CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 28/01

Ex parte

THE MINISTER OF SAFETY AND SECURITY — 1st Intervener

and

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — 2nd Intervener

together with

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Interested Party

and

THE CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION — Amicus Curiae

In re

THE STATE

versus

EDWARD JOSEPH WALTERS — Accused No 1

MARVIN EDWARD WALTERS — Accused No 2

Heard on : 15 November 2001

Decided on : 21 May 2002

JUDGMENT

KRIEGLER J:

Introduction

1. This case concerns the constitutionality of statutory provisions that permit force to be used when carrying out an arrest. Chapter 5 of the Criminal Procedure Act 51 of 1977 (the CPA),[1] makes plain that the purpose of arrest is to bring suspects before court for trial. It also specifies when and in what manner a person may be arrested.[2] Although the vast majority of arrests is carried out by police officers, not only they are authorised by Chapter 5 to arrest suspects. In given circumstances private persons may also carry out arrests, either on their own[3] or when called upon to assist a police officer.[4]

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1 Comprising s 39 to 53.

2 This is in conformity with the Constitution, which in s 35(1)(d) balances the temporary deprivation of liberty inherent in arrest against "the right . . . to be brought before a court as soon as reasonably possible".

3 See s 42 of the CPA.

4 See s 47 of the CPA.

2. The crucial provisions are contained in two interrelated sections of Chapter 5. The first is section 39(1) which, in the course of prescribing the manner of effecting an arrest, provides that "if the circumstances so require" the body of the suspect is to be "forcibly" confined. This is then supplemented by section 49, which makes more detailed provision for the use of force in effecting an arrest. It contemplates two situations where force may be used: (a) to overcome resistance to arrest by the suspect and (b) to prevent the suspect from fleeing. Subsection 49(1) governs the use of such force in principle while subsection (2) deals specifically with what it terms "justifiable homicide". This is how the section reads:

> **"Use of force in effecting arrest.**
>
> (1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person –
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> (a) resists the attempt and cannot be arrested without the use of force; or
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> (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,
>
> the person so authorized 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 that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide."

3. Such a provision authorising the use of force against persons – and more particularly

justifying homicide – inevitably raises constitutional misgivings about its relationship with three elemental rights contained in the Bill of Rights.[5] They are the right to life, to human dignity and to bodily integrity. The Constitution commands the state and all its organs to respect, protect, promote and fulfil all of the rights protected by the Bill of Rights.[6] These particular rights are, insofar here relevant, expressed in the following terms by sections 10, 11 and 12 of the Constitution:

> **"10. Human dignity**
>
> Everyone has inherent dignity and the right to have their dignity respected and protected.
>
> **11. Life**
>
> Everyone has the right to life.
>
> **12. Freedom and security of the person**
>
> (1) Everyone has the right to freedom and security of the person, which includes the right –

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5 Which the Constitution introduces as follows in s 7(1):

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

6 See s 7(2) of the Constitution read with s 8(1), which provide as follows:

> "7(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights."
>
> "8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

(a) . . . .

(b) . . . .

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right –

(a) . . . .

(b) to security in and control over their body; and

(c) . . . ."

4. Although the centrality of these rights to the value system of the society envisaged by the Constitution is well-known, it would be useful to recall what was said about them when first this Court had occasion to consider the constitutionality of a law that sanctioned the killing of human beings. I am referring to the death penalty case, *S v Makwanyane and Another*.[7] There the constitutionally challenged law authorised the state itself to kill persons under a criminal justice system that permitted capital punishment. Here the challenge is to a law conferring on individuals trying to carry out a preparatory step in the system of criminal justice the right to use force and even to kill. Also, the challenge in *Makwanyane* was brought under the interim Constitution[8] while this case is concerned with the 1996 Constitution. Yet the parallels between the two cases are obvious

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7 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

8 The Constitution of the Republic of South Africa Act 200 of 1993.

and the differences in wording between the two constitutions in respect of the rights in issue not really significant.

5. In *Makwanyane* there were a number of other considerations in issue and the individual concurring judgments each emphasised one or more particular features, but a thread that ran through all was the great store our Constitution puts on the two interrelated rights to life and to dignity. This, for instance, is what O'Regan J said:

> "The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.
>
> The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence – it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."[9]

6. The particular poignancy of these values for South Africans was underscored in that case by Langa J. His remarks are particularly relevant in the context of the present case. This is what he

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9 Above n 7 at para 326-7.

said:

> "The emphasis I place on the right to life is, in part, influenced by the recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence, resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties. The State has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life."[10]

For reasons that will become clear later, it would also be pertinent to repeat my colleague Langa J's reference to a famous United States Supreme Court case highlighting the principle that the state ought to play an exemplary role, as well as his application of this principle to the role that our state ought to play in promoting a culture of respect for human life and dignity:

> "Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society.[11] A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for

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10 Id at para 218.

11 Brandeis J in his dissenting opinion in *Olmstead et al v United States* 277 US 438, 485 (1928) put it succinctly:

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

human life and dignity by refusing to destroy that of the criminal. Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well."[12]

12 Above n 7 at para 222.

7. The question whether section 49 infringes any one or more of these rights – and the consequential question whether such infringement can be justified under section 36(1) of the Constitution[13]– will be considered later, after an outline of the factual and legal context in which these constitutional issues have arisen. It is also necessary to identify the parties and to mention a number of associated questions that have to be answered.

The factual context

8. It all started with a murder trial before the High Court at Umtata. The prosecution arose from a shooting incident in Lady Frere one night in February 1999 when the two accused, a father and son, shot at and wounded a burglar fleeing from their bakery. One or more of the burglar's wounds proved fatal, resulting in a murder charge to which the defence raised the exculpatory provisions of section 49(2). The prosecution disputed both the factual and legal foundation of this defence, besides challenging the constitutional validity of the section on which it was founded.[14]

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13 Section 36 of the Constitution is quoted in para 27 below.

14 It is not necessary to consider in this case whether it is open to the state to challenge the constitutionality of a statutory defence. This question is therefore left open.

9. The presiding judge found the section inconsistent with the Constitution – and consequently invalid – to the extent that it legally sanctions the use of force to prevent the flight of a suspect.[15] This, he found, is inconsistent with the suspect's constitutionally guaranteed rights to life and human dignity. The judge also concluded that the extent to which these rights were limited by the section could not be justified under section 36 of the Constitution. Though he carefully worded a declaration of invalidity designed to strike down section 49 only to the extent that it permits the use of force to prevent a suspect from fleeing,[16] he did not try to limit the retrospective effect of the declaration of invalidity, nor to suspend its operation, and referred the declaration to this Court for

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15 The judgment of the High Court is reported as *S v Walters and Another* 2001 (10) BCLR 1088 (Tk).

16 The relevant paragraphs of the order, id at para 38, read as follows:

> "1. The provisions of section 49(1)(b) of the Criminal Procedure Act 51 of 1977 (including the words "*or to prevent the person concerned from fleeing*") are declared to be inconsistent with the Constitution and invalid.
>
> 2. The provisions of section 49(2) of the same Act 51 of 1977 insofar as they refer to the fleeing suspect (including the words "*or prevent him from fleeing*") are declared to be inconsistent with the Constitution and invalid." (My emphasis)

confirmation in terms of section 172(2)(a) of the Constitution.[17] At the same time he adjourned the proceedings before him, remarking that "[t]he accused will suffer no real prejudice as they are out on bail."

The parties

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17 Section 172(2)(a) of the Constitution reads as follows:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

See also s 167(5) which provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

10. Although section 172(2)(d) of the Constitution afforded both the prosecution and the accused an automatic right to appeal or apply directly to this Court for confirmation or variation of the order of invalidity,[18] neither wished to exercise this right. Consequently directions were issued[19] for the orders of invalidation made by the High Court to be drawn to the attention of the Ministers of Justice and of Safety and Security as well as the Commissioner of the South African Police Service (the Commissioner) to afford them the opportunity to make representations regarding confirmation of the orders or otherwise if they so wished. The Minister of Justice did not formally intervene in the proceedings, as section 172(2)(d) entitled him to do as the political head of the department of state responsible for the administration of section 49. He nevertheless briefed counsel who submitted written and oral argument in support of the partial invalidation ordered by the High Court. The Minister of Safety and Security, supported by the Commissioner, contended for the validity of the section, filed extensive evidentiary material and strenuously opposed the findings of the trial court. The Centre for the Study of Violence and Reconciliation, a non-governmental organisation with special expertise in the field of combatting violent crime and with a special interest in the use of force by and against the police, was admitted as *amicus curiae* and joined with the Minister of Justice in challenging the constitutional validity of the section.

