

# An analysis of the wording, interpretation and development of the provisions dealing with the use of lethal force in effecting an arrest in South African criminal procedure

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## ABSTRACT

Since the first introduction of a provision dealing with the use of (lethal) force in effecting an arrest in South African criminal procedure in 1917, the provisions have been amended a total of four times with a possible fifth amendment soon to be passed in terms of the Criminal Procedure Amendment Bill B39 – 2010. In this article the wording, interpretation and development of the provisions from its common-law roots and the first provision in the 1917 Act to the latest proposed amendment will be analysed and compared.

## 1. Introduction

With the recent proposed amendments to section 49 of the Criminal Procedure Act 51 of 1977 dealing with the use of lethal force in effecting an arrest (Criminal Procedure Amendment Bill B39 – 2010), this controversial provision has certainly become one of the most amended provisions in the history of South African criminal procedure. Since its initial introduction by the legislator in the Criminal Procedure and Evidence Act 31 of 1917, this provision has been amended a total of four times with a possible fifth amendment on the horizon. In this article the development of this provision, from its first enactment in the 1917 Act to the proposed amendments of the 2010 Amendment Bill will be discussed to provide an informed overview of the development of the law of criminal procedure in this regard.

The analysis will commence with a short discussion on the early history and development of the concept of lethal force in effecting an arrest, whereafter the relevant provisions of the 1917 Criminal Procedure Act and a chronological exposition of the major amendments

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to this particular provision in the South African law will be analysed. This exposition will include a discussion of section 37 of the Criminal Procedure Act 56 of 1955 and the relevant provisions of the Criminal Procedure Act 51 of 1977. With regard to the latter Act, a further demarcation will be made between the period before and after the establishment of South Africa's constitutional democracy, and the amendment provision in section 7 of the Judicial Second Amendment Act 122 of 1998. The analysis will conclude with a critical discussion of the amendments proposed by the Criminal Procedure Amendment Bill 2010. The provisions of the Amendment Bill are aimed at clearing up alleged ambiguity in section 49 of the present Criminal Procedure Act 51 of 1977, and if promulgated, may provide police officials with extensive powers to use lethal force.

## **2. The early history of the use of lethal force in effecting an arrest**

Cowling, citing Milton, submits that the use of lethal force in effecting an arrest has its roots in '... primitive institutions of the English common law ...'.<sup>1</sup> The two main institutions in English common law that form the basis of this provision are the system of outlawry and the concept of felony. Outlawry, according to Milton, is 'a crude system of law enforcement' whereby those that committed serious offences were regarded as being at war with the community and were thus declared to be outside the protection of the law.<sup>2</sup> It was then 'the duty of every citizen to track down and kill those that were declared to be outlaws.'<sup>3</sup> The concept of felony, on the other hand, referred to criminal acts of a particularly reprehensible nature,<sup>4</sup> which were punishable by the death penalty.<sup>5</sup> Milton argues that it was because the lives of outlaws and felons were effectively declared to be forfeit that deadly force was warranted in effecting their arrest.<sup>6</sup>

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<sup>1</sup> M Cowling 'The licence to flee? Recent restrictions on the use of deadly force in effecting an arrest' in SV Hoctor and PJ Schwikkard (eds) *The Exemplary Scholar: Essays in Honour of John Milton* (2007) 103; JRL Milton 'Ultima ratio legis: The use of deadly force in effecting arrests' in JA Coetzee (ed) *Gedenkbundel: HL Swanepoel* (1976) 142. Milton argues that the use of deadly force in Roman-Dutch Law primarily dealt with situations where one had to protect one's property and not where the main object was to effect an arrest. However, Rumpff CJ refers to Van der Keessel's *Praelections ad Jus Criminale* in the case of *Matlou v Makhubedu* 1978 (1) SA 946 (A), where it is held that the use of deadly force to effect an arrest is only warranted in cases of self-defence.

<sup>2</sup> Cowling op cit (n1) 103 citing Milton op cit (n1) at 142.

<sup>3</sup> Cowling op cit (n1) 103 citing Milton op cit (n1) at 142.

<sup>4</sup> For example robbery, arson, rape and homicide.

<sup>5</sup> Cowling op cit (n1) 103 citing Milton op cit (n1) at 142.

<sup>6</sup> Cowling op cit (n1) 103 citing Milton op cit (n1) at 143.

