

USE OF DEADLY FORCE BY THE SOUTH AFRICAN POLICE SERVICES RE-VISITED.

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1 Introduction

Duties of the South African Police Services (SAPS), as espoused in section 205(3) of the Constitution Act 108 of 1996, include 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 the law'. In terms of section 38 of the Criminal Procedure Act (CPA) 51 of 1977 arrest is one the SAPS' *modus operandi* in the prosecution of its crime prevention or combat duties. The million-dollar question has always been, and still is, whether it is justifiable and constitutional to the use of force, in particular deadly force, in order to secure the arrest of a person or to control and/or prevent crime. The question is more pressing particularly that section 11 of the Constitution guarantees everyone the right to life, even those who find themselves on the wrong side of the law (**S v Makwanyane** 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC)). It is therefore incumbent on the SAPS to respect the Constitutional rights of all men to liberty, equality and justice.

2 Use of deadly force in the pre-constitutional era

The object of the arrestor must be to bring the suspect person before the court for prosecution and conviction, so that he/she may be led to cease to contravene the law (**Tsose v Minister of Justice** 1951 (3) SA 10 (A); **Macdonald v Kumalo** 1927 EDL 273). This procedure is important since in our law accused persons are innocent until proven guilty. Having regard to this object, it has been a difficult exercise in trying to justify the use of force, particularly deadly force under the guise of justifiable homicide, in terms of the old section 49 of the CPA.

The relevant provision of section 49 of the CPA reads:

- (1)...
- (2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground of having committed such an offence, and the person authorised under this Act to arrest or to assist is arresting him cannot arrest him or prevent him from fleeing by other means than killing him, the killing shall be deemed to be justifiable homicide.

Section 49(2) authorised an arrestor, under the protection of the defence called justifiable homicide, to kill a person who resists arrest or flees arrest. The requirements for a successful defence of justifiable homicide were that it should be proved that: (a) the accused intended to affect arrest and had the authority to do so in terms of the CPA; (b) the accused (arrestor) must have known that the deceased committed a schedule 1 offence, such as murder; (c) the accused must have attempted to arrest the deceased and the deceased must have resisted arrest or have taken flight; (d) the deceased must have been aware that an attempt was made to arrest him; (e) the accused must have intended to kill the deceased and; (f) that there was no other practicable and reasonably effective means of

arresting the deceased or preventing his flight than killing him. In practice, the courts limited the application of section 49(2) by providing that the onus of proof lies on the person (arrestor) relying on the protection of section 49(2), to show on the balance of probabilities that his/her action fell within the scope of the section (**Matlou v Makhubedu** 1978 (1) SA 946 (A)). The state had to prove all the elements of the offence beyond a reasonable doubt.

The requirements set above in limiting the use of deadly force in order to curb trigger-happy police officials were commendable. The courts stated that section 49(2) needed a much 'stricter test,' and that the section 'should not be given a liberal interpretation: on the contrary, it must be construed and applied restrictively against the person seeking to rely on it' (**Prince v. Minister van Wet en Orde** 1987 (4) SA 231 (E)). However, the general opinion has been that 'justifiable homicide' is not justifiable as the defence is coined. 'How can shooting to kill be done with a view to arrest? You cannot arrest a corpse,' argues Smith (1994:356) in his critique of justifiable homicide in the English law. This argument has been raised against the bare provisions of the old section 49(2). It provided that 'where the person concerned is to be arrested... and the person authorised under this Act to arrest ... cannot arrest him or prevent him from fleeing by other means than by killing him, the killing [*for the purpose of arresting him*] shall be deemed to be justifiable homicide.' (*own emphasis*). Burchell (1997:121) described section 49(2) as 'dangerously wide and possibly open to abuse since the protection is available to ordinary citizens as well as public officers.' Section 49(2), as it then was, was used by the law enforcement agencies as some kind of a licence to kill. Often on a discriminatory basis with blacks mostly on the receiving end of the stick. The continued sustenance of this licence to kill should not be a surprising factor, the criminal justice system then was not accountable to a constitutional system respecting basic human rights, in particular the right to life and the right to bodily integrity.

3 The constitutional era and the use of deadly force

The retention of section 49(2) would be irreconcilable with the abolition of death penalty: if the state has no right to take life in punishment of a convicted criminal, how may it retain the right to kill a person who is only suspected of having committed an offence?' (Watney 1999:30). The intentional use of deadly force as in terms of section 49(2) of the CPA as discussed constituted a *prima facie* violation of the right to life (Steytler 1998:73). Though the matter was not before the court, Chaskalson P in **Makwayane and Another** *supra* at 448 - 550 pointed out that section 49(2) was a last resort and has some limits. Refraining from expressing a specific view on section 49(2), Chaskalson P said that if the consequence of the judgement in **Makwayane and Another** *supra* were to render this section unconstitutional, the Legislature would have to modify it to bring it in line with the constitution. However, he opined that shooting at a fleeing criminal in the heat of the moment is not necessarily to be equated with the execution of a captured criminal. According to Chaskalson P "the [g]reater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional State which respect every person's right to life."