The issues

11. Apart from the main issue of the constitutional validity of section 49, the case presents a

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[18] Section 172(2)(d) of the Constitution provides as follows:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

number of further constitutional questions or "issues connected with decisions on constitutional matters", to use the language of section 167(3)(b) of the Constitution, which also fall within this Court's jurisdiction.[20] Each of these, though ancillary to the principal question of the validity of the section, is of some moment in its own right. It will be convenient to outline them at this introductory stage and then to return to a discussion of each once the principal issue has been dealt with.

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19 In terms of rule 15(5) of the Constitutional Court rules.

20 Section 167(3) of the Constitution provides as follows:

> "The Constitutional Court –
> (a) is the highest court in all constitutional matters;
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

12. The first ancillary question relates to the application of the principle of the binding authority of judicial precedent where constitutional issues are involved. The High Court, in finding the section constitutionally invalid to the extent stated, consciously departed from a decision delivered shortly before in the Supreme Court of Appeal (the SCA) in the case of *Govender v Minister of Safety and Security*.[21] In this latter judgment the SCA, putting a particular construction on subsection (1) of section 49, held it to be constitutionally valid. The High Court rejected both the interpretation and the resultant finding of the SCA, saying that these were constitutional questions on which the decisions of this Court and not those of the SCA were binding on other courts. Decisions of the SCA on constitutional questions, so the trial court reasoned, should not be followed by High Courts when they find them to be wrong. This line of reasoning and conclusion have serious implications for established interrelationships in our hierarchy of courts and consequently for the administration of justice in general. It also has implications for the rule of law.

13. Consideration will also have to be given to the procedure adopted by the High Court in determining the constitutional challenge to the section without first dealing with the criminal trial on its factual or legal merits. It will also be necessary to touch on the implications of retrospective invalidation of the exculpatory provisions of section 49(2) and to consider its potential impact on the question of the guilt of the accused, who acted at a time when the indemnification afforded by the subsection still stood unimpeached.

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[21] 2001 (4) SA 273 (SCA).

14. An additional peculiarity of this case is that a provision specifically intended to replace the whole of section 49 was adopted by Parliament in 1998 but has not yet been put into operation. The constitutional propriety of such a delay on the part of the executive in putting into operation a statutory provision passed by the legislature, is tangentially relevant and is touched on below. In this context mention will also be made of submissions regarding the meaning and practicability of the new section. Having outlined the various peripheral matters, it would be convenient to turn to the submissions made on the main issue in this case, namely, the constitutional validity of section 49.

Submissions regarding the constitutionality of section 49

15. The Department of Justice has a substantial interest in a definitive ruling on the validity of the section. It has for several years been of the view that the section in its present form is not constitutionally defensible and sponsored the revision which, in amended form, became the new section 49 in 1998. The basic submission on behalf of the Minister of Justice in this Court was that subsection 49(1) can be saved along the lines adopted by the SCA in *Govender*,[22] but that the right to use deadly force conferred on an arrester under subsection (2) of section 49, clearly infringes each of the three protected rights in issue. Therefore, so it was argued, the case really turns on the question whether the limitation can be justified under section 36 of the Constitution. Here the submission was that the subsection fails the limitation test, mainly because it does not require that the use of deadly force be proportional to the harm sought to be averted by such use. Irrespective of the objective reasonableness of the force, the subsection declares any consequent death to be

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22 Id.

justifiable homicide and leaves room for the proverbial shooting of a fleeing child for having stolen an apple.

16. Counsel for the *amicus* went further, arguing that both subsections of section 49 are inconsistent with the fundamental rights mentioned and cannot be saved under section 36, even if interpreted along the lines indicated in *Govender*. A substantial body of supporting written material submitted by the *amicus* consisted mainly of affidavits by a senior researcher on the staff of the *amicus*, Mr RD Bruce. He has academic grounding and practical experience related to two broad areas of specialised interest: (a) accountability of and control over the police, including management of their use of force; and (b) the process of crime investigation and prosecution. Much of his work since 1996 was done for the Independent Complaints Directorate and included research relevant to the implications for the Constitution of the use of force by the South African Police Service (the SAPS). His research had been both qualitative and statistical, the latter based largely on data released officially by the police from time to time. Mr Bruce has also had exposure to a substantial body of international English language material relating to police work and the use of force in the course thereof. An essential lesson he has distilled from these sources, especially in North America, is that force tends to beget force and violence, violence. More importantly, the converse seems to hold true; where the use of firearms by the police has been cut down, criminals tend to follow suit in their interaction with the police.

17. The approach adopted by counsel representing the Minister of Safety and Security and the Commissioner was not as clear-cut, although ultimately issue was joined mainly on whether the

section could be saved under section 36 of the Constitution. At the hearing it transpired that the written material lodged with the Court on behalf of the *amicus* had for some reason not reached counsel acting for the Minister of Safety and Security and the Commissioner. They were then given an opportunity to supplement their papers after the hearing, which they did. Consequently the Court had the benefit of extensive evidence and detailed submissions on behalf of all relevant sides to the debate.

18. The evidence and submissions on behalf of the Minister of Safety and Security and the Commissioner were gleaned from material compiled over several years. In the course of the ongoing debate about the appropriate limits to be placed on the use of force to arrest a suspect, the Minister and the Commissioner had caused an extensive survey to be made of how the use of force by police officers is controlled in a wide spectrum of democratic and/or comparable jurisdictions. This information has recently been updated for the purposes of this case and was filed in support of the case presented on their behalf. Much of this material was directed at the opinion evidence of Mr Bruce.

19. A catalyst for research by the SAPS into the constitutionality of the use of deadly force by police officers, was a case arising out of the fatal shooting by a policeman of a ten-year-old boy in Vryburg one evening in mid-April 1994. The local police contended that the circumstances were covered by section 49(2). The boy's mother subsequently instituted motion proceedings alleging that this subsection infringed the rights guaranteed under sections 9, 10, 11, 24 and 30 of the interim

Constitution.[23] The Minister of Justice accepted that the section could be unconstitutional in part and abided the court's decision. The Commissioner and the Minister of Law and Order,[24] however, contended that the section was constitutionally defensible and the survey of comparative provisions in other jurisdictions was launched on their instructions. The child's mother ultimately asked that this constitutional issue be referred to this Court for determination, as was allowed under the jurisdictional regime prescribed by the interim Constitution.[25] The application for referral was refused and an application for leave to appeal is still pending in the High Court.[26] It is ironic that one of the grounds on which the application for referral was refused was that, although there was a reasonable prospect that this Court would declare subsection 49(2) constitutionally invalid, important amendments to the section were said to be imminent. The judge accordingly held that it would not be in the interests of justice to refer for constitutional consideration a statutory provision so manifestly on its last legs. That was in December 1997.

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23 These sections of the Constitution of the Republic of South Africa Act 200 of 1993 related to the right to life, human dignity, freedom and security of the person, administrative justice and children's rights respectively.

24 As the Minister of Safety and Security was then known.

25 See s 102(1) read with s 98(2) of the interim Constitution.

26 The judgment is reported as *Raloso v Wilson and Others* 1998 (4) SA 369 (NCD); 1998 (1) BCLR 26 (NC). Apparently the disposal of the case awaits this judgment.

20. Clearly the SAPS took the need to rethink their attitude to section 49 seriously. The papers filed by the *amicus curiae* include a copy of a special service order issued by the Commissioner to the SAPS in January 1997. It deals with the use of force under section 49 in the light of the provisions of the interim Constitution.[27] The order commences with a reminder that section 13(3)(b) of the South African Police Service Act 68 of 1995 prescribes generally that whenever a member is authorised by law to use force, only the minimum force necessary in the circumstances may be used. The order then proceeds to give detailed and explicit instructions to all members of the SAPS limiting their use of force under section 49 pending its amendment.[28] The order also makes plain that (i) police officers can use force only where it is considered on reasonable grounds to be necessary to overcome resistance or to prevent flight; (ii) the least degree of force necessary has to be used; (iii) such force has to be proportional to the seriousness of the crime committed or reasonably suspected to have been committed by the arrestee; (iv) in any event the use of potentially deadly force is permissible only where the arrest is for relatively serious offences listed in a schedule to the order.[29] The order went on to explain that where an officer intends to shoot at an arrestee, the shooting has to be preceded by a warning and/or a warning shot whenever that is reasonably possible. The order emphasises that members have at all times to consider whether force is required

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27 The formulation of the particular rights in the two constitutions can for present purposes be taken as essentially the same.

28 The order says that the SAPS had suggested to the Department of Justice that the section be amended to bring it into line with the fundamental rights contained in the interim Constitution and anticipated that it would be submitted to Parliament in the first half of 1997.

29 The list differs from the First Schedule to the CPA but still includes crimes such as stock theft, drug dealing, and car theft.

at all. The order also explains by way of example that where the identity of the suspect is known and he can be picked up later, the use of force to prevent the arrestee from fleeing is never justified, whatever crime may have been committed. Moreover, the order emphasises, deadly force is never permissible unless the crime in question is one listed in the schedule to the order. Lastly, the order makes plain that it in no way qualifies the use of force in self defence or the defence of others.

