Different arresting worldviews

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BETWEEN 2004 and 2010 some twelve different High Court judges ('the twelve'), in jurisdictions ranging from Gauteng and the Free State to Kwazulu-Natal, came to the conclusion that Schreiner JA's words in *Tsose v Minister of Justice* 1951 (3) SA 10 (a) at 17h: '… there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective' could no longer constitute the law in the post-1994 constitutional era. Five SCA judges ('the five') nipped this emerging constitutional limitation of arresting powers in the bud, however, in *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA).

The conflict between the approach of the High Court and that of the SCA centred on whether a peace officer should use a summons to get a suspect to appear in court if there is no reasonable apprehension that the suspect will abscond or will fail to appear in court, instead of using his powers of arrest and detention in terms of section 40 of the Criminal Procedure Act to ensure appearance.

The controversy stems from the difference between the substantive reasoning used by the twelve and the formal, rule-based reasoning used by the five. The crucial issue is whether an arresting officer's discretion (ie 'a peace officer may without warrant arrest any person …') is still permeated by the values underlying section 12(1) of the Constitution, (ie 'everyone has the right to freedom … which includes the right not to be deprived of freedom … without just cause'). The question, therefore, is whether such discretion is still constrained by the Constitution when the four jurisdictional requirements for an arrest without a warrant set out in section 40 are present. Or whether, on the rule-based reasoning of Harms DP, whenever the four jurisdictional factors are present 'peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality … A number of choices may be open to [them], all of which may fall within the range of rationality.' The focal point is the 'are entitled.' Can it really be said that police officers are entitled to act 'as they see fit,' notwithstanding the values entrenched in section 12?

In an upsurge of constitutional thinking the High Courts, via Judges Bertelsmann, De Vos, Hancke, Kruger, Levenberg, Madondo, Msimang, Plasket, Saldulker and Van Zyl, reasoned that being so entitled was 'constitutionally untenable.' [See: *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (TPD) *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (TPD) *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (wld) *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (ECD) *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (NPD) *MVU v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB)]

How and why did such a major difference in approach emerge between 2004 and 2011? Were the High Courts simply legally 'wrong' and the SCA 'right'? I submit not. The twelve and the five had the same legal tools at their disposal. They simply applied the tools differently to achieve their desired outcomes. It was, in other words, possible with the legal tools at their disposal within the available parameters to reach a decision that the milder method should be used whenever it would be equally effective. That is proved by the judgments of the twelve.

It would have been quite simple for the SCA to find that a 'constitutional rule of law' now determined that the milder method should be used. In other words, that the values of section 12 should influence the discretion whether to arrest or not, despite the clear presence of all four of the jurisdictional requirements, which would mean that the 'bounds of rationality' were circumscribed by the values of section 12. Yet they did not.

WHAT IS IT that causes judges (who in the end are only people) to lean one way and not the other in such controversial matters where the issues are balanced on a knife's edge? And perhaps more specifically, as in this instance, to decide for police powers as against individual freedom? In my view it can only be the result of value preferences.

People subjectively regard certain values as relatively more desirable than others. These value priorities then motivate, direct and induce their selection of particular tools from those available in the legal shed. Anecdotally, counsel know the importance of the question: 'Who is our judge?' The Constitutional Court acknowledged as much *S v Makwanyane* 1995 (3) SA 391 (CC) at 491F with its reference to '… the temperament and sometimes unarticulated but perfectly bona fide values of the sentencing officer and their impact on the weight to be attached to mitigating and aggravating factors…'

So far the Constitutional Court has declined to make a final ruling on the matter, deferring, instead, to the executive by stating that 'those involved in the day-to-day exercise and supervision of the power to make arrests are usually best positioned to establish appropriate operational parameters concerning the discretion to arrest.' (see: *Minister of Safety & Security v Van Niekerk* 2008 (1) SACR 56 (CC) at 61G).

Really? Can the rights entrenched in sections 21(1) and 12(1)(a) of the Constitution so easily be placed in the hands of the police? Should the executive really be the final judge in its own cause? *Nemo iudex in sua causa*? The inevitable consequen-

ce of the said deferrence was a passing of the ball to the SCA – which resulted in S*ekhoto*.

Sooner or later the Constitutional Court will have to make a doctrinal choice by determining which of the competing values should take preference. Such choice, or ethical value selection, made by a court of law would then result in a legal ruling. In that way, out of ethics and societal values, law is formed. As was said in *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC) at 583E: 'Interpretation and application of the law under the Constitution is never a mechanical application of rules; it always involves a value judgment. Our Constitution and law are infused with moral values. The days of denying the value-laden content of law are long gone.'

In the meantime the SCA preference in the matter prevails. Seeing that perfectly plausible legal rulings in either direction are possible for the Constitutional Court within the available legal parameters, however, it is still open to the public to debate what the most desirable value preference would be. The competing values from which a preference has to be determined, are, on the one hand, personal freedom of movement and sanctity of personal space, and on the other, the authority, discretion and powers of policemen insofar as those are needed to provide and maintain stability in the community.

The crux of the question is whether a person is still entitled to his sanctity of personal space and movement when the state, by proxy of a government official called a policeman, on reasonable grounds suspects that he has committed a specific class of offence. It is certainly a matter on which reasonable people, having applied their minds, strenuously differ. In my view, Judges Jones and Pickering in *Minister of Safety and Security v Glisson* 2007 (3) SA 78 (ECD) succinctly worded the preferable position at 82B: 'Where the two are evenly balanced, the scales in a modern constitutional state will fall on the side of individual liberty.'

SOCIETAL VALUES have moved on since *Tsose*. That might be because the police may no longer be perceived as a legitimate authority. The revelations by the Truth and Reconciliation Commission of crimes committed by policemen, successive heads of the police in recent years leaving under serious suspicion of crime, the *Tatane* atrocity and the *Marikana* massacre have all had their impact on the perceptions of the public. This history warranted a unanimous Constitutional Court recently in N*gqukumba v Minister of Safety and Security* [2014] *ZACC* 14 at par [20] to state that: 'After all, police excesses are not unknown.'

Let us assume, for example, that a national Minister, or, for that matter, a Premier of a Province, is reasonably suspected of having committed a Schedule 1 offence (properly so, as envisaged in Section 40). Assume it to be a Minister or Premier so well-known that he or she can and will not disappear. Would peace officers then really be 'entitled to exercise their discretion as they see fit …' on a Friday afternoon five o'clock? Without a rule of law requiring a milder method to bring the Minister or Premier to court to be operative?

In my view, then, the time has come for a direct challenge to the constitutionality of section 40, strategically based on a suitable set of facts. It would be most interesting to see which of the competing values, individual sanctity or police authority, would ultimately prevail. A