Mindful of the graduation of South Africa to a constitutional State respecting human life, and the sometimes-ready use of deadly force by police official, the SAPS proposed an amendment to section 49 of the CPA (Nel and Bezuidenhout 1997:195 - 198). In the interim the SAPS issued instructions to its members concerning the use of force in affecting arrest, pending the amendment to section 49. This instructions supplanted section 13(3)(b) of the South African Police Services Act (SAPS Act) 68 of 1995, which enjoins police service members 'to use only the minimum force which is

reasonable in the circumstances' where such member is by law authorised to use force in the performance of his duties. The instructions were not innovative steps by the SAPS, but more of an embodiment and reformulation of all the courts interpretations of the old section 49(2), particularly those decisions that sought to drastically limit the use of deadly force, as the SAPS' use of force policy document. These instructions have been influential in the wording of the new section 49(2).

3.1 The new section 49(2)

Section 49 has now been amended by section 7 of the Judicial Matters Second Amendment Act 122 of 1998. It reads as follows:

2. If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such *force as may be reasonably necessary and proportional* in the circumstances to overcome resistance or to prevent the suspect from fleeing: *Provided* that the *arrestor is justified in terms of this section in using deadly force* that is intended or is likely to cause death or grievous bodily harm to a suspect, *only if he or she believes on reasonable grounds-*
 - (a) that the force is immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
 - (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
 - (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm." (*own emphasis*)

How different is the new section 49(2) from the old section 49(2)? Is it just a Trojan horse of the SAPS carrying the old section 49 and its noted ramifications? Does it take into account the constitutional right to life and the right to be free from all forms of violence? Despite some apparent similarities, the new section 49(2) represent a remarkable development in the defence of justifiable homicide in South Africa. In a what is seemingly the consolidation of subsections (1) and (2) of the old section 49 into one section 49(2), the new section 49(2) maintains two different standards regarding the use of force: Firstly, for justifiable use of force in order to avoid resistance or to prevent the suspect from fleeing it requires reasonably necessary and proportional force. The test of proportionality is a new innovation by the new section 49 of the CPA. Proportionality was not mentioned in the old section 49 of the CPA, though the test reasonableness has always been there (**Prince v Minister van Wet en Orde** *supra*). Secondly, for the use of deadly force intended to cause death or grievous bodily harm, the proviso to section 49(2) requires that the arrestor have a 'reasonable believe' that circumstances allows him/her to act in private defence or in the prevention of crime.

3.3.1 Private defence

Deprivation of a person's life by the arrester may in terms of the new section 49(2)(a) be justified under the so-called private defence. Due to the concern of the basic right to life and physical safety, one would expect that a law enforcement official who is attacked or threatened when executing his/her duties to be accorded the liberty to repel that attack to preserve his own life or the lives of others (Asworth 1995:133). The attacker forfeits his/her right to life and bodily integrity when he mounts an attack on others or on the arresting officer. Our view is that the proviso mentioned codifies the common law justification of private defence, making section 49(2) well within the bounds of the Bill of Rights and constitutional. In relying on private in terms of the new section 49(2) defence the accused will basically have to prove the common law requirements of the defence of private defence. Noteworthy of these requirements is that (a) the attack must be unlawful; (b) must have either begun or must have been imminent; (c) the force used must be directed only against the unlawful attacker (d) it must necessary to resort to force to avert the attack and (e) means used to avert the attack must be reasonable (Snyman. 1995:97 - 106).

However, it should not be concluded that the common law private defence is such codified by section 49(2) that we no longer have the defence at common law. The proper understanding of section 49(2) would be that the South African Criminal Justice System provides two sets of 'private defence' justifications in relation to the SAPS justifiable homicide cases, namely the 'common law private defence' and the 'statutory private defence.' The possible co-existence of these two defences in the realm of law enforcement is indicated the Regulation of Gatherings Act 205 of 1993. Section 9(3) provides that: 'No common law principles regarding self-defence, necessity and protection of property shall be affected by the provisions of this Act.' Though there is no such proviso in the new section 49 of CPA, the view is that the proper construction of section 49 is that there is a common law and statutory self-defence justification existing alongside each other.

