr Groves while giving evidence also warranted this punitive costs order.

### *Analysis*

#### *Jurisdiction and leave to appeal*

[46] It is common cause between the parties that this Court's jurisdiction is engaged on the question of discretion. I agree with the view taken that this case concerns an issue of fundamental constitutional import because it raises an unresolved legal question relating to the powers of arrest and detention. Our jurisdiction is engaged because the question of whether an arresting officer, armed with a warrant, has a discretion whether



or not to make the arrest is an arguable point of law of general public importance. This point of law is also a constitutional matter, because the right guaranteed in section 12(1) of the Constitution bears on the interpretation of the relevant provisions of the CPA.

[47] Notwithstanding my conclusion that this Court has jurisdiction, the Court still has to determine whether leave to appeal must be granted. Leave will only be granted if it is in the interests of justice for this Court to hear the appeal.

[48] It is in the interests of justice to entertain the question pertaining to the exercise of a discretion by an arresting officer who arrests a suspect on the strength of a warrant. This is so because depriving a person of liberty with an arrest impacts on an entrenched constitutional right. Whether a discretion must be exercised by the arresting officer is an important factor in ensuring that a person's freedom is not unjustly or arbitrarily deprived. It would also be in the interests of justice to clarify the legal uncertainty occasioned by the reliance on the dictum in *Sekhoto*.<sup>21</sup> Thus, I am of the view that it is in the interests of justice that leave to appeal should be granted.

### *Merits*

[49] Section 12(1)(a)<sup>22</sup> of the Constitution guarantees that no person may be arbitrarily deprived of freedom. This right, together with the right to human dignity, are fundamental rights entrenched in the Bill of Rights. Section 205(3) of the Constitution mandates the police to “prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law”. Arrests in terms of section 43(2) of the CPA are affected by this mandate.

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<sup>21</sup> See n 13 above.

<sup>22</sup> Section 12(1)(a) of the Constitution states:

“Everyone has the right to freedom and security of the person, which includes the right

(a) not to be deprived of freedom arbitrarily or without just cause.”

[50] When making an arrest, a peace officer is required to respect, protect, promote and fulfil constitutional rights. In *Sekhoto*, the Supreme Court of Appeal found:

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

[51] At first blush, this statement supports the argument of the applicant and is fatal to the respondents’ argument. But as alluded to previously, *Groenewald* did not decide that a peace officer making an arrest on the strength of a warrant has a discretion; the case dealt with the discretion of the Magistrate or peace officer authorising the warrant of arrest. The statement made in *Sekhoto* with reference to *Groenewald* constitutes an error in law and leaves the question open as to whether a peace officer executing a warrant of arrest must exercise a discretion when executing the authorised warrant. I should add that, because *Sekhoto* dealt with an arrest without a warrant, what the Court said in that case about an arrest on the strength of a warrant was an *obiter dictum* (something said in passing).

[52] A warrant of arrest issued by a peace officer is to be distinguished from a warrantless arrest. The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40(1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able

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<sup>23</sup> *Sekhoto* above n 13 at para 28.

to justify the exercising of his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.<sup>24</sup>

[53] An authorised warrant has 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 of peace (who considers the application and issues the warrant). 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.

[54] Counsel for the applicant conceded that W/O Swanepoel did not need to know the content of the docket or have the docket with him when executing the warrant. If the arresting officer need not know the content of the docket, then on what facts would he or she exercise a discretion before executing the warrant of arrest? In this matter W/O Swanepoel could only “exercise a discretion” in relation to the execution of the warrant in terms of section 44 of the CPA, which directs that “the peace officer executing such warrant shall do so in accordance with the terms thereof.”

[55] I will now explain the correlation between sections 43(1), 43(2)<sup>25</sup> and 44<sup>26</sup> of the CPA where there is seemingly a disjuncture between “may” and “shall” pertaining to a discretion to execute a warrant.

[56] Section 43(2) of the CPA places a positive duty on an arresting officer to arrest the person identified in the warrant with the use of the word “shall”. There is no scope to interpret section 43(2) of the CPA as granting the arresting officer a discretion whether to arrest or not. The “shall” relates to execution of the warrant and does not expressly or by implication create room for a discretion. Section 44 of the CPA

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<sup>24</sup> *Minister of Police v Dhali*, unreported judgment of the Eastern Cape Division of the High Court, Grahamstown, Case No CA 327/2017 (26 February 2019) at para 13.

<sup>25</sup> See section 43(2) above n 2.