21. The argument in this Court on behalf of the Minister of Safety and Security and the Commissioner proceeded from the basis that section 49 could be construed consistently with constitutional norms by both reading in and reading down.[30] Taking a lead from judicial interpretations of the section and its predecessors, the submission was that the two subsections should be read together and as supplementing one another. Thus interpreted, so it was submitted, the section contained sufficient constraints on the use of force, including lethal force under subsection (2), to align our section 49 with comparable provisions in open and democratic societies such as Germany, France, Canada, the Netherlands and some state jurisdictions in the United States of America.

22. The further submission was that the section, in common with comparable codes abroad,

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30 How this could be done at the interpretation stage, was not explained. Presumably counsel used these terms to denote a special construction that could be put on the section by purposive interpretation. Though this is not the place for a semantic discourse, it should be observed that the technical sense in which the term "reading down" is ordinarily used by this Court, is a method of constitutional construction whereby a more limited meaning is given to a statutory provision, where it is reasonably possible to do so, in order that the provision in question may not be inconsistent with the Constitution; whereas the term "reading in" is used to connote a possible constitutional remedy following on a finding of the constitutional invalidity of such provision. See for example *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) para 23-4; and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) para 22-5.

required both subsidiarity and proportionality. By this is meant that (a) force is permitted only where there are no lesser means of achieving the arrest and (b) such force must be reasonably proportionate to the seriousness of the suspect's offence. Thus a firearm may be used only where the suspect cannot be caught or brought to book by means other than shooting and in any event only where the relative gravity of the crime warrants such a degree of force. In the alternative, counsel for the Commissioner urged the Court to afford Parliament time to draft a suitable new section if section 49 were found to be constitutionally bad. In this context it was submitted that the new section contained in Act 122 of 1998 was so unreasonably restrictive that it was unworkable.

Constitutionality of section 49

23. The section and its predecessors[31] have been on the statute book in this country for some 165 years and, being contentious, they elicited a good deal of judicial and academic criticism long before the advent of constitutionalism.[32] This criticism arose largely because the section allows the use of

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31 Section 1 of Ordinance 2 of 1837 (C); s 41 of the Criminal Procedure Ordinance 1 of 1903 (T); s 44 of the Criminal Procedure Act 31 of 1917; and s 37 of the Criminal Procedure Act 56 of 1955.

32 For judicial comment see for example *R v Hartzer* 1933 AD 306; *R v Britz* 1949 (3) SA 293 (A); *R v Koning* 1953 (3) SA 220 (T); *Mazeka v Minister of Justice* 1956 (1) SA 312 (A); *R v Horn* 1958 (3) SA 457 (A); *R v Metelerkamp* 1959 (4) SA 102 (E); *R v Labuschagne* 1960 (1) SA 632 (A); *Matlou v Makhubedu* 1978 (1) SA 946 (A); *S v Nel and Another* 1980 (4) SA 28 (E); *Wiesner v Molomo* 1983 (3) SA 151 (A); *Macu v Du Toit en 'n Ander* 1983 (4) SA 629 (A); *S v Martinus* 1990 (2) SACR 568 (A); *S v Martin* 2001 (2) SACR 271 (C). For other comment on the section and s 37 of Act 56 of 1955 see Harcourt *Swift's Law of Criminal Procedure* 2 ed (Butterworths, Durban 1969) at 67-8; Dugard *South African Criminal Law and Procedure Vol IV: Introduction to Criminal Procedure* (Juta, Cape Town 1977) at 68-9; Hiemstra *Suid-Afrikaanse Strafproses* 3 ed (Butterworths, Durban 1981) at 96-9 and 4 ed (1986) at 102-6; Louw and De Jager "Die geskiedkundige ontwikkeling van die reëls insake straffelose doodslag tydens arres in die 'common law'" (1988) 3 *Tydskrif vir die SA Reg* (*Journal of SA Law*) 426. For comment since the advent of the constitutional era see Du Toit et al *Commentary on the Criminal Procedure Act* Service 24 (Juta, Cape Town 2000) at 5-26 to 30; Steytler *Constitutional Criminal Procedure* (Butterworths, Durban 1998) at 7-76; Rudolph "The 1993 constitution - Some thoughts on its effect on certain aspects of our system of criminal procedure" (1994) 111 *SA Law Journal* 497 at 501; Watney "To shoot or not to shoot: The changing face of section 49 of the Criminal Procedure Act 51 of 1977" (September 1999) *De Rebus* 28.

force, not only to overcome resistance but also to prevent flight and – albeit in limited circumstances – sanctions the killing of a suspect. The use of force to overcome resistance to an attempted arrest was in itself problematic, especially the use of a firearm, but the more difficult part of the problem was the licence to use such force to prevent the escape of a suspect. Now, of course, section 49 is to be evaluated according to constitutional norms.

24. The Minister of Safety and Security, the Commissioner and the rank and file of the SAPS have a special interest in knowing what the constitutional status of section 49 is. Although the section does not specifically refer to police officers but applies generally to all instances of forceful arrest, it is largely the police that come within its ambit. By reason of its constitutionally mandated law enforcement duties,[33] it is the SAPS and its officers that are primarily concerned with the power and duty to carry out arrests; and it is these officers who are most frequently exposed to situations where the use of force is necessary or may subjectively be perceived to be such. It is the police that bear the brunt of the war against crime and it is these men and women who have the most direct interest in having clarity as to the boundaries of constitutionally permissible force when apprehending or attempting to detain suspects. They in particular are entitled to be told in clear language whether the section is invalid and, if so, to what extent and why.

25. The starting point in answering these questions is to emphasise that now, since the advent of

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[33] Section 205(3) of the Constitution describes the objects of the SAPS in the following terms:

> "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

constitutional democracy in South Africa, the legally permissible boundaries of such force have to be assessed afresh in the light of constitutional norms. This is what Chaskalson P, speaking on behalf of this Court in the *Makwanyane* case,[34] observed about the use of deadly force by police officers in carrying out an arrest:

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34 Above n 7.

> "The case of a police officer shooting at an escaping criminal was also raised in argument. This is permitted under s 49(2) of the Criminal Procedure Act as a last resort if it is not possible to arrest the criminal in the ordinary way. Once again, there are limits. It would not, for instance, be permissible to shoot at point blank range at a criminal who has turned his or her back upon a police officer in order to abscond, when other methods of subduing and arresting the criminal are possible. We are not concerned here with the validity of s 49(2) of the Criminal Procedure Act, and I specifically refrain from expressing any view thereon. Greater restriction 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. Shooting at a fleeing criminal in the heat of the moment is not necessarily to be equated with the execution of a captured criminal. But if one of the consequences of this judgment might be to render the provisions of s 49(2) unconstitutional, the Legislature will have to modify the provisions of the section in order to bring it into line with the Constitution."[35]

Clearly these remarks are directly in point in the present case, where the central issue is indeed the constitutionality of section 49.

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35 Id at para 140.

26. As observed at the outset, the Bill of Rights spells out the fundamental rights to which everyone is entitled and which the state is obliged to respect, protect, promote and fulfil. An enactment (like section 49) may limit these rights only if – and to the extent that – the limitation can be justified under section 36 of the Constitution. Otherwise it has to be declared invalid under section 172(1).[36] This is essentially a two-stage exercise. First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of section 39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then.

27. If there is indeed a limitation, however, the second stage ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and

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[36] Section 172(1)(a) reads as follows:

> "When deciding a constitutional matter within its power, a court –
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (i) may make any order that is just and equitable, including –
> (ii) an order limiting the retrospective effect of the declaration of invalidity; and
> (iii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

purpose of the limiting enactment.[37] Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved. It provides as follows:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

28. What looms large in both the threshold and the limitation phases of the exercise in the present case, is that the right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of any of these rights, would for its justification demand a very compelling countervailing public interest.

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[37] The nature of this balancing exercise was first explained by Chaskalson P in relation to the forerunner of s 36(1) of the Constitution, s 33(1) of the interim Constitution, in the case of *Makwanyane*, above n 7 at para 104.

29. The question whether section 49 does significantly limit any or all of the three rights in question need not detain us long. The meaning and effect of the section were judicially and academically dissected many times in the pre-constitutional era and were exhaustively debated when its replacement was being thrashed out in Parliament in 1998. In the period since the adoption of the new section there has also been continued research into and debate about the essential problems involved in the police's right to use force, especially deadly force, in effecting arrests. Consequently there is considerable information as to the scope and effect of the section. It has also been thoroughly examined by the SCA in *Govender*'s case.[38]

30. This is what it amounts to. Provided certain circumstances are present, it is lawful to use force and to inflict bodily harm, including potentially fatal wounds, on a person suspected of having committed a crime and who is resisting arrest and/or fleeing in order to escape it. The arrest of a person by definition entails deprivation of liberty and some impairment of dignity and bodily integrity. Where, in addition, it is accompanied by the use of force, the impairment of these rights is all the greater; and, ultimately, the use of potentially lethal force jeopardises the most important of all individual rights, the right to life itself. The extent to which section 49 limits the rights in question is therefore obvious. However narrowly the section is construed, its main thrust necessarily affords a prospective arrester statutory authority for conduct that could significantly impair an arrestee's right to claim protection of each of the three core rights in question. That being the case,

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[38] Above n 21.

the enquiry must turn to the question of justification.