### 3. The Criminal Procedure and Evidence Act 31 of 1917

In 1917 the criminal codes of the four pre-union colonies in South Africa were repealed,<sup>7</sup> and the Criminal Procedure and Evidence Act 31 of 1917 was enacted. Section 44(1) of this Act governed the use of lethal force in effecting an arrest. This section read as follows:

‘when any peace officer or private person authorised or required under this Act, to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any of the offences mentioned in the first schedule to this Act, attempts to make such arrest, and the person so attempted to be arrested flees or resists and cannot be apprehended and prevented from escaping by other means than by such officer or private person killing the person so fleeing or resisting, such killing shall be deemed in law justifiable homicide.’<sup>8</sup>

The section made provision for the use of lethal force in instances where no other means were available to the arrestor. It was required that the suspect be suspected on *reasonable grounds*; thus requiring the presence of an *objective* belief on the part of the arrestor when making use of (lethal) force to effect an arrest. The provision also directly authorised private persons to use lethal force in effecting an arrest, placing peace officers and private persons on the same footing. It is interesting to note however, that in terms of English law, a clear distinction was made between police officers and private persons with regard to the use of lethal force to effect an arrest; if an arrestee was found to be innocent of the crime he/she was suspected of having committed, lethal force would only be justified in the case of police officers and not private persons.<sup>9</sup> The distinction between peace officers and private persons was done away with in the amendment to the 1917 Act and section 56 of the 1955 Act merely refers to persons authorised in terms of the latter Act.

It is also interesting to note that the use of lethal force in effecting an arrest was justified if the suspect was suspected, on reasonable grounds, of having committed any of the offences listed in the First Schedule of the Act. This obviously included murder and other serious offences such as rape, but it also included less serious transgressions like sedition (subversion), sodomy (this is no longer an offence in terms of South African criminal law),<sup>10</sup> receiving stolen property knowing

<sup>7</sup> Cape: Ordinance 40 of 1828; Natal: Ordinance 18 of 1856; Transvaal: Ordinance 1 of 1903; Orange Free State: Ordinance 12 of 1902.

<sup>8</sup> Section 44(1) of the Criminal Procedure and Evidence Act 31 of 1917.

<sup>9</sup> Cowling *op cit* (n1) 116.

<sup>10</sup> See Schedule 1 of the Criminal Procedure and Evidence Act 31 of 1917; the common-law proscription of sodomy was declared unconstitutional in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC).

that the property was obtained illegally and any attempt to commit any of the offences listed in Schedule 1. Thus, although the presence of an objective belief on the part of the arrestor was required when making use of lethal force in effecting an arrest, the requirement of proportionality between the force used in order to effect an arrest and the alleged offence committed by the suspect was lacking. The requirement of proportionality became much more prominent in the 1998 amendment of this provision.

#### **4. The Criminal Procedure Act 56 of 1955**

In 1955 the Criminal Procedure and Evidence Act<sup>11</sup> was replaced by the Criminal Procedure Act.<sup>12</sup> Section 37 of the Criminal Procedure Act 1955 makes provision for the use of lethal force in effecting an arrest.

- (1) Whenever any person authorized under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any offence mentioned in the First Schedule, attempts to arrest any such person and such person flees or resists and cannot be arrested and prevented from escaping by other means than by killing the person so fleeing or resisting, such killing shall be deemed in law justifiable homicide.
- (2) Nothing in this section shall authorise the killing of a person who is not accused or suspected of having committed an offence mentioned in the First Schedule.'

While the use of lethal force in effecting an arrest was limited in the 1917 Act only to peace officers and private persons authorised or required to act in terms of the provisions of the 1917 Act, the 1955 provision allowed for any person, specifically authorised by the Act, to use lethal force in effecting an arrest. However, in real terms there is probably not much difference between the effect of the wording in the 1917 and the 1955 Act in this regard. The only other difference in the wording of this 1955 provision compared to the 1917 provision is the inclusion of subsection (2).

Subsection (2) of the 1955 Act merely emphasises the ambit of section 37(1) of the 1955 Act by stating that nothing in section 37(1) of the 1955 Act shall authorise the killing of a person who is not accused or suspected of having committed an offence mentioned in the First Schedule of the Act. However, the inclusion of this explanatory and limiting additional provision to section 37(1) really did not contribute materially to the development of the use of lethal force in effecting an

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<sup>11</sup> Ibid.

<sup>12</sup> Criminal Procedure Act 56 of 1955.

arrest, as the First Schedules of both the 1917 and 1955 Acts are exactly the same.