3.3.2 Crime prevention

The prevention of a crime can also be a ground to rely on after using deadly force against the deceased (CPA ss 49(2)(b) and 49(2)(c)). Crime prevention is a measure taken before a criminal or delinquent act has actually occurred for the purpose of forestalling such an act. The new section 49(2) seems to refer particularly to 'punitive prevention' in that deadly force may be used even to prevent future criminal acts. As stated in section 49(2), it should be proven 'that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed' or 'that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.'

Can it be argued that applying to 'future' offences section 49(2) is in that respect unconstitutional, in that it may also be used to remote possibilities of commission of offences, or be subject to abuse. And also violating the longstanding principle of legality? A similar constitutionality question on of using crime prevention as a pre-emptive strike had to be answered in the interpretation of section 3(1) of the Criminal law (Northern Ireland) Act of 1967, by the European Commission of Human Rights (EUCHR) in **John Kelly v the United Kingdom** (Application No 17579/90, January 13, 1993). Section 3 provides that:

A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

In *Kelly*, the Northern Ireland security forces who set up a road checkpoint (Roadblock) opened fire on a car driven by Paul Kelly with the other two youths, thinking that they were determined terrorists, who would probably continue to commit terrorist offences should they escape. Paul Kelly was killed as a result and the other two youths injured. In the Court of Appeal in Northern Ireland, and admitting the soldiers defence based on section 3, Carswell J held that: 'But in my opinion the kind of harm to be averted (as the soldiers reasonably thought) by preventing their escape was even graver-the freedom conferred to on active and dangerous terrorists to resume their activities of dealing in death and destruction.'

The EUCHR confirmed the *Kelly* decision. Having made reference to article 2 of the European Convention on Human Rights which provides that 'everyone's rights to life shall be protected by law' the EUCHR held that deprivation of a person's life shall not be regarded as the contravention of article 2 right to life 'when it results from the use of force which is no more than necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.' Smith (1994:356) is critical of the EUCHR decision. He contends that it 'gives encouragement to a policy of killing to prevent 'remote' offences.' According to Rogers (1998:489) it is a 'dangerous doctrine' to allow law enforcement agencies to shoot to kill a suspected offender on the ground of the possible commission of 'some unspecified act of violence' at an 'unspecified time in the future.'

It is hoped that the new section 49(2) is not going to be used by the SAPS to punish even too far remote offences. Although such unfortunate use and abuse is potentially inherent in the implementation of laws mandating the use of force by the law enforcement agencies, there seems to be no strong likelihood of that occurring in South Africa with regard to section 49(2). Section 49(2) places stricter tests of 'immediate necessity,' 'substantial risk,' 'forcible and serious nature', and 'strong likelihood,' in addition to the test of reasonableness and proportionality. Furthermore, there are other measures outside the requirements of section 49 that ask for and enjoin the SAPS to a greater discipline on the use of force. Section 13(1) of the SAPS Act enjoins members of the SAPS, subject to the constitution and with due regard to the fundamental rights of any person, to perform such duties and functions as are by law conferred on or assigned upon him/her. That when they resort to force in the prosecution of their duties they should use minimum and reasonable force (SAPS Act s13(3)(b)). As pointed out earlier the SAPS had also issued out internal instructions to its members to comply with on the use of force in effecting arrest.

Under the new section 49(2), the SAPS will be in line with international instruments and developments on the use of deadly force and other influential foreign jurisprudence on the issue. Article 3 of the U.N Code for Law Enforcement Officials provides that law enforcement officials restrain from using force unless when it is 'strictly necessary and to the extent required for the performance of their duty.' In terms of the commentary to article 3, national legislation should restrict the use of force by law enforcement officials in 'accordance with a principle of proportionality. Furthermore, firearms should generally not be used 'except when a suspected offender offers armed resistance or otherwise jeopardises the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.' The same sentiments have been echoed in U.N Basic Principles on the

Use of Force by Law Enforcement Officials. The relevant articles read as follows:

Art. 4: Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving intended results.

Art.5: Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (c) Minimise damage and injury, and respect and preserve human life

4. Conclusion

Admittedly, the possible loopholes and constitutional debates that can be generated by the application of the new section 49(2). Unscrupulous and trigger-happy law enforcement officials may over-step the permissible lengths of the use of deadly force. However, sight should not be lost that the new section 49(2) represents the changing face in the South African Criminal Justice System as far as the issue of the use of force by the SAPS is concerned. It has also taken South Africa a step further to be in line with the world development and changing attitudes of the use of force by law enforcement agencies. In summation, the new section 49(2) is poised to pass any constitutional scrutiny.

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