

1/02/10

REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE AMENDMENT BILL

(Working draft)

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B – 2010]

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- _____ Words underlined with a solid line indicate insertions in existing enactments.
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B I L L

To amend the Criminal Procedure Act, 1977, so as to bring the provisions relating to the use of force when effecting an arrest into line with a judgment of the Constitutional Court; and to provide for matters connected thereto.

PARLIAMENT of the Republic of South Africa, enacts as follows:—

Substitution of section 49 of Act 51 of 1977, as substituted by section 7 of Act 122 of 1998

1. The following section is hereby substituted for section 49 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977):

"Use of force in effecting arrest

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

- (a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect; **[and]**
- (b) 'suspect' means any person in respect of whom an arrestor has **[or had]** a reasonable suspicion that such person is committing or has committed an offence; and
- (c) 'deadly force' means force that is intended or likely to cause death or serious bodily harm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force **[that is intended or is likely to cause death or grievous bodily harm to a suspect,]** only if he or she believes on reasonable grounds—

- (a) that the force is **[immediately]** necessary for the purposes of protecting the arrestor **[, any person lawfully assisting the arrestor]** or any other person from imminent or future death or **[grievous]** serious bodily harm; or
- (b) **[that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or]** that the suspect is suspected on reasonable grounds of

- having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
- (c) **that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.]"**

Short title

2. This Act is called the Criminal Procedure Amendment Act, 2010.

**MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE
AMENDMENT BILL, 2010
(DRAFT)**

1. BACKGROUND AND OBJECTS

1.1 Section 49 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), regulates the circumstances in which force may be used by an arrestor when attempting to arrest a suspect, as well as the degree of force that would be lawful in the circumstances. The section provides as follows:

Use of force in effecting arrest

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

1.2 The present wording of section 49 (the new text), was introduced in the Criminal Procedure

Act, 1977, by the Judicial Matters Second Amendment Act, 1998 (Act No. 122 of 1998) (the 1998 Act), since it was anticipated, at the time, that the provisions of the "old" section 49 would not pass Constitutional muster. However, the new text only came into force in 2003, that is five years since the passing of the 1998 Act.

1.3 In the mean while, the "old" section 49(2) was declared unconstitutional and invalid by the Constitutional Court in 2002, in the case of *Ex parte: The Minister of Safety and Security and Others: In re the State v Walters and Another (Walters)*. (2002(2) SACR 105 (CC), par [77]) The Court also held that (the old) section 49(1) had to be interpreted as set out by the Supreme Court of Appeal in the case of *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA). (*Walters* par [76])

1.4 In order to "make perfectly clear" what the law regarding this topic is, the court tabulated the main points as follows (in par [54]):

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

1.5 At the time of formulating the new text of section 49, the Legislature did not have the benefit of the authoritative guidelines furnished by the Constitutional Court in the *Walters* case regarding the use of force for the purpose of effecting an arrest. It is also a known fact that the South African Police Service raised serious concerns regarding the interpretation and application of the new text, especially in so far as appropriate training of police officers was concerned. (The concerns in question led to the five-year delay in the commencement of the new section 49.)

1.6 No objections have to date been raised against the constitutionality of the new text. However, the new text has been subjected to criticism from legal scholars, among others, as being difficult to

interpret and as equating the use of force for the purpose of effecting an arrest to the established common law principles of self defence, including acting in defence of others. Some authors have suggested that it would have been better not to put the new text into operation, in which event the "more satisfactory" legal position as set out in the *Walters* case would continue to apply. One source goes as far as suggesting that the new text has given a suspect a "right to flee" (Snyman: *Criminal Law* 5th Ed on 136).

1.7 The view is held that (with the benefit of hindsight now being afforded) the section should be aligned more closely with the criteria laid down by the Constitutional Court in the *Walters* case in order to ensure greater legal certainty regarding the circumstances in which force, especially deadly force, may be used in order to effect an arrest. The Bill aims to achieve this goal.

2. PROVISIONS OF BILL

2.1 The Bill amends section 49(1) by defining the expression "deadly force". This is linked to the deletion of the words "that is intended or is likely to cause death or serious bodily harm to a suspect" in subsection (2), and is aimed at improving the intelligibility of subsection (2).

2.2 The Bill also amends section 49(2) by closely aligning the wording of the proviso, that sets out the criteria when deadly force may be used in order to arrest a suspect, with the criteria laid down by the Constitutional Court in the *Walters* case (see paragraph 1.4 (h) above), but with the added qualification that the threat of violence posed by the suspect to the arrestor or others must be reasonably perceived (by the arrestor) to be life-threatening or of a very serious nature (serious bodily harm).

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The(insert particulars) and the South African Police Service were consulted in the process of preparing the draft legislation.

4. IMPLICATIONS FOR PROVINCES

None.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

None.

6. FINANCIAL IMPLICATIONS FOR STATE

None.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the

Constitution applies.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.