31. Clearly this is the crux of the problem. How is a balance to be struck between the public interest at which section 49 is aimed and the significant impairment of the rights inherently put at risk by its implementation? Many questions have been raised as to the limits that ought in principle to be put – and would be feasible to put consistently with the demands of preserving law and order – on the use of firearms by police officers in the course of their duties. The debate is coloured by our history of state violence being used to enforce repressive policies, the state often being personified by armed policemen. Today the debate is given added pungency by the high level of violent crime which often targets the police. There is moreover an apparent difference of opinion between the two ministries of state most directly concerned with the section. Each proceeds from and emphasises a particular public interest: on the one hand the Ministry of Safety and Security underscoring the pressing public need to afford the SAPS the powers they reasonably require to maintain law and order; and on the other side the Ministry of Justice seeks to conform with the constitutional command to promote and protect the fundamental rights and freedoms of all, including fleeing suspects.

32. When conducting the proportionality evaluation of section 49, it is important to remember that it, in contradistinction to most of the comparative provisions in other jurisdictions referred to in the research material, does not govern the use of force by police officers only. For instance, Mr Walters senior and his son, the accused in the criminal trial giving rise to these proceedings, are not policemen. They are included in the category of persons referred to in the section as "any person

authorised under this Act to arrest . . . another". These words hark back to sections 42 and 47 of the CPA, where such authority is conferred not only on police officers but also on ordinary members of the public, albeit in more limited terms. Police officers can reasonably be assumed to have been trained in the use of firearms and to have at least a rudimentary understanding of the legal requirements for conducting an arrest. They are also subject to the supervision and discipline of their superiors. None of these safeguards applies to the ordinary civilian, who is nevertheless also given the right to use force, provided it is done within the four corners of the section. Therefore, although historically the debate revolved around the use of deadly force by police officers and although the present impasse about a replacement for section 49 is largely the result of police resistance to the new section, any evaluation of the constitutional validity of section 49 must keep account of this wider dimension.

33. It should also be noted that we are not concerned here with a weighing up of competing rights to bodily integrity, dignity and life in the context of self defence or the protection of the life or safety of someone else. The principles of private defence are not in issue in this case. Section 49 is not directed at the right to defend oneself or someone else against the threat of harm. That right is not challenged in this case, nor is it addressed in this judgment. This needs to be emphasised as some of the material submitted on behalf of the SAPS seems to suggest that the right of police officers to defend themselves and others against threats of violence would be put in jeopardy by interpreting section 49 along the lines suggested by counsel for the Minister of Justice and the *amicus curiae*.

34. In *Govender*[39] the SCA decided that it was necessary to reinterpret subsection (1) of the section consistently with the Constitution and proceeded to do so. In *Govender*'s case the plaintiff's minor son was shot and permanently disabled while he and a companion were being pursued on foot by a policeman who had stopped a stolen motor car driven by the boy. The plaintiff had been non-suited in the trial court but the SCA, applying the reinterpreted criteria it determined, found the shooting to have been unlawful, upheld the appeal and referred the matter back for quantification of damages. Olivier JA, with Hefer ACJ, Smalberger ADCJ, Scott JA and Cameron JA concurring, commenced with an explanation of what statutory interpretation under section 39 of the Constitution entails, quoting Langa DP in the *Hyundai* case[40] and citing a number of other judgments of this Court dealing with the way in which courts can and should seek to harmonise statutory enactments with the Constitution.[41]

35. Although the present case is concerned also with the constitutionality of subsection (2) of

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39 Id.

40 Above n 30 at para 21-2.

41 *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 30 at para 23-4; *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (2) SACR 748; 1995 (12) BCLR 1579 (CC) at para 28.

section 49 while subsection (1) only was in issue in *Govender*, a discussion of the judgment is nevertheless necessary. The judge in the trial court here found it necessary for the purposes of his analysis to consider not only the use of deadly force under subsection (2) but also the general question of force against a fleeing suspect as regulated by subsection (1), so much so that he weighed and rejected the SCA judgment in *Govender*.

36. The *Govender* judgment finds that the objects and purport of section 49 are to protect the safety and security of all through the deterrence of an effective criminal justice system, thus preventing lawlessness and a loss of state legitimacy. The specific object of the section is to ensure that suspects do not readily flee from arrest and are brought to justice. At the same time the rights of all, including fleeing suspects, are to be protected. The telling observation is made – with respect correctly – that "[n]either the fleeing suspect nor the escaping convict becomes an outlaw."[42] The Court then seeks to balance the interests of the state and those of the fleeing suspect by applying the constitutional test of reasonableness and justifiability in an open and democratic society based on freedom and equality. It scrutinises the circumstances under which section 49(1) allows the wounding of a fleeing suspect and emphasises that the subsection permits

> "the use of such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing."

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42 Above n 21 at para 13.

37. Then, having considered the leading South African cases criticising the low threshold posed by the section for the use of firearms to prevent suspects from escaping arrest,[43] the judgment discusses the decision of the United States Supreme Court in *Tennessee v Garner*.[44] The Supreme Court, dealing with a Tennessee statute worded along the same lines as section 49, held that:

> "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so . . .
>
> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[45]

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43 *Britz* above n 32 at 303-4; *Mazeka* above n 32 at 316A-C; *Matlou* above n 32 at 957C-F.

44 471 US 1 (1985).

45 Id at 11-12.

38. Analysis of the decision in *Tennessee v Garner* and a review of the jurisprudence of a number of other open and democratic societies[46] leads Olivier JA to the conclusion that in reading section 49(1) consistently with the Constitution, the proportionality of the force to be permitted in arresting a fugitive must be determined not only by the seriousness of the relevant offence but also by the threat or danger posed by the fugitive to the arrester(s), to others or to society at large. He finds it "a rational and equitable way of balancing the interests of the State, society, the police officers involved, and of the fugitive" and "a proper mechanism for balancing collective against individual interests".[47] The judgment rejects measuring the degree of permissible force by the seriousness of the crime only, making the point that the use of potentially lethal force is inappropriate for a person suspected of a non-violent crime who tries to escape unarmed and poses no immediate or foreseeable physical threat to anyone. The judge finds support for such interpretation in the use of both the words "reasonable" and "necessary" in subsection (1) to qualify the permitted force. In the result Olivier JA holds that

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46 Canada: *R v Lines* [1993] O.J. No. 3284 and s 25(4) of the Canadian Criminal Code; Germany: *Bundesgerichtshof* (1992) 5 StR 370/92, BGHSt 39/1; United Kingdom: *Reference under s 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937 (HL) at 947*d*; European Court of Human Rights: *McCann and Others v United Kingdom* (1996) 21 EHRR 97 at para 207; United Nations: *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* at para 9.

47 Above n 21 at para 19.

> "the existing (and narrow) test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of proportionality between the nature and degree of the force used and the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole.
>
> . . . .
>
> The words 'use such force as may in the circumstances be reasonably necessary . . . to prevent the person concerned from fleeing' in s 49(1)*(b)* of the Act must therefore generally speaking (there may be exceptions) be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorised to arrest, or assist in arresting, a fleeing suspect has reasonable grounds for believing
>
> 1. 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
> 2. that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm."[48]

39. I respectfully agree. This interpretation put on section 49(1)(b) by the SCA in *Govender*'s case is constitutionally sound and serves to save it from invalidation. The order of invalidation made by the High Court in relation to this subsection can therefore not be confirmed. Moreover, although *Govender*'s case was concerned specifically with section 49(1)(b) and the non-lethal use of a firearm in order to arrest a fleeing suspect, the discussion and conclusions obviously inform any consideration of the other terms of section 49. The central finding in *Govender* generally limits the use of potentially deadly force to arrests where the fugitive poses a violent threat to persons on the scene or where the fugitive is reasonably suspected of having committed a crime involving the infliction or threatened infliction of serious bodily harm. The reasoning leading to this finding is

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48 Id at para 21 and 24.

helpful when dealing with the meaning of subsection 49(2) and its effect on the fundamental rights allegedly infringed by the section. This is so because subsection (1) deals generally with the use of force in effecting an arrest while subsection (2), with which the present case is directly concerned, concentrates on the use of deadly force in order to arrest suspected First Schedule offenders.