In an early case decided under the 1955 Act, Justice Galgut held that the words 'reasonable suspicion' qualified the suspicion of the arrestor and had to be interpreted objectively; the grounds of suspicion must be those which induce a reasonable man to have the suspicion.<sup>13</sup> It was furthermore held that section 37 of the 1955 Act only applied to the use of lethal force in effecting an arrest and not to the mere use of force.<sup>14</sup> Similarly, in the case of *Sambo v Milns*,<sup>15</sup> the court held that the test required, when dealing with section 37 of the Criminal Procedure Act,<sup>16</sup> was (similar to the 1917 provision) an objective one. The court further held that in order to qualify for the protection of section 37, the person that made use of lethal force in effecting an arrest must discharge the onus of proving – on a balance of probabilities – that all the requirements laid down by the particular provision were met. These requirements included:<sup>17</sup>

- that the person seeking the immunity conferred by the section had reasonable grounds for suspecting the person killed (or injured) of having committed a First Schedule offence;
- that he had attempted to arrest him;
- that the person killed (or injured) fled or resisted; and
- that he could not be arrested or prevented from escaping by other means than killing (or injuring) him.

While the defendant in the *Sambo v Milns* case failed to prove all these requirements, the accused in the case of *S v Scholtz*,<sup>18</sup> succeeded with his defence in terms of section 37 as the circumstances revealed that he did not take the decision to shoot lightly. The accused in this case was a constable in the South African Police (as it was then known) and he was standing trial on a charge of culpable homicide. He had arrested a driver who appeared to be under the influence of alcohol and who was involved in a motor vehicle accident. However, on the way to the charge office the arrestee escaped and fled. The accused chased him and during this pursuit the accused gave numerous warnings to the arrestee to stop. The accused also fired a few warning shots and when it seemed as if the arrestee was about to get away, the accused shot and killed him. The court held that from the circumstances of this case, it appeared that the accused had not taken his decision to shoot lightly

<sup>13</sup> *R v van Heerden* 1958 (3) SA 150 (T) at 151 E-F.

<sup>14</sup> *R v van Heerden* supra (n13) at 152.

<sup>15</sup> 1973 (4) SA 312 (T).

<sup>16</sup> Criminal Procedure Act 56 of 1955.

<sup>17</sup> *Sambo v Milns* supra (n15) at 321E-G.

<sup>18</sup> 1974 (1) SA 120 (W).

and that he had done everything that could reasonably be expected of him to prevent the arrestee from escaping at that critical moment.

According to Milton, there appeared to be no ‘... prevailing view [at the time of writing – 1976] that the law in this regard is in need of reform ...’<sup>19</sup> It is for this reason that the amendment of this section in terms of section 49 of the 1977 Act constitutes a ‘... virtual re-enactment of section 37 ...’ in the 1955 Act.<sup>20</sup>

## **5. The Criminal Procedure Act 51 of 1977**

The two amendments to section 49 of the 1977 Act have further refined and shaped the use of lethal force in effecting an arrest in South African jurisprudence. This discussion relating to the 1977 Act is divided into two sections: the pre-constitutional era and the post-constitutional era. The reason for this division is to juxtapose the amendments to this particular provision of the 1977 Act after South Africa became a constitutional democracy with the provision as it stood during South Africa’s pre-constitutional history.

### **5.1 The use of lethal force in effecting an arrest in the pre-constitutional era**

The wording of the ‘old’ section 49 of the Criminal Procedure Act 51 of 1977, before South Africa’s constitutional democracy, differs markedly from the provisions in the 1917 and 1955 Acts. Section 49 read:

- ‘(1) if any person authorised under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person –
  - (a) resists the attempt and cannot be arrested without the use of force; or
  - (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorised may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.
- (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.’<sup>21</sup>

<sup>19</sup> Milton op cit (n1) 151.

<sup>20</sup> Cowling op cit (n1) 100.

<sup>21</sup> Section 49 of Criminal Procedure Act 51 of 1977.

While the scope of the use of lethal force in effecting an arrest is still available to any person authorised under the Act, as provided in the 1955 version, the 1977 provision now makes a distinction between the use of force in effecting an arrest (section 49(1)) and the use of lethal force in affecting an arrest (section 49(2)). No mention is furthermore made of the reasonable grounds on which the arrestor must suspect the arrestee of having committed the said offences,<sup>22</sup> but the force to be used in terms of section 49(1) is now rather limited to force that is reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

In *Prince v Minister of Law and Order*,<sup>23</sup> for example, the second and third defendants, who were members of the South African Police Service (SAPS), were involved in a high speed chase in which they pursued the plaintiffs after they tried to dodge a roadblock. The plaintiffs failed to stop after numerous warning shots were fired. One of the shots fired by the second and third defendants penetrated the vehicle the plaintiffs were driving, injuring the plaintiffs. The defendants, instituting an action for damages for bodily injury, relied on the protection of section 49(1)(b) of the Criminal Procedure Act 51 of 1977. The court held that the second and third defendants had acted on a reasonable suspicion and that there were no reasonable alternatives available to the defendants other than to fire shots at the plaintiffs.

