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**THE BALANCING OF CONFLICTING RIGHTS IN THE  
APPLICATION OF SECTION 49 OF THE CRIMINAL PROCEDURE ACT**

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# THE BALANCING OF CONFLICTING RIGHTS IN THE APPLICATION OF SECTION 49 OF THE CRIMINAL PROCEDURE ACT<sup>\*1</sup>

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## 1 INTRODUCTION

Section 49<sup>2</sup> of the Criminal Procedure Act<sup>3</sup> (hereafter CPA) provides for the use of force during arrest. This provision recently came under the spotlight in the Supreme Court of Appeal<sup>4</sup> as well as in the Constitutional Court.<sup>5</sup> Section 49 of the CPA is shrouded in controversy, as the proposed amendment (section 7 of the Judicial Matters Second Amendment Act, 122 of 1998) has not yet been put into operation because of the resistance of the Minister of Safety and Security.

Before the abovementioned cases the position was as follows: Section 49(1),<sup>6</sup> which has not been struck down by the Constitutional Court, allows the use of reasonable force in the circumstances where a person:

- (a) resists against an attempt to arrest him; and
- (b) flees when it is clear that there is an attempt to arrest him or resists and then flees.

Subsection (2), prior to it being struck down by the Constitutional Court in the Walters<sup>7</sup> case, dealt with so-called "justifiable homicide". Where a person stood to be arrested for committing a Schedule 1<sup>8</sup> offence, or where a person was reasonably suspected to have committed such a schedule 1 offence, the person attempting the arrest was allowed to use deadly force where there was no other way to arrest the suspect or to prevent the suspect from fleeing.

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1 Criminal Procedure Act 51 of 1977.

2 Section 49 of the Criminal Procedure Act 51 of 1977.

3 Note 1 above.

4 *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA).

5 *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC).

6 Note 2 above.

7 Note 5 above.

As early as 1978 the then Appellate Division stated in *Matlou v Makhubedu*<sup>9</sup> that the degree of force used must be proportional to the seriousness of the offence that the suspect is suspected of having committed.

The Appellate division through the years repeatedly stated that it was concerned with the freedom to use deadly force in circumstances where the suspect is suspected of having committed a less serious crime, but is killed during an arrest attempt because he attempted to flee. See *R v Britz*,<sup>10</sup> *Mazeka v Minister of Justice*,<sup>11</sup> *R v Labushagne*,<sup>12</sup> *S v Marthinus*.<sup>13</sup>

Where an accused person was charged with murder or culpable homicide and he or she relied on section 49(2)<sup>14</sup> the accused had to prove the following on a balance of probabilities:<sup>15</sup>

- (a) the accused planned to arrest the deceased and was entitled to arrest in terms of the CPA;
- (b) the reason for the arrest was that the deceased was reasonably suspected of having committed a schedule 1 offence. The test for the reasonableness of the suspicion was an objective test – the facts of the matter had to be of such a nature that a reasonable person would have formed the suspicion;
- (c) the deceased resisted the attempt to arrest him or attempted to flee;
- (d) there was no other possible way to stop the flight of the deceased. The test for this requirement is an objective one.

8 Schedule 1 to the Criminal Procedure Act, 51 of 1977.

9 1978 (1) SA 946 (A).

10 1949 (3) SA 293 (A).

11 1956 (1) SA 312 (A).

12 1960 (1) SA 632 (A).

13 1990 (2) SASV 568 (A).

14 Note 2 above.

15 *R v Britz* Note 10 above.

Although section 49(2)<sup>16</sup> only referred to the killing of a suspect, the court in *Matlou v Makhubedu*<sup>17</sup> held that the word killing should be interpreted to also include cases where the suspect was intentionally wounded for purposes of personal accountability. In *Macu v Du Toit en 'n Ander*<sup>18</sup> it was held that the requirement of weighing the seriousness of the crime against the degree of force used was not contained in section 49(2).<sup>19</sup> The court held however, that it was a common law requirement, which the court had to apply.