40. If one accepts the test in *Govender* as establishing the pre-requisites 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. By like token, if one accepts the SCA's general warning against the use of a firearm to prevent flight in the absence of a threat of serious bodily harm, the use of deadly force and its exculpation under subsection (2) absent such a threat, can hardly be sustained. One needs to add a weighty consideration before the lives of suspects can be risked by using a firearm or some other form of potentially deadly force merely to prevent escape.

41. Subsection (2) finds this additional consideration in the seriousness of the offence for which the fugitive is to be arrested. The legislature clearly wished to limit the licence to kill to serious cases. The spectre of a child being shot dead for snatching a mealie is, after all, stark. The mechanism chosen in subsection (2) to maintain reasonable proportionality with the use of deadly force, was to draw a distinguishing line between lesser and more serious offences and to permit the use of deadly force for the arrest of fugitives suspected of having committed crimes in the more serious category only. This was done by introducing the First Schedule and[49] providing that lethal

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[49] Schedule 1, as substituted by s 17 of Act 26 of 1987, reads as follows:

force may be legally warranted in arresting fugitives suspected of having committed one or other of these offences. But this line of distinction fails in its fundamental objective of achieving realistic proportionality. The schedule lists a widely divergent rag-bag of some 20 offences ranging from really serious crimes with an element of violence like treason, public violence, murder, rape and robbery at one end of the spectrum to, at the other end, relatively petty offences like pickpocketing or grabbing the mealie from the fruit-stall. What is more, the schedule includes offences that do not constitute any kind of physical threat, let alone violence. It is difficult to imagine why lethal force should be justified in arresting a fugitive who is suspected of having passed a forged cheque or a homemade banknote or, for that matter, having gratified his sexual urges with an animal.

"Treason.
Sedition.
Public violence.
Murder.
Culpable homicide.
Rape.
Indecent assault.
Sodomy.
Bestiality.
Robbery.
Kidnapping.
Childstealing.
Assault, when a dangerous wound is inflicted.
Arson.
Malicious injury to property.
Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.
Theft, whether under the common law or a statutory provision.
Receiving stolen property knowing it to have been stolen.
Fraud.
Forgery or uttering a forged document knowing it to have been forged. Offences relating to the coinage.
Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.
Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.
Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule."

42. Our law, unlike the criminal law of countries in the Anglo-American tradition, draws no distinction between felonies and misdemeanours. The rule of English common law that allowed police officers to use deadly force to arrest fleeing felons, who generally faced the death penalty anyway, could not be applied here. But even in the common law jurisdictions the distinction between felonies and misdemeanours became too blurred and arbitrary to serve as a rational boundary between those who could and those who could not be killed to prevent their escape. Modern firepower also greatly intensified the harshness of the rule while the inviolability of human life enjoyed increasing recognition in modern democracies.[50] As a result different criteria had to be evolved for distinguishing between crimes that are sufficiently serious to warrant lethal force being used to perfect an arrest and those where such a degree of force would be regarded as disproportionate to the societal interest in seeing their perpetrators apprehended.

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50 See *Makwanyane* above n 7 at para 144. See also *McCann* above n 46.

43. The balancing of these interests and the consequent line drawn by the United States Supreme Court in *Tennessee v Garner*[51] are instructive, not only as regards the unsuitability in modern times of drawing the distinction for permitting the use of deadly force along the felony/misdemeanour line, but also and more pertinently in relation to the need for proportionality when sanctioning deadly force to perfect an arrest. Justice White, writing for the majority, found it "constitutionally unreasonable" to use

> "deadly force to prevent the escape of all felony suspects, whatever the circumstances"

and continued:

> "It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.
>
> It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he

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51 Above n 44.

> has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[52]

44. In our violent society the proportionality point made by Justice White in *Tennessee v Garner* has particular cogency. Our Constitution demands respect for the life, dignity and physical integrity of every individual. Ordinarily this respect outweighs the disadvantage to the administration of justice in allowing a criminal to escape. These sentiments are wholly consonant with the views of this Court as expressed by Chaskalson P in paragraph 144 of his judgment in *Makwanyane*:

> "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 two rights above all others."

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52 Id at 11.

The value we place on these rights is important when one weighs them against the competing societal interest in promoting the efficient combatting of crime. As O'Regan J observed in *S v Manamela and Another (Director-General of Justice Intervening)*:[53]

> "The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be."

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53 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 69.

There is on the face of it a glaring disproportion in depriving an unarmed fleeing criminal of life merely in order to effect an arrest there and then. But perhaps it is necessary in the current climate of public concern about the level of crime and the perception that police officers would be nobbled if the scope of section 49 were to be diminished to repeat what I said in the bail case, *Sv Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*:[54]

> "Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of s 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights."

45. If due recognition is to be given to the rights limited by the section and the extent of their limitation, the resort to Schedule 1 in subsection (2) in order to draw the line between serious cases warranting the potential use of deadly force and those that do not, comprehensively fails the test of reasonableness and justifiability postulated by section 36(1) of the Constitution. The protection due to the rights of a suspect fleeing from arrest cannot be lifted merely because there is to be an arrest for having committed one or other of the wide variety of offences listed in the First Schedule. As we have seen,[55] this schedule not only includes relatively trivial offences, but what is more important, it

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54 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 68.

55 Above n 49.

includes offences involving no suggestion of violence and no hint of possible danger to anyone. The list is therefore simply too wide and inappropriately focussed to permit a constitutionally defensible line to be drawn for the permissible use of deadly force.

46. Moreover and in any event, section 49(2) inherently inclines unreasonably and disproportionately towards the arrester. As was observed in *Govender*, neither the seriousness of their crime(s) nor their trying to make off, nor even both circumstances, put such fugitives beyond the law. If the fugitive is not suspected of having committed a crime involving the infliction or threatened infliction of serious bodily harm or if the fugitive constitutes no threat to the arrester or to someone else or to the public at large and can be picked up later, there is no justification for the use of any significant force, let alone deadly force. In the case of section 49(2) there is consequently a manifest disproportion between the rights infringed and the interests sought to be advanced. The subsection was rightly held to be inconsistent with the right to life, human dignity and bodily integrity.

47. The observation in *Olmstead v United States* referred to by Langa J in the passage quoted above from his judgment in *Makwanyane* also needs to be repeated and underscored:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[56]

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[56] Above n 11.

We have a history of violence – personal, political and institutional. Our country is still disfigured by violence, not only in the dramatic form of murder, rape and robbery but more mundanely in our homes and on our roads. This is inconsistent with the ideals proclaimed by the Constitution. The state is called upon to set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors. Its role in our violent society is rather to demonstrate that we are serious about the human rights the Constitution guarantees for everyone, even suspected criminals. An enactment that authorises police officers in the performance of their public duties to use force where it may not be necessary or reasonably proportionate is therefore both socially undesirable and constitutionally impermissible.

48. The finding that the indemnity afforded by section 49(2) is constitutionally bad and has to be struck down, should create no problem for the SAPS. Indeed, if the Commissioner's order of January 1997 has been conscientiously obeyed, there is very little that need be done. But even if it has not, there ought to be no crisis. The legal position is really quite simple and the average police officer can be instructed sufficiently with relative ease and expedition. The variety of circumstances that occur in human experience is infinite. It would therefore be unwise to try to lay down hard and fast rules applicable in every conceivable situation. But the broad principles are clear enough to be understood and applied by anyone of average intelligence and commonsense. The Constitution[57]

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[57] In s 205(3).

obliges the police to

> "prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

Police officers do not have a discretion to fulfil these obligations if they wish – it is their duty to do so. They are always entitled and often obliged to take all reasonable steps, including the use of reasonable force, to carry out their duties.

49. Arresting a suspect in terms of sections 39 and 49 of the Criminal Procedure Act is one of these police duties. The purpose of an arrest is to take the suspect into custody to be brought before court as soon as possible on a criminal charge. It does not necessarily involve the use of force. On the contrary, the use of any degree of force to effect an arrest is allowed only when force is necessary to overcome resistance (by the suspect and/or anyone else), to an arrest by the person authorised by law to carry out such arrest. And where the use of force is permitted, only the least degree of force necessary to perfect the arrest may be used. Similarly, when the suspect flees, force may be used only where it is necessary and then only the minimum degree of force that will be effective may be used. Arrest is not an objective in itself; it is merely an optional means of bringing a suspected criminal before court. Therefore resistance or flight does not have to be overcome or prevented at all costs. Thus a suspect whose identity and whereabouts are known or who can otherwise be picked up later, can properly be left until then. Even when the suspect is likely to get clean away if not stopped there and then, arrest at every cost is not warranted. The might of the law need not be engaged to bring to book a petty criminal.