With regard to the use of lethal force in effecting an arrest, the original section 49(2) still limited this aspect to offences listed in Schedule 1 of the Act and this list of offences differs somewhat from the list found in the 1917 and 1955 Acts. The most important differences are that offences related to coinage and offences against the laws for the prevention of illicit dealing in possession of precious metals, precious stones or the supply of toxicating liquor to natives or coloured people are not again included in Schedule 1. A new offence included in Schedule 1 of the Act is escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule 1 or is in such custody in respect of the offence of escaping from lawful custody.

## 5.2 The use of lethal force in effecting an arrest post-1996

In *S v Makwanyane and another*, the court held that:

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<sup>22</sup> Both the 1917 and 1955 Acts require that the arrestee must have committed the offence or that the arrestor must suspect on reasonable grounds that the arrestee committed the said offences.

<sup>23</sup> 1987 (4) SA 231 (E).

‘The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chapter 3 [of the Interim Constitution]. By committing ourselves to a society founded on the recognition of human rights we are required to value these to rights above all others.’<sup>24</sup>

This value system, as embodied in the Constitution of the Republic of South Africa, 1996, is a system founded on human dignity. It is a value system based on individual human worth to the survival of society. It calls on all, including the State, to protect and promote respect for life and human dignity.

In the case of *S v Makwanyane and Another*, Chaskalson P also pointed out that section 49(2) of the 1977 Criminal Procedure Act was a last resort in situations where an arrestor’s life was in danger. It was held that the provision is limited in its application in that other methods of subduing and arresting criminals should always be used where possible and the majority of the Constitutional Court contended that greater restrictions on the use of lethal force may be one of the consequences of the establishment of a constitutional state which respects every person’s right to life.<sup>25</sup> Chaskalson P submitted that if the consequence of the *Makwanyane* judgment were to render this particular provision unconstitutional, the legislature would have to amend section 49 to bring it in line with the Constitution.<sup>26</sup>

In 1998 an amendment to section 49 was consequently passed by Parliament in terms of section 7 of the Judicial Matters Second Amendment Act 122 of 1998 and it came into effect in 2003. The implementation of the amendment by the Judicial Second Amendment Act was delayed for more than four years due to concerns raised by the SAPS and the Minister of Safety and Security. These concerns emanated from uncertainties surrounding the use of firearms by the SAPS, as this was an equivocal issue to its members. The Minister of Safety and Security, at that time, was of the view that the proposed 1998 amendment only allowed members of the SAPS to shoot at criminals in self-defence, placing the police at risk of massive assaults from criminals.<sup>27</sup>

From 1998 when the amendment to section 49 was passed by Parliament, to the time that it came into effect in 2003, concerns regarding the constitutionality of the 1977 provision were also the subject of two further judgments delivered in the Supreme Court of Appeal and the Constitutional Court respectively. In *Govender v*

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<sup>24</sup> 1995 (3) SA 391 (CC) at para [144].

<sup>25</sup> *S v Makwanyane and Another* supra (n24) at para [140] & [144].

<sup>26</sup> Constitution of the Republic of South Africa, 1996.

<sup>27</sup> T van der Walt ‘The use of force in effecting arrest in South Africa and the 2010 Bill: A step in the right direction?’ (2011) 14(1) *Potchefstroom Electronic Law Journal* 140.

*Minister of Safety and Security*,<sup>28</sup> four youths stole a car and were later spotted by police officials. The police ordered the youths to stop the vehicle but their failure to do so resulted in a high-speed chase. The driver of the vehicle, the appellant's son, eventually stopped the car and attempted to flee. The police pursued him on foot and warned him to stop. The officer then fired a warning shot and again shouted at him to stop but he still failed to do so. The officer, by then convinced that the suspect would escape, fired a shot at the suspect's legs. The shot however injured the suspect's spine and left him paralysed. The court held that,

[t]he words "use such force as may in the circumstances be reasonably necessary ... to prevent the person concerned from fleeing" in section 49(1) (b) of the [Criminal Procedure] Act must therefore generally speaking ... be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorised to arrest, or assist in an arresting ... has reasonable grounds for believing 1) that the suspect poses an immediate threat of serious bodily harm to the [arrestor], or a threat of harm to members of the public; or 2) that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.<sup>29</sup>

The judgment in this particular case effectively narrowed down the working of section 49(1) in relation to the use of lethal force but failed to consider the constitutionality of section 49(2).

