THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 435/05

In the matter between

MINISTER OF SAFETY & SECURITY **APPELLANT**

and

NOFOTO FOLO **1ST RESPONDENT**
SIYANDA SWELEKA **2ND RESPONDENT**
THEMBA SWELEKA **3RD RESPONDENT**

CORAM: **MTHIYANE, BRAND, NUGENT, MAYA JJA and MALAN AJA**

HEARD: **8 SEPTEMBER 2006**
DELIVERED: **26 SEPTEMBER 2006**

Summary: **Interpretation of s 49(2) of Act 51 of 1977 – The meaning to be given to the section as it was prior to being struck down as unconstitutional.**

Neutral Citation: **This judgment may be referred to as Minister of Safety & Security v N Folo & 2 Others [2006] SCA 117 (RSA).**

JUDGMENT

MTHIYANE JA:

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[1] The respondents sued the appellant in the Transkei High Court, Umtata, for damages suffered by them as a consequence of the death of Mr Sivuyile Sweleka, the deceased husband of the first respondent and father of her minor children, the second and third respondents. The deceased was shot and killed by Inspector Jameson Dingiso, a member of the South African Police Service, who was at the time on patrol duty in Umtata. The shooting occurred on the night of 28 November 1997 after a police vehicle in which Dingiso was a passenger had given chase to a stolen vehicle driven by the deceased. The stolen vehicle ultimately stopped when it collided with a pole and turned over. The deceased and his companion, Mr Vuyolwethu Matroshe, jumped out of the vehicle and ran in different directions. Matroshe made good his escape. Dingiso continued to pursue the deceased on foot. The deceased ignored requests to stop and, when Dingiso realised that he was being outpaced, he fired four shots at the deceased, all of which hit him from behind. The last shot struck him in the right thigh as he tried to scale a boundary fence, and felled him.

[2] In his defence, adopted by the appellant at the trial, Dingiso claimed that he had not acted unlawfully in that the killing of the deceased was justified and thus rendered lawful by s 49(2) of the Criminal Procedure Act 51 of 1977. As at the time of the shooting s 49(2) read:

‘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 authorised 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] Sub-section (1) deals with use of force by an arrestor in general. At the time this sub-section read:

‘49 Use of force in affecting an arrest.

(1) If any person authorised under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person -

(a) resists the attempt and cannot be arrested without the use of force; or

(b) flees when it is clear that an attempt to arrest him is being made, or resists such an attempt and flees;

the person so authorised may in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.’

[4] Section 49 has been discussed more recently in two cases: one in this court and the other in the Constitutional Court. In *Govender v Minister of Safety and Security*[1] this court was concerned with the interpretation of s 49(1) of the Act. It laid down that under the sub-section the arrestor was only entitled to use a firearm or similar weapon if he had reasonable grounds for believing that (a) the suspect poses an immediate threat of serious bodily harm to her or him, or a threat of harm to a member of the public; or (b) that the suspect had committed a crime involving the infliction or threatened infliction of serious bodily harm (para 24 at 284F–G). In *Ex Parte Minister of Safety and Security and others: In re: S v Walters and another*[2] s 49(2) was declared unconstitutional with prospective effect, which means that s 49(2) was of full force and effect at the time of the incident. Following *Govender* and *Walters* both sections 49(1) and 49(2) were amended and substituted by s 7 of Act 122 of 1998 on 18 July 2003.

[5] At the trial the court was called upon to determine whether Dingiso had complied with the requirements of justification under s 49(2) *as at the time of the shooting*. After ordering a separation of the issues of liability and quantum in terms of Uniform Rule 33(4) as requested by the parties, Nhlangulela AJ proceeded with the trial and held that the killing of the deceased was not

[1] 2001 (4) SA 273 (SCA).
[2] 2002 (4) SA 613 (CC).

justified. Applying what he 'termed', an 'expanded constitutional test' he proceeded to read the *Govender* requirements[3] for justification under s 49(1) into s 49(2), and found that Dingiso had not met the criteria for justification of the killing.