50. Nor should the essential failure of logic underlying the use of lethal force under section 49(2) be overlooked. The express purpose of arrest should be remembered. It is a means towards an end. Chapter 4 of the CPA[58] lists the four legally permissible methods of securing the presence of an accused in court. The first of these is arrest. Chapter 5 then sets out the rules which govern the application of this process in aid of the criminal justice system. Whatever these individual rules may say, for instance those in section 49(2) governing the use of lethal force to prevent a suspect's flight, the fundamental purpose of arrest – and the main thrust of everything that goes with it under Chapter 5 – is to bring the suspect before a court of law, there to face due prosecution. But killing the suspect is surely the most effective way of ensuring that he or she will never be brought before a court.[59] It can therefore hardly be said to be justified to shoot a suspect where there is no suggestion of a threat to anyone, such as happened with the boys running away from the police in the cases of *Raloso*[60] and *Govender*.[61]

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58 Consisting of s 38 only.

59 In *Tennessee v Garner* above n 44 at 10 Justice White aptly calls it "a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion."

60 Above n 26.

61 Above n 21.

51. It also needs to be emphasised that the lives of policemen and -women are not endangered by the constitutional interpretation of section 49(1) by the SCA in *Govender*, nor by a striking down of subsection 49(2) pursuant to the finding in this case. Nothing said in either judgment and nothing that flows from them can contribute one iota to the dangers that these brave men and women have to face in the performance of their often thankless task. The interpretation put on the existing section 49 in these two judgments has no bearing on the situation where the life or safety of the prospective arrester or of someone else is being threatened by the suspect. The right – and indeed the duty – of police officers to protect their lives and personal safety and those of others is clearly endorsed and in no respect diminished. What these judgments deal with – and all that they deal with – is the use of force merely to stop a fleeing suspect from getting away. The judgments do not say that a police officer who is threatened or who may reasonably apprehend that he or she is threatened, may not use a reasonable degree of proportionate force to avert the threat. Nor do they say that where the threat is – or is reasonably apprehended to be – directed at someone other than the arrester, reasonably proportionate force cannot be used to avert such threat. The judgments also do not say that a dangerous fugitive should be allowed to make good an escape when the use of force is all that can prevent it.

52. The two judgments do not require of police officers a greater or lesser degree of forethought about the use of force, deadly or otherwise, than was required before. The message the judgments contain is simple and could and should long since have filtered down to the proverbial police officer on the beat by means of training seminars, standing orders and the like. You may not shoot a fleeing

suspect merely because he will otherwise get away. You may not shoot at your suspect unless –

(a) you believe; and

(b) have reasonable grounds for believing that your suspect either

(i) poses an immediate threat of serious bodily harm to you or members of the public, or

(ii) has committed a crime involving the infliction or threatened infliction of serious bodily harm.[62]

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62 The circular issued by the Commissioner in January 1997 referred to in para 20 above was addressed to all deputy commissioners, provincial commissioners and commanding officers of all training establishments. It drew attention to s 49 and s 13(3)(b) of the South African Police Service Act 68 of 1995, which permits only minimal force where its use by a member is warranted. These instructions need only slight modification to meet the additional requirement of an immediate threat of serious bodily harm posed by the suspect. In the *Raloso* matter, above n 26, the Minister of Safety and Security had caused a general directive dated 11 April 1995 to be issued to the Service, saying:

"1. The current wording of sec. 49 (2) of the Criminal Procedure Act, is presently being reconsidered. As an interim measure, the following guidelines should be followed

concerning the relevant section:

1.1 The field of application ought to be restricted to serious offences (such as murder, armed robbery, assault with intent to inflict grievous bodily harm etc) or where there is a reasonable suspicion that the fugitive is a danger to the public.

1.2 The existing restrictions and prerequisites as determined by courts, must be applied rigorously.

1.3 All actions must invariably be reasonable and in agreement with the principle of minimum force."

Three things should be noted about the directive. First, it was apparently intended generally to qualify s 49(2) as far as police officers are concerned. Second, it was presented as "an interim measure" and, thirdly, although it purported to restrict the field of application of the subsection, the list of "serious offences" it mentioned opened with a vague "such as" and concluded with an open-ended "etc". In the result the guidance the directive could actually give to the police was problematic.

The expressed intention and effect of the judgments is that South African law on this topic is brought into line with that of comparable open and democratic societies based on dignity, equality and freedom, for instance *Tennessee v Garner*[63] in the United States and *McCann v United Kingdom*[64] in Europe.

53. The point of departure is the value our Constitution places on human life; and the judgments aim to protect the life and physical integrity of fleeing suspects against the threat of excessive force. It is in that regard alone that the judgments bring about a change. There is no change as regards the respect for and protection of the lives or safety of anybody other than the fleeing suspect. Neither the restricted meaning given to section 49(1), nor the striking down of subsection (2) waters down the right to defend oneself or others. The extent of this right remains as expressed unequivocally and clearly on behalf of this Court by Chaskalson P in his leading judgment in *Makwanyane*'s case:[65]

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63 Above n 44.

64 Above n 46.

65 Above n 7 at para 138.

"Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with s 33(1). [The equivalent of section 36 of the (final) Constitution.] To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty.[66] But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to."

54. In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

(a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.

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66 Self-defence is treated in our law as a species of private defence. It is not necessary for the purposes of this judgement to examine the limits of private defence. Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interest, in circumstances where it is reasonable and necessary to do so. *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A). Whether this is consistent with the values of our new legal order is not a matter which arises for consideration in the present case. What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. These interests must now be weighed in the light of the Constitution.

(b) Arrest is not the only means of achieving this purpose, nor always the best.

(c) Arrest may never be used to punish a suspect.

(d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.

(e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.

(f) 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 arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.

(g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.

(h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or 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.

(i) These limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

Stare decisis

55. The judge in the trial court, having resolved to adjudicate upon the constitutional challenge to section 49 raised by the prosecution, came face to face with the SCA judgment in *Govender* discussed above.[67] He analysed the reasoning of the SCA in *Govender*, found it to be at variance with dicta of this Court on constitutional issues, concluded that it was therefore not binding on him and declined to follow it. Instead he found subsections (1)(b) and (2) of the section, insofar as they refer to a fleeing suspect, to be inconsistent with the Constitution and declared them invalid to that extent. As intimated before, he then adjourned the hearing and referred the orders of invalidation to this Court for confirmation.

56. In declining to follow the precedent of *Govender*, the trial judge acknowledged the binding force of superior judicial precedent but rejected the reasoning and conclusion of the SCA in *Govender* as

> "not consistent with the decisions of the Constitutional Court on the issue of dealing with legislation that limits the rights entrenched in the Bill of Rights."[68]

The judge then also found that, because the SCA had lacked jurisdiction under the interim Constitution to determine constitutional issues, it had "overstepped its constitutional

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67 Above para 36.

68 Above n 15 at para 19.

mandate" in *Govender* and came to the conclusion that he was not bound by the judgment because

> "orders of constitutional invalidity made by the SCA rank in the same level with similar orders made by the High Courts."[69]

57. What is at issue here is not the doctrine of *stare decisis* as such, but its applicability in the circumstances of this particular case.[70] A brief comment on the doctrine will therefore suffice. The words are an abbreviation of a Latin maxim, *stare decisis et non quieta movere*, which means that one stands by decisions and does not disturb settled points. It is widely recognized in developed legal systems.[71] Hahlo and Kahn[72] describe this deference of the law for precedent as a manifestation of the general human tendency to have respect for experience. They explain why the doctrine of *stare decisis* is so important, saying:

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69 Id.

70 It should perhaps be pointed out that we are not concerned here with the limits put on the binding force of pre-constitutional judicial pronouncements by the requirements of s 39(2) of the Constitution. Here the SCA judgment was expressly couched in terms of this subsection.

71 See for instance Hogg *Constitutional Law of Canada* 3 ed (Carswell, Scarborough 1992) ch 8.7 at 219-21.

"In the legal system the calls of justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.

. . . .

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[72] Hahlo and Kahn *The South African Legal System and its Background* (Juta, Cape Town 1968).

> It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike . . . Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*." (Footnotes omitted.)[73]

58. The first reported instance in the constitutional era where the doctrine came pertinently under scrutiny was in *Shabalala v Attorney-General, Transvaal, and Another; Gumede and Others v Attorney-General, Transvaal*,[74] where counsel sought to persuade Cloete J that

> "where a Court is called upon to interpret the Constitution, that Court can depart from other decisions on the same point in the same Division if it disagrees with such other decisions. I cannot agree with this submission. It is settled law that a Court can only depart from the previous decisions of a Court of equivalent status in the same area of jurisdiction where it is satisfied that the previous decision is 'clearly wrong': *S v Tarajka Estates (Edms) Bpk en Andere* 1963 (4) SA 467 (T) at 470A; and cf *R v Jansen* 1937 CPD 294 at 297 and *Duminij v Prinsloo* 1916 OPD 83 at 84 and 85.
>
> I see no reason to depart from this salutary principle simply because the point at issue

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73 Id at 214.

74 1995 (1) SA 608 (T) at 618D-H; 1994 (6) BCLR 85 (T) at 95B-F.