In *Ex parte Minister of Safety and Security and others in re S v Walters*,<sup>30</sup> the Constitutional Court held that section 49(2) was unconstitutional in its entirety. This case arose from an incident in which a business owner shot and killed a burglar who broke into his business premises. The business owner and his son pursued the burglar, who was trying to escape by jumping over a fence and they shot and killed him.<sup>31</sup> The accused contended that the shooting was justified in terms of section 49(1)(b) and (2) of the Criminal Procedure Act 51 of 1977, while the State argued that section 49 was inconsistent with the Constitution and therefore had no effect.<sup>32</sup> The Constitutional Court also interpreted section 49(1)(b) of the Criminal Procedure Act 1977 so as to exclude the use of a firearm or similar weapon unless

<sup>28</sup> 2001 (4) SA 278 (SCA).

<sup>29</sup> *Govender v Minister of Safety and Security* supra (n28) at para [24].

<sup>30</sup> 2002 (4) SA 613 (CC); Also see M Watney 'The final word on the use of force during arrest: *Ex parte Minister of Safety and Security and others in re S v Walters*' (2003) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 775-783.

<sup>31</sup> *Ex parte Minister of Safety and Security and others in re S v Walters* supra (n30) at paras [8] & [9].

<sup>32</sup> *Ex parte Minister of Safety and Security and others in re S v Walters* supra (n30) at paras [15]-[22].

the person authorised to arrest, or assisting in the arrest of a fleeing suspect has reasonable grounds for believing:

- that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or
- that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.<sup>33</sup>

Kriegler J indicated that this interpretation of section 49(1)(b) was constitutionally sound and saved it from invalidation. In delivering the judgment, Kriegler J furthermore said that

‘[i]f one accepts the test in *Govender* as establishing the prerequisites to any use of a firearm, there can be little doubt that the same requirements should at the very least be preconditions to an arrester who shoots and kills the fugitive’.<sup>34</sup>

With regard to section 49(2) Kriegler J held that,

‘[i]f due recognition is to be given to the rights limited by the subsection and the extent of their limitation, the resort to Schedule 1 ... in order to draw the line between serious cases [that warrant] the potential of deadly use of force and those that do not, comprehensively fails the test of reasonableness justifiability postulated by section 36(1) of the Constitution.’<sup>35</sup>

Moreover, section 49(2) inherently inclines unreasonably towards the arrestor. The judge indicated that ‘the purpose of arrest’ should be to bring persons who are suspected of committing crimes before a court of law and it should not be used to punish a suspect.<sup>36</sup> Where arrest is called for, ‘force may be used only when it is necessary in order to carry out the arrest’ and ‘only the least degree of force reasonably necessary may be used.’<sup>37</sup> ‘In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed.’<sup>38</sup> The force used in effecting the arrest should furthermore be ‘proportional to all these circumstances.’<sup>39</sup> And, it was held that a fatal shooting in order to effect an arrest, as in the *Walters*

<sup>33</sup> *Ex parte Minister of Safety and Security and others in re S v Walters* supra (n30) at para [38].

<sup>34</sup> *Ex parte Minister of Safety and Security and others in re S v Walters* supra (n30) at para [40].

<sup>35</sup> *Ex parte Minister of Safety and Security and others in re S v Walters* supra (n30) at para [45].

<sup>36</sup> *Ex parte Minister of Safety and Security and others in re S v Walters* supra (n30) at para [54].

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

case, will generally only be reasonable if the ‘suspect poses a threat of violence to the arrestor or others’ or if the suspect is ‘suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.’<sup>40</sup> The court further held that the above ‘limitations in no way [limit the] rights of an arrestor attempting to carry out an arrest[,] to kill a suspect in [private] defence.’<sup>41</sup>

The amended section 49, which was passed by Parliament in 1998 and only came into effect after the *Govender* and *Walters* judgments, addressed the shortcomings identified in both these cases by emphasising the role of reasonableness in the use of force in effecting an arrest, introducing the concept of proportionality<sup>42</sup> and providing for strict requirements to be adhered to.<sup>43</sup> Section 7 of the Judicial Matters Second Amendment Act 122 of 1998 reads as follows:

- (1) for the purposes of this section –
  - a) ‘arrestor’ means any person authorised under this Act to arrest or to assist in arresting a suspect; and
  - b) ‘suspect’ means any person in respect of whom an arrestor has or had a reasonable suspicion that the person is committing or has committed an offence.
- (2) If the 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 has been made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the 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 believes on reasonable grounds –
  - a) that the force is immediately necessary for the purposes 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 possibility that it will cause grievous bodily harm.’

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> This notion of proportionality is also evident from this provisions common law roots, where the serious cases of outlawry and felonies were the only circumstances that warranted the use of deadly force to effect an arrest; Cowling op cit (n1) 117.