<sup>26</sup> Section 44 states that–

“A warrant of arrest issued under any provision of this Act may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof.”

determines that a warrant of arrest issued “may” be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof. Taking into account the ordinary grammatical meaning and rules of construction, the “may” relates to who has the power to execute the warrant (a peace officer) and does not confer a discretion when executing the warrant. There is no disjuncture between these sections: section 44 of the CPA determines who may arrest and section 43(2) of the CPA places an obligation on the arresting officer to arrest in terms of the warrant.

[57] A warrant is issued and served in the manner prescribed by statute and circumscribes the terms of the arrest. The person mentioned in the warrant is the person that the arresting officer is authorised and directed to arrest. Once arrested, such person must be brought before a lower court in accordance with the provisions of section 50 of the CPA.

[58] But are these the only two requirements that the executing officer needs to consider? The argument on behalf of the applicant is that W/O Swanepoel should not have arrested Mr Groves because the following factors should have been considered: (a) he was not a flight risk; (b) he was arrested at home; and (c) he had an aerial around his leg. The Magistrate would have considered whether Mr Groves was a flight risk before granting the warrant of arrest. Those factors did not render the execution of the warrant irrational or without just cause.

[59] It was further argued that it was plain for all involved to see that Mr Groves had an aerial attached to his injured leg caused by a bullet wound. He had trouble getting into a vehicle as he had to swing his leg to negotiate the aerial attached to the leg. Despite the limitation, Mr Groves testified that he could drive a vehicle and on the day of the arrest intended to drive off when Cst Zaayman appeared on the scene. In his evidence, Mr Groves never intimated that the aerial attached to his leg was a hindrance to him being arrested or being brought before a court. Nor did it arise in W/O Swanepoel’s cross-examination that he should not have arrested Mr Groves because of the aerial. From my reading of the record, the evidence that arises

concerning the aerial is with reference to the fact that Mr Groves should not have been in the back of a police van for two to three hours. This did not render Mr Groves unfit to be arrested or brought before a court. These facts do not sustain an argument that his freedom was deprived arbitrarily or without just cause.

[60] Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and “[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>27</sup> An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be affected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.

[61] The reasoning of the High Court on the exercise of W/O Swanepoel’s discretion is flawed. The High Court acknowledged that W/O Swanepoel was not aware that he had a discretion, but found that he did apply his mind due to “the purpose and exigency of the operation”. The High Court also relied on the evidence that W/O Swanepoel would have arrested Mr Groves had he been aware that he had a discretion. Although the outcome of the appeal was correct, the reasoning pertaining to the discretion to be exercised by the arresting officer executing a warrant was wrong. W/O Swanepoel did not in law have a discretion to refrain from making the arrest and he did not need to be familiar with the contents of the docket and the circumstances which justified the issuing of the warrant.

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<sup>27</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90.

*Costs*

[62] The only question that remains for consideration is costs. The Regional Court ordered Mr Groves to pay costs on an attorney and client scale, which was confirmed on appeal by the High Court.

[63] The award of costs is a discretionary matter and an appellate court will be slow to interfere with a costs order made by a lower court. This Court in *Premier, Province of Mpumalanga*, relying on the reasoning in *Blom*,<sup>28</sup> held that the circumstances in which such interference will be justified are limited “to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question”.<sup>29</sup>

[64] It is common cause that Mr Groves’ arrest was based on mistaken identity. This fact cannot simply be swept under the carpet and is a relevant consideration pertaining to costs. From this fact alone, the finding by the Regional Court that the claim was orchestrated is unsubstantiated. Nor does the amendment of the further particulars before trial lead to the inference that the claim was orchestrated, as pleadings are often amended to bring them in line with further consultations and the evidence to be presented. The criticism of Mr Groves’ evidence on the day of the arrest is also not a basis to award punitive costs.

[65] I am of the view that the circumstances of this matter justify the interference of this Court, as the costs order granted reflects a material misdirection on the facts. A punitive costs order in these circumstances offends one’s sense of justice and the Regional Court’s misdirection on the facts rendered the exercise of its discretion on costs unjudicial.

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<sup>28</sup> *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A).

<sup>29</sup> *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* [1999] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 53.

[66] In this Court the applicant should not pay costs as the issue of police discretion is not only of interest to Mr Groves' estate, but to other persons arrested with a warrant, as well as police officers executing such warrants. Secondly, the deviation from the loser pays rule is so as not to discourage litigants from instituting claims against the state.<sup>30</sup> In light of the *Biowatch* principle, there is no costs order in this Court.

*Order*

[67] In the premises, I make the following order:

1. The applications for condonation and substitution are granted.
2. Leave to appeal is granted.
3. Save as set out in paragraph 4 below, the appeal is dismissed.
4. The costs order of the Regional Court is set aside and replaced with the following:  
“The plaintiff is to pay the costs of the first and second defendants.”
5. There is no order as to costs in this Court.

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<sup>30</sup> *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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