The accused also had to show the absence of culpa ie that he was not negligent with regard to the requirements set out in section 49(2).<sup>20</sup> Where it was not the intention of the person attempting the arrest to bring the suspect to justice and there was no reasonable suspicion that the suspect committed a schedule 1<sup>21</sup> offence, the person attempting the arrest had no right to shoot at the fleeing suspect (either to kill or wound) and if he did so he was liable in accordance with the common law.<sup>22</sup>

## 2. CONSTITUTIONAL COURT'S APPROACH

The constitutionality of section 49<sup>23</sup> was challenged in the Constitutional Court in the case of *S v Walters*<sup>24</sup>. In the court a quo (the Transkei High Court<sup>25</sup>) it was held that despite the decision in the *Govender*<sup>26</sup>-case, the provisions of section 49(1) and (2)<sup>27</sup> were unconstitutional to the extent that it legally sanctioned the use of force to prevent the flight of a suspect.

16 Note 2 above.

17 Note 9 above.

18 1983 (4) SA 329 (A) on 640E.

19 Note 2 above.

20 Ibid.

21 Note 8 above.

22 *Wiesner v Molomo* 1983 (3) SA 151 (A).

23 Note 2 above.

24 Note 5 above.

25 *S v Walters* 2001 (2) SASV 471 (Tk).

26 Note 4 above.

The Constitutional Court stated from the outset that a provision authorising the use of force against persons and justifying homicide '...inevitably raises constitutional misgivings about its relationship with three elemental rights contained in the Bill of Rights.<sup>28</sup> These rights are the right to life, to human dignity<sup>29</sup> and the right to bodily integrity contained in the Bill of Rights in the Constitution.

The court made it clear that the case is not about self-defence or the protection of the life or safety of somebody else – the right to defend oneself or someone else from harm was not challenged in this case. Section 49<sup>30</sup> is also not directed at that right.<sup>31</sup> The court agreed with the finding of the Supreme Court of Appeal in the Govender<sup>32</sup> case on the constitutional validity of section 49(1).<sup>33</sup>

The court considered the constitutionality of section 49(2)<sup>34</sup> inter alia with reference to the United States Supreme Court case *Tennessee v Garner*<sup>35</sup> and found the case instructive in two ways:

- (a) the unsuitability to draw a distinction for permitting the use of deadly force along the felony/misdemeanour line; and
- (b) the need for proportionality when sanctioning the use of deadly forces to perfect an arrest.

Kriegler, J, who delivered the judgement, quoted and reiterated Chaskalson P's dictum in the case of *S v Makwanyane and Another*.<sup>36</sup>

27 Note 2 above.

28 Note 5 above, par (3).

29 Sections 10, 11 and 12 of the 1996 Constitution.

30 Note 2 above.

31 Note 5 above, par (33).

32 Note 4 above.

33 Note 5 above, par 39.

34 Note 2 above.

35 *Tennessee v Garner* 417 US 1 (1985).

36 1995 (3) SA 391 (CC) 144.

'...The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these to rights above all others'

The court found that section 49(2)<sup>37</sup> was rightly held by the court a quo to be inconsistent with the right to life, human dignity and bodily integrity. It found that the section did not pass constitutional muster as set out in the limitation clause,<sup>38</sup> primarily because of the lack of proportionality between the use of deadly force and the wide variety of offences listed in schedule 1 to the CPA.

In summary the court found that section 49(1)<sup>39</sup> had to be interpreted restrictively in such a way that it is a justifiable limitation on the rights to life, human dignity and bodily integrity as set out in the Govender<sup>40</sup> case and so as to pass constitutional muster. However section 49(2)<sup>41</sup> was struck down as being unconstitutional mainly because it sanctioned the use of deadly force for a wide variety of offences (listed in schedule 1<sup>42</sup>) without balancing and weighing the different rights and interests in a proportional manner. Section 49(2)<sup>43</sup> failed the test contained in the limitation clause and was declared invalid.

It must be stressed that the judgement also does not say that a dangerous fugitive should be allowed to make an escape when the use of force is all that can prevent it. What is interesting about the judgement is that potentially deadly force to arrest a fleeing suspect may also be utilised when he has committed a crime involving the infliction or threatened infliction of serious bodily harm irrespective of whether the suspect poses an immediate threat of serious bodily harm to others at the stage of arrest. Cognisance is clearly given to the right of the state to ensure that dangerous criminals are brought to trial. The prerequisite is that the crime must involve the infliction or threatened infliction of serious bodily harm. It will in every case be a question of fact whether this requirement has been complied with and the test is an objective one. The above is the general rule, the SCA in the Govender<sup>44</sup> case stated that there may be exceptions.