<sup>43</sup> Also see CR Snyman ‘Geregverdigde doodslag by inhegtenisneming: Die bepalings van die nuwe artikel 49 van die Strafproseswet’ (2004) 15(3) *Stellenbosch Law Review* 540-542.

Section 49(1) now provides definitions for the terms 'arrestor' and 'suspect' respectively. The term arrestor, in terms of this amendment, still provides for the broader inclusion of any person authorised under the Act to arrest a suspect. This is similar to the 1955 and 1977 amendments, while the 1917 provision only made reference to peace officers and private persons authorised in terms of the Act. Section 49(2), which only regulated the use of lethal force in the 1977 Act, now consolidates the use of lethal and non-lethal force making a clear distinction between the two. In situations where non-deadly force is used, subsection (2) specifically provides that the force used by the arrestor must be 'reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing.' This test is known as the proportionality test and the value of this criterion is that the court has to balance various factors against each other. Factors that may be relevant in this regard are: The seriousness of the suspected offence; the degree of force used by the arrestor; whether or not the suspect was made aware of the fact that an attempt to arrest him had been made; the need for oral warning shots; and, the ability of the suspect to escape as well as the possibility that innocent bystanders may be injured due to the use of a firearm by the arrestor.<sup>44</sup> The requirement that the force must be reasonably necessary in the circumstances, which was first introduced in the 1977 Act, is consequently elaborated on in the 1998 amendment in that proportionality is now also required. This is significant as the 1998 amendment is the first provision that explicitly requires proportionality between the force to be applied and the particular circumstances on the situation. In no preceding provision has proportionality been required.

Where lethal force is to be used, the arrestor will furthermore only be justified in his/her actions if he or she believes on reasonable grounds that: deadly force is immediately necessary to protect him- or herself or the person assisting him in the arrest from imminent or future death or grievous bodily harm,<sup>45</sup> and there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm,<sup>46</sup> or 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 possibility that it will cause

<sup>44</sup> JJ Joubert (ed), PM Bekker, T Geldenhuys, JP Swanepoel, SS Terblanche, SE van der Merwe *Criminal Procedure Handbook* (9th ed) (2009) Chapter 7 at 98ff.

<sup>45</sup> Section 49(2)(a) of the Criminal Procedure Act 51 of 1977.

<sup>46</sup> Section 49(2)(b) of the Criminal Procedure Act 51 of 1977; This requirement is similar to section 3 07(2)(b)(iv)(B) of the American Model Penal Code; MD Dubber *Criminal Law: Model Penal Code* (2002) 326-329; Snyman op cit (n43) 540.

grievous bodily harm.<sup>47</sup> These three requirements relate to aspects of the reasonable belief of the arrestor. The first two requirements also formed the basis of the approach followed in the United States Supreme Court case of *Tennessee v Garner*,<sup>48</sup> where the Supreme Court said that the shooting of the suspect by the police officer violated the Fourth Amendment. Justice White conceded that the police officers must have *probable cause* to believe that the suspect poses a threat to the safety of the officers, or the community, if not arrested.<sup>49</sup>

The amended section 49, which was introduced by the Judicial Matters Second Amendment Act 122 of 1998, represents a significant development from the 1917, 1955 and 1977 provisions. The test of proportionality is a new concept incorporated in the new section 49 (2) and, in addition to the proportionality test, three requirements are included in subsection (2) which provide for a more stringent framework for the use of lethal force. All references to Schedule 1 of the Act and the list of offences to which the use of the lethal force provision is to be applied, are furthermore deleted. The omission of the reference to Schedule 1 offences can most probably be attributed to the more stringent framework that is set by the 1998 amendment for the use of lethal force in effecting an arrest; the requirement that the use of lethal force in effecting an arrest only be applied to certain serious offences, as listed in Schedule 1, is now no longer necessary.

Another interesting feature of the 1998 amendment is the provision made for an arrestor to use lethal force with respect to a future risk of death or grievous bodily injury by a suspect, a proviso which was not afforded under the previous provisions. This 'future danger principle' is a phrase that can however also be found in section 25 of the Canadian Criminal Code.<sup>50</sup> The inclusion of this provision has been criticised by Bruce and Van der Walt as it requires members of the SAPS to make a judgement and perform their legal responsibilities under an ill-defined legal framework that may expose them to an enhanced risk of criminal prosecution.<sup>51</sup> Bruce also argues that this 'speculative abstraction' required from members of the SAPS is unsuited for the South African context as in countries like Canada which incorporated the 'future danger principle' as part of their law there are lower violent crimes rates, and other countries are generally better able to maintain

<sup>47</sup> Section 49(2)(c) of the Criminal Procedure Act 51 of 1977.

<sup>48</sup> 471 U.S. 1,3 (1985).