> involves an interpretation of the Constitution. I appreciate that s 4(1) of the Constitution provides that 'This Constitution shall be the supreme law of the Republic . . .' and that s 4(2) provides that 'This Constitution shall bind all . . . judicial organs of State at all levels of government'; but those provisions do not in my view mean that the established principles of *stare decisis* no longer apply. Such an approach would justify a single Judge departing from a decision of a Full Bench in the same Division because he considered the interpretation given to the Constitution by the Full Bench to be in conflict with the Constitution, with resultant lack of uniformity and certainty until the Constitutional Court, whose decisions in terms of s 98(4) bind, *inter alia*, 'all judicial organs of State', had pronounced upon the question."

The constitution that was under discussion there was the interim Constitution[75] and the point at issue was the correctness of a previous interpretation of one of its provisions by another judge in the same division.

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75 Above n 8.

59. In 1999 Cloete J, speaking on behalf of a full bench of the Witwatersrand High Court, had occasion to revisit the question of the applicability of the doctrine of *stare decisis*, this time under the (final) Constitution. The argument related to the binding force on a lower court of an interpretation put on an enactment by a higher court which had arrived at its interpretation by applying the dictates of section 39(2) of the Constitution.[76] The contention was that this section freed a lower court from the duty to adhere to superior precedent. The judgment, reported as *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another*,[77] reiterated the passage in *Shabalala*'s case quoted above and continued:

> "I am fully aware that in terms of s 8(1) of the final Constitution the Bill of Rights applies to all law and binds, *inter alia*, the Judiciary. I am also aware that, whereas s 35(3) of the interim Constitution required a court, when interpreting a statute, to have 'due regard' to the spirit, purport and objects of the chapter on fundamental rights, s 39(2) of the final Constitution goes further and provides that a court 'must promote' the spirit, purport and objects of the Bill of Rights (*S v Letaoana* 1997 (11) BCLR 1581 (W) at 1591); and that s 39(2) provides that 'when interpreting any legislation . . . every court must promote the spirit, purport and objects of the Bill of Rights'. In my view, these changes do not affect the position as stated in the *Shabalala* case *supra* for the reasons given in the passage quoted.

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76 See s 39(2) which reads as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

77 1999 (4) SA 799 (W) at 811B-D.

To hold otherwise would be to invite chaos."

60. This statement of principle and the warning it contains are in point in the present case. According to the hierarchy of courts in Chapter 8 of the Constitution, the SCA clearly ranks above the High Courts. It is "the highest court of appeal except in constitutional matters".[78] Neither the fact that under the interim Constitution the SCA had no constitutional jurisdiction nor that under the (final) Constitution it does not enjoy ultimate jurisdiction in constitutional matters, warrants a finding that its decisions on constitutional matters are not binding on High Courts. It does not matter, as Cloete J correctly observed in *Bookworks*, that the Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals.

61. It follows that the trial court in the instant matter was bound by the interpretation put on section 49 by the SCA in *Govender*. The judge was obliged to approach the case before him on the basis that such interpretation was correct, however much he may personally have had his misgivings about it. High courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue. It should be made plain, however, that this part of the judgment does not deal with the binding effect of decisions of higher tribunals given before the constitutional era. Here we are concerned with a judgment by the SCA

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78 See s 168(3) of the Constitution.

delivered after the advent of the constitutional regime and in compliance with the requirements of section 39 of the Constitution.

Trial procedure

62. In the murder trial that initiated the instant case the prosecution disputed both the factual and legal foundation of the defence, beside challenging the constitutional validity of the section on which it was founded. The prosecution's non-constitutional challenge to the accused's defence under section 49 was based on the reappraisal of the section by the SCA in *Govender*'s case. The defence in turn raised both constitutional and common law objections to the propriety of gauging the legal culpability of the accused according to constitutional norms limiting the indemnity afforded by section 49 that had not been in existence at the time of the fatal shooting – or had at least not been judicially identified at that time. It was then that the presiding judge decided to determine the question of the constitutional validity of the section without resolving either the factual issues in the case or the non-constitutional questions of law. He expressly declined to deal with a legal submission by counsel for the accused that, irrespective of the invalidity, his clients had lacked unlawful criminal intent at the time of the shooting. He also held that, in the light of his view as to invalidity, it would be "futile" to give

> "serious consideration to the facts with a view to determine whether the requirements of the section were strictly complied with before claiming protection under it."[79]

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79 Above n 15 at para 37.

Instead, as intimated at the outset,[80] he struck down the section in part, without qualification as to retrospectivity or suspension of the invalidation, and referred the order to this Court for confirmation.

63. The result is most unfortunate. It is an established principle that the public interest is served by bringing litigation to a close with all due expedition. The law and the judicial process, in performing their vital conflict-resolution role, must provide a structure and mechanism whereby conflicts can be resolved and their consequent tensions can be relieved openly, fairly and efficiently. Delays and interruptions in the smooth course of litigation inevitably frustrate the proper performance of this role: justice delayed is justice denied. It is all the more true in criminal cases, particularly those involving serious charges where the stakes are high and tensions commensurately heightened. And, of course, while complainants, next-of-kin, other interested parties and the public at large have a material interest in having timeous closure, accused persons are constitutionally entitled to be tried with reasonable expedition.[81]

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80 Above para 9.

81 Section 35(3)(d) of the Constitution entitles all accused persons "to have their trial begin and conclude without

64. The mere fact that constitutional issues have arisen in a case does not justify piecemeal litigation. In *S v Mhlungu*[82] Kentridge AJ formulated the following rule of practice:

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unreasonable delay".

82 *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. One may conceive of cases where an immediate reference under s 102(1) would be in the interests of justice – for example, a criminal trial likely to last many months, where a declaration by this Court of the invalidity of a statute would put an end to the whole prosecution. But those cases would be exceptional. One may compare the practice of the Supreme Court with regard to reviews of criminal trials. It is only in very special circumstances that it would entertain a review before verdict."[83]

65. Shortly thereafter, in *Zantsi v Council of State, Ciskei, and Others*,[84] Chaskalson P quoted the following passage from the opinion of Matthews J in the United States Supreme Court in *Liverpool, New York and Philadelphia Steamship Company v Commissioners of Emigration*:[85]

> "[N]ever . . . anticipate a question of constitutional law in advance of the necessity of deciding it; . . . never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[86]

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83 Id at para 59.

84 1995 (4) SA 615 (CC); 1995(10) BCLR 1424 (CC).

85 113 US 33, 39 (1885).

86 Above n 84 at para 2.

Remarking that several other jurisdictions[87] had accepted this admonition as a general though flexible rule and endorsing it, Chaskalson P said:

> "This rule allows the law to develop incrementally. In view of the far-reaching implications attaching to constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised."[88]

66. The instant case was a criminal trial involving a very serious charge that was adjourned indefinitely. The outcome of the proceedings will touch the lives of many people. The accused face the prospect of many years in prison. They are left in suspense indefinitely and cannot organise their lives and affairs until the case against them is finally concluded. Their counsel may retire, accept judicial appointment or die. Witnesses who might have to be recalled or whose evidence becomes relevant with regard to sentence could also die or otherwise become unavailable. The recollection of all concerned must fade. The closing observation by the trial judge that the accused, being on bail, suffer no real prejudice, is therefore a considerable understatement. In any event, the delay unavoidably brings potential prejudice to the broader interests of justice.

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87 See *inter alia* Seervai *Constitutional Law of India* Vol I 3 ed (Tripathi, Bombay 1983) at para 11.200; Casey *Constitutional Law in Ireland* 2 ed (Sweet & Maxwell, London 1992) at 284; *The Law Society of Upper Canada v Skapinker* (1984) 8 CRR 193 at 214; *Borowski v Attorney-General of Canada* (1989) 57 DLR (4th) 231.

88 Above n 84 at para 5.

67. It would have been better for the judge to deal with the case before him routinely on its merits, listening to and weighing the cogency of the argument on behalf of the respective parties, resolving the issues of fact and law necessary for determination of the verdict and making the conclusions known to the parties as quickly and plainly as possible. The prosecution's resort to a constitutional issue did not warrant departing from the time-honoured procedure of determining a case once and for all by resolving all factual questions and legal issues necessary for its disposal. The constitutional issue, however important it might be, could and should have been kept in abeyance for determination only if and when it proved necessary for determining the guilt or innocence of the two accused. Be that as it may, the order of invalidation having been made, the referral was mandatory under sections 167(5) and 172(2) of the Constitution and this Court has to consider its confirmation.

Separation of powers

68. It is common cause that the new section 49 was adopted by Parliament in October 1998, assented to by the President on 20 November 1998 and published on 11 December 1998,[89] but has not yet been put into operation. A chronology of the new section's subsequent vagaries[90] reveals that at a meeting on 23 April 1999 the Minister of Safety and Security and the Minister of Justice agreed that promulgation would "be kept in abeyance to enable police training to take place".