- 37 Note 2 above.
- 38 Section 36 of the 1996 Constitution.
- 39 Note 2 above.
- 40 Note 4 above.
- 41 Note 2 above.
- 42 Note 8 above.
- 43 Note 2 above.

It must also be kept in mind that even if the person who affects the arrest have reasonable grounds for believing that the suspect either

- poses an immediate threat of serious bodily harm to himself or members of the public;
- or has committed a crime involving the infliction or threatened infliction of serious bodily harm

potentially deadly force may not be used if other effective means of bringing the suspect before a court for trial purposes are possible, for instance were the suspect's address is known and the arrest can be effected later.

The Constitutional Court emphasised that the state:

'... is called upon to set an example of measured, rational, reasonable and proportionate response to anti-social conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors.'<sup>45</sup>

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The court also stated clearly<sup>46</sup> that it is the duty of the State to play an exemplary role and that the state should also promote a culture of respect for human life and dignity. The state must be the role model of society and set the example. If the state thus refuses to permit the killing of suspected criminals it projects a message that it is wrong to kill. The court repeated and underscored<sup>47</sup> the observation in *Olmstead v United States*<sup>48</sup> quoted by Langa J in *Makwanyane*<sup>49</sup> :

44 Note 4 above.

45 Note 5 above, par 47.

46 Note 5 above, par 6.



‘Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example.’

It is clear that there is a heavy duty placed on the state to set the example for its citizens. The state should not be allowed to take this duty lightly. It is therefore worrying that despite the fact that the proposed amendment was adopted by Parliament in October 1998, assented to by the President on 20 November 1998, and published on 11 December 1998 it has not yet been put into operation. Apparently promulgation was at first delayed to enable police training to take place. The President later signed a proclamation fixing 1 August 2000 as the date on which the amended sec 49 would come into operation. The proclamation was however not published. In terms of section 81 of the Constitution the Legislature in this case opted to prescribe in the enactment that the date of inception is to be determined by the President. It seems that the delay is due to the objections of unworkability (perceived or real) by the Minister of Safety and Security. The Constitutional Court, quite correctly, refused to comment on this failure and stated that the amendment bears the stamp of approval of the Legislature and could be put into operation within a matter of days.

### 3 CONCLUSION

The court repeatedly stated that it only dealt with an evaluation of section 49<sup>50</sup> and not with the principles of private defence. In particular the purpose of section 49<sup>51</sup> is not to regulate the legal position regarding a police officer or any other person’s right to defend oneself or someone else against the threat of harm. The judgement does not detract from or jeopardise in any way those rights. The judgement clearly only dealt with the boundaries of constitutionally permissible force when arresting or attempting to arrest suspects who resist and/or flee.

47 Note 5 above, par 47.

48 *Olmstead et al v United States of America* 277 US 438 (1928).

49 Note 36 above.

50 Note 2 above.

The fear that the effect of the judgement will be to endanger the lives of the police effecting arrests, and that once again the rights of the offender are protected by the constitution to the detriment of the innocent, is not well founded. A police officer or any other person whose life is endangered or threatened still has his or her right to self-defence. The court acknowledged the fact that under certain circumstances it is lawful to use force, including deadly force, on a person suspected of having committed a crime, and who resists arrest or tries to escape arrest.

What is however also of interest in this case is the express accepting again by the constitutional court of the principle that the state ought to play an exemplary role. In this case in promoting a culture of respect for human life and dignity.

It is ironic that in this matter on another aspect the state is not playing an exemplary role. Despite the court's clear finding that the power conferred on the State President by section 16 of the Judicial Matters Second Amendment Act<sup>52</sup> to fix a date for its commencement, is a public power and has to be exercised lawfully for the purpose for which it was given, a date for the commencement of the Act has not yet been fixed. More than four years have already passed since October 1998 when the Act was adopted by parliament.

Hereby the principle of separation of powers as between executive, legislature and judiciary, which is acknowledged by the constitution, is breached. The practical implication of the present position is in effect that the president is vetoing or at least preventing the implementation of the Judicial Matters Second Amendment Act. This situation ought to be addressed as the impression is created that the state itself does not act in accordance with the constitution and certainly does not comply with the principle that it should play an exemplary role.

51 Ibid.

52 Act 122 of 1998.