<sup>49</sup> *Tennessee v Garner* supra (n48) at 3.

<sup>50</sup> Snyman op cit (n43) 543.

<sup>51</sup> See generally D Bruce 'Interpreting the body count: South African statistics on lethal police violence' (2005) 36(2) *South African Review of Sociology* 141-159; Van der Walt op cit (n27) 142.

administrative mechanisms which can impose accountability in relation to such a standard.<sup>52</sup>

The 1998 amendment was criticised for being extremely risky for arrestors who potentially use lethal force in effecting an arrest, since the use of force in effecting an arrest required that the arrestor first had to decide what force would be reasonably necessary and proportional in the circumstances before acting. On the other hand, the use of lethal force in effecting an arrest provided more protection to the arrestor as the reasonable grounds listed in the Act and on which the arrestor's actions had to be based, provided for more scope and possibility to have the arrestor's actions justified. This incongruity was described by some as 'the licence to flee'.<sup>53</sup>

## **6. The new Criminal Procedure Amendment Bill, 2010**

Although no case challenged the constitutionality of the 1998 amendment, section 49 was widely criticised as '... being complex and confusing and lacking in legal clarity'.<sup>54</sup> The SAPS raised concerns that the provision hampered the police in combating crime and questioned the interpretation and application of the text in terms of the appropriate training of police officers. It was even suggested that section 49 created a 'right to flee'; protecting the rights of criminals more than the rights of law-abiding citizens and police officers.<sup>55</sup>

In 2009, Bheki Cele, the National Commissioner of Police announced that there were plans to further amend section 49 of the Criminal Procedure Act 51 of 1977 as the current section was ambiguous.<sup>56</sup> A bill was consequently formulated, proposing various amendments to section 49 of the Criminal Procedure Act of 1977, as amended by Section 7 of the Judicial Matters Second Amendment Act 122 of 1998. The proposed section 49 reads as follows:

'Use of force in effecting arrest

49. (1) For the purposes of this section –

(a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect; [and]

<sup>52</sup> See Bruce op cit (n51) 141–159; Van der Walt op cit (n27) 142.

<sup>53</sup> Cowling op cit (n1) 116.

<sup>54</sup> Van der Walt op cit (n27) 142; See in general D Bruce 'Reasonable force? The use of force as a learning process' (2000) 20(8) *Crime and Conflict* 16–19.

<sup>55</sup> Van der Walt op cit (n27) 143.

<sup>56</sup> National Commissioner of the Police, General Bheki Cele, at the Business Against Crime South Africa (BACSA) Breakfast Meeting, Sun Hotel, Sandton, 28 October 2009, available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=5862&tid=6007>, accessed on 23 August 2011.

(b) 'suspect' means any person in respect of whom an arrestor has [or had] a reasonable suspicion that such person is committing or has committed an offence; and

(c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

(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 the resistance or to prevent the suspect from fleeing: Provided that the arrestor may use deadly force only if –

(a) the suspect poses a threat of serious violence to the arrestor or any other person; or

(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.'

Some of the key elements of this new provision, as set out in the Criminal Procedure Amendment Bill B39 – 2010, will now be discussed.

Section 49(1)(c), an additional subsection to section 49(1), now defines deadly force. This is a valuable addition as it addresses any potential ambiguity that may surround the interpretation of deadly force in terms of section 49. This insertion is furthermore necessary as the words have been deleted from subsection (2): 'that is intended or is likely to cause death or grievous bodily harm to a suspect', leaving the concept of lethal force in effecting an arrest open to interpretation.

The three requirements relating to aspects of the reasonable belief of the arrestor and relevant for the use of deadly force have also been amended. Now, provision is only made for two requirements: Deadly force may now only be used if the suspect poses a threat of serious violence to the arrestor or any other person,<sup>57</sup> or the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.<sup>58</sup> The deletion of the phrase 'any person lawfully assisting the arrestor' implies that the arrestor is the only person with authority to use lethal force when effecting an arrest. This omission could have both a positive and negative effect. A positive implication is that the arrestor, who is assumed to have authority to

<sup>57</sup> Section 49(2)(a) of the Criminal Procedure Act 51 of 1977.

<sup>58</sup> Compare this to the summary provided by Kriegler J in *Walters* on the practical effect of the *Govender* and *Walters* judgments; *Ex parte Minister of Safety and Security and Others: S v Walters* 2002 (2) SACR 105 (CC) at para [52]; Van der Walt op cit (n27) 144-145.

exercise the use of deadly force, will be the only person designated to employ such power in terms of the Act. A negative implication would however be that there is no expressed statement as to the extent to which a person assisting an arrestor in a particular situation may provide such assistance.