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89 In Government Gazette No. 19590, Notice No. 1636.

90 Although the chronology did not form part of the papers lodged in the ordinary course prior to the hearing, there was no objection to its being handed up from the Bar by counsel for the Minister of Justice in the course of the hearing, nor was its accuracy challenged.

Pursuant to agreement reached at a meeting between these two ministers, some parliamentarians and members of the SAPS, the Minister of Justice advised the President towards the end of June 2000 to implement the provisions with effect from 1 August 2000. On 30 June 2000 the President signed a Proclamation fixing 1 August 2000 as the date on which sections 7 and 8 of the Amendment Act would come into operation. On 27 July 2000, however, Acting President Zuma wrote to the Minister of Justice informing him that as the SAPS was "not in a position to give effect to the provisions of the amended section", its implementation would be delayed. The Department of Justice continued pressing for implementation, but the President declined to publish and thus implement the Proclamation. During January to May 2001 the Minister of Safety and Security and the SAPS maintained that the amendments should be referred back to Parliament for revision, causing the Minister of Justice to write to his colleague on 30 May 2001, stating among other things:

> "As you are aware the Amendment Act, which reflects the will of Parliament and to which effect should be given, was placed on the Statute Book during December 1998. After more than two years the sections dealing with the use of force during arrest have not yet commenced. The situation has become untenable and it is increasingly difficult for me to account for the long delay. It will be appreciated if we could meet to finally resolve the implementation of the sections concerned."

The new section has still not been put into operation.

69. The Constitution acknowledges as a foundational principle the doctrine of separation of powers as between executive, legislature and judiciary. Section 43(a) of the Constitution says quite plainly:

"In the Republic, the legislative authority –

(a) of the national sphere of government is vested in Parliament, as set out in section 44 . . ."

It also makes detailed provision for the introduction of various categories of Bills and their adoption by both chambers of Parliament and deals with their consideration by the President. Section 79 provides for assent by the President to Bills adopted by Parliament. The part of section 79 relevant to this matter reads as follows:

"(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) . . . .

(3) . . . .

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either -

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality."

Subsection (1) gives the President two options: to assent to and sign a Bill or to refer it back to Parliament. The latter option is available only when the President has reservations about the Bill's constitutionality. If and when the Bill comes back to the President, there are once again two options: to assent to and sign the Bill or to refer it to this Court for a decision on its constitutionality.[91] If the Court finds that the Bill passes constitutional muster, the President

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91 *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) is an example of such a referral.

must assent to and sign it.

70. The national legislative process is concluded by section 81, which reads as follows:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

For present purposes two features of the section should be noted. First, that it requires prompt publication of the Bill once it has become an Act and, second, that there are two possible inception dates for such an Act; either upon its publication or on another date determined in the Act itself or in a manner it prescribes. Parliament is thus afforded the power by section 81 of the Constitution not to fix the date of inception of an enactment itself but to prescribe in such enactment how such date is to be determined.

71. Although the Constitution does not expressly say so, it is clear that this power vested in Parliament to include in an enactment terms for determining its date of inception, includes the power to prescribe that such date is to be determined by the President. The language of section 81 is wide enough to allow such a procedure and there is no objection in principle to a legislature, in the exercise of its legislative powers, leaving the determination of an ancillary feature such as an inception date to an appropriate person. It is therefore recognised legislative practice to use this useful mechanism to achieve proper timing for the commencement of new statutory provisions. Accordingly this Court has twice accepted the existence and constitutional propriety of the practice

without comment.[92]

72. In the instant case, the legislature chose the second option contemplated by section 81 of the Constitution. Section 16 of the Judicial Matters Second Amendment Act 122 of 1998, the statute with which we are concerned here, provides that its date of inception is to be determined by the President. It reads as follows:

> "This Act is called the Judicial Matters Second Amendment Act, 1998, and comes into operation on a date fixed by the President by proclamation in the *Gazette*."

The President was therefore to determine the date of commencement.

73. This power conferred on the President by section 16 of Act 122 of 1998 is a public power and has to be exercised lawfully for the purpose for which it was given in the enactment. It could not lawfully be used to veto or otherwise block its implementation. The new section 49 remains in abeyance for reasons that Parliament did not contemplate when the power to implement was given to the President. Resolution of the objections to the new section is the exclusive prerogative of Parliament. For this reason alone it would be quite improper for this Court to accede to the request addressed in argument that we express a view on the interpretation and constitutionality of the new

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92 See *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) and *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000* 2001 (11) BCLR 1126 (CC).

provision in order to facilitate resolution of the impasse. The constitutionality of that enactment has not been challenged before us. We have no jurisdiction to express any view and the less said on the topic the better. In any event, the thrust of the complaint about it is not its unconstitutionality but its unworkability, perceived or real. Suffice it to say that the new section bears the stamp of approval of the legislature and could be put into operation within a matter of days.

Remedy

74. Having come to the conclusion that there must be confirmation of the order in the trial court declaring s 49(2) invalid, the crucial question of timing arises. In principle, the finding of invalidity dated back to the moment the inconsistency arose between the section and the constitutionally protected rights it infringes. That would be 27 April 1994, when the interim Constitution came into force. Although, on the one hand, deferment of the invalidation would serve to prolong the life of a provision that offends against the basic value system of both constitutions, it would clearly be neither just, nor equitable to allow unqualified retrospectivity of invalidation. This the instant case demonstrates. When the two accused shot the fleeing burglar, they were ostensibly entitled to invoke the indemnity afforded them by section 49(2). The effect of the unqualified striking down of the section by the trial court might in their case in effect retrospectively criminalise conduct that was not punishable at the time it was committed. Whipping away the protective statutory shield against criminal prosecution with the wisdom of constitutional hindsight would not only be unfair but would arguably offend the right protected by section 35(3)(l) of the Constitution "not to be convicted for an act . . . that was not an offence . . . at the time it was committed". Similar considerations apply to any other criminal prosecutions where there was a fatal shooting under section 49 since the advent of

constitutionalism. On the face of it, therefore, it would be just and equitable if the order invalidating section 49(2) were to be made prospective only.

75. The question has however been raised whether a distinction should be drawn between the civil and criminal aspects of retrospective invalidation of section 49(2). The indemnity afforded by the subsection extends to both spheres of liability. Allowing the order to operate retrospectively in respect of civil liability only would not involve section 35(3)(l) of the Constitution and would not be as manifestly inequitable as retrospectively taking away a defence to a criminal charge. Nevertheless it would be anomalous to have such a distinction between civil and criminal liability and it would to some extent still be unfair to create even civil liability only after the event. As it is, the effect of the SCA's interpretation of the use of force generally in *Govender*'s case is that all actions arising out of the shooting of a fugitive from arrest that were not finally disposed of or otherwise defunct when that judgment was delivered, have to be dealt with in accordance with the law as expounded in that case. Consequently, there ought to be an order qualifying prospectivity under section 172(1)(b) of the Constitution in order to prevent injustice.

76. As regards the period for which the invalidation of section 49(2) should still be suspended, little need be said. There is an amending provision bearing the stamp of approval of the legislature waiting in the wings. It could be put into operation within a matter of days. In any event, should the striking down of subsection 49(2) become effective upon the delivery of this judgment, no harm can befall the country. Subsection (1), as interpreted in *Govender*'s case, regulates the use of all force when carrying out an arrest. In the circumstances there need be no suspension of the invalidation of

section 49(2) brought about by this judgment.

Order

77. In the result the following order is made:

1. The order made by the High Court on 12 July 2001 in the case of *The State v Edward Joseph Walters and Marvin Edward Walters* (Case No 45/2001, Transkei) relating to the constitutional validity of the provisions of section 49(1)(b) and section 49(2) of the Criminal Procedure Act 51 of 1977 is set aside.
2. The following order is substituted for the order referred to in paragraph 1:
   2.1 Section 49(2) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid.
   2.2 The order in 2.1 is prospective only.
3. The case of *The State v Edward Joseph Walters and Marvin Edward Walters* (Case No 45/2001, Transkei) is referred back to the High Court for resumption and conclusion of the criminal trial against the accused on the basis that section 49(2) of the said Act is constitutionally valid.

Chaskalson CJ, Langa DCJ, Ackermann J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du

KRIEGLER J

Plessis AJ and Skweyiya AJ concur in the judgment of Kriegler J.

For the 1st and 2nd Intervening Parties:	Adv PJ De Bruyn SC, Adv GJ Joubert and Adv BJ Pienaar instructed by the State Attorney, Johannesburg
For the Interested Party:	Adv GJ Marcus SC and Adv M Chaskalson instructed by Hofmeyr Herbstein & Gihwala Inc., Sandton
For the *Amicus Curiae*:	Adv G Bizos SC and Adv B Majola instructed by the Legal Resources Centre, Johannesburg