[6] The appeal to the full bench of the Transkei Division of the High Court, with his leave, was unsuccessful. Schoeman J (with Nepgen and Sangoni JJ concurring) also held that the requirements of reasonableness laid down in *Govender* for justification under s 49(1) applied to s 49(2). Otherwise, so Schoeman J held, it would lead to an untenable position that lesser requirements would be laid down for justification of homicide than for a lesser injury within the framework of s 49(1). The learned judge found that it 'would be anomalous if, in order to lawfully injure a person when effecting an arrest, the arrestor had to act reasonably but no such prerequisite of reasonableness is required when killing a person in the same circumstances.' It follows, the court concluded, that the *Govender* requirements for compliance with s 49(1), had to be read into s 49(2) at the time of the shooting. Since the deceased had posed no threat to anyone, so the judge found, and since the theft of the vehicle did not involve the infliction of harm, Dingiso had not complied with the requirements of reasonableness as set out in *Govender*. In the result the appeal was dismissed.

[7] The further appeal to this court is with the special leave. The crisp question for decision is whether s 49(2) is to be given its ordinary (and unconstitutional) meaning when applied in the circumstances of the present case or whether it is to be given a meaning that is consistent with the construction that was placed on s 49(1) in *Govender*.

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[3](a) The suspect must pose a danger of harm to the arrestor and (b) that the suspected crime must be one involving the infliction of violence.

[8] In the appellant's defence at the trial Dingiso at no stage indicated that he was under any threat of violence from the deceased nor that the suspected theft of the vehicle was one where violence was involved. He merely described how he had chased the deceased; how he fired a warning shot; and how he then aimed his further shots below the waistline of the deceased. The *Govender* test requires imminent serious harm prevention or previous serious harm inflicted by the person shot, before the protection of the s 49(1) could be involved. It follows that if s 49(2) were to be interpreted so as to incorporate the *Govender* criteria, Dingiso's reliance on this section would not prevail and that the killing of the deceased would therefore not be justified. That much was conceded by Mr Kemp, for the appellant. The converse would however hold true if the section is given its ordinary meaning, as articulated in the case law, uninfluenced by the decision in *Govender*, according to which the enquiry is twofold: first, whether a reasonable suspicion existed that the suspect had committed a Schedule 1 offence; second, whether the killing of the suspect was necessary to prevent his escape or secure his arrest. (See *Matlou v Makhubedu*.[4])

[9] In my view the courts below erred in reading the requirements for lawful injury during arrest as laid down by this court in *Govender* as applicable to s 49(1) of the Act into the provisions of s 49(2). If so read, it would be difficult to see how s 49(2) could be unconstitutional as the approach adopted by the full bench would have the effect of saving the section from constitutional invalidity. That approach is in conflict with *Walters*, where Kriegler J declared that s 49(2) was constitutionally invalid from the time the Constitution came into effect on 27 April 1994 and refused to read in the *Govender* criteria to save the section from invalidity. It seems that Kriegler J considered, correctly in my view, that

[4] 1978 (1) SA 946 (A).

no means of constitutional engineering, either in the form of 'reading down'[5] or 'reading in', could save the section from invalidity.

[10] What is more, *Walters* declared s 49(2) unconstitutional prospectively and not retrospectively. This meant that if Dingiso were charged criminally for the shooting the prosecution would not have succeeded because the actions of Dingiso were protected under s 49(2) which treated the killing as justifiable homicide. It is clear from the decision in *Walters* that the defence in s 49(2) was equally available in the event of the arrestor being sued civilly. There is a sentence in the section of the judgment of Kriegler J, dealing with 'Remedy' (652E) which, when taken in isolation, suggests that the *Govender* criteria apply to all cases involving the shooting of a fugitive from arrest which had not been disposed of at the time