The deletion of the word 'grievous' and the substitution thereof with the word 'serious', presents a series of questions and concerns that need to be addressed. The Oxford Concise Dictionary<sup>59</sup> defines 'grievous' as 'severe', and 'serious' as 'not slight nor negligible'. If these words are construed in this context it indicates that 'serious' constitutes a less severe form of 'grievous', which would in turn mean that the insertion of the word 'serious' amounts to a less stringent criterion for the use of deadly force. This subsection could now be interpreted to denote the following: It would afford an arrestor a broader scope in which to exercise such discretionary powers and would limit any liability incurred by him/her in doing so. It would furthermore restrict the boundaries within which the arrestor has to remain in order not to violate the provisions provided for in the amended section 49.

In addition, the 'future danger principle' has been omitted and the 'threat of danger' requirement postulated in the *Walters* case has rather been included in the provision.<sup>60</sup> Van der Walt however argues that the 'future danger principle' is actually still incorporated within the provisions of section 49 as the bill – contrary to the decision in *Walters* – does not include the requirement that the suspect must offer an immediate threat of serious bodily harm to the arrestor or members of the public in general. Van der Walt argues that this omission of the word 'immediate' implies that deadly force may also be used when the arrestor reasonably believes that the suspect offers a serious threat of danger to him or others at any time and not only at the time of the arrest.<sup>61</sup>

## 7. Conclusion

It is evident from the above exposition that from the very first enactment of a provision regarding the use of lethal force to effect an arrest in South African criminal procedure, the provision has been subject to numerous amendments in order to provide greater clarity on when exactly, and in what circumstances, an arrestor may resort

<sup>59</sup> S Wehmeier (Ed) *Oxford Advanced Learner's Dictionary* (2000) 565 & 1167, respectively.

<sup>60</sup> *Ex parte Minister of Safety and Security and Others: S v Walters* supra (n58) at paras [40] & [52]; Van der Walt op cit (n27) 144.

<sup>61</sup> Van der Walt op cit (n27) 146.

to such extremes. However, despite these numerous and far-reaching amendments, the provision remains, to this day, controversial.

The key element of the 1917 provision was the notion of objectivity on the part of the arrestor when deciding to make use of potentially lethal force. From the 1955 amendments onward, it is noteworthy that numerous requirements and limitations have continuously been added in order to limit the arrestor's ability to make use of such extreme measures. And, while the main focus in the 1977 amendments was the concept of reasonableness, the 1998 amendment also included a proportionality test. With regard to the 1998 amendment, it is said that a major fear of the SAPS was that the provision would limit members of the police service to only shoot a suspect in self-defence. This, Van der Walt rightly argues, is incorrect as the provision on the use of (lethal) force in effecting an arrest has never had any bearing on the common-law right to self-defence but is rather exclusively dealing with the right to use (lethal) force to stop a fleeing suspect from getting away.<sup>62</sup> This is also evident from the 2010 Bill, in section 49(2)(b), which provides for the use of lethal force even in circumstances where the arrestor's life or bodily integrity is not even at stake.<sup>63</sup>

But, have these amendments been successful in clarifying the approach to be used by police officers when exercising their discretion to make use of potentially lethal force in order to effect an arrest? We respectfully agree with De Vos in this regard, when he says that:

'The suggestions by the Ministry that it would be able to change the wording of section 49(2) to "clarify" section 49(2) and to provide clear rules not requiring the exercise of a discretion, is just plain daft.'<sup>64</sup>

The amended wording of legislation cannot altogether inform the exercise of discretion by a police officer who is faced with a range of dangerous situations on a daily basis. The only viable solution to the controversy surrounding the use of lethal force would be to address the internal mechanisms of the SAPS, such as providing adequate training to police officials. Any attempt to remedy the problems experienced in practice with the use of force in effecting arrests by amending section 49, will only create a false sense of security for police officials,<sup>65</sup> as they could still incur criminal liability if they do not apply their discretion in an appropriate manner.

<sup>62</sup> Van der Walt op cit (n27) 146; For a contrary view see Snyman op cit (n43) 536–549 and D Bruce 'Killing and the Constitution – arrest and the use of lethal force' (2003) 19(3) *South African Journal on Human Rights* 430–454.

<sup>63</sup> Van der Walt op cit (n27) 146.

<sup>64</sup> P de Vos 'If we start killing our own people we all lose', 13 November 2009, available at [constitutionallyspeaking.co.za/if-we-start-killing-our-own-people-we-all-lose/](http://constitutionallyspeaking.co.za/if-we-start-killing-our-own-people-we-all-lose/), accessed on 29 July 2011.

<sup>65</sup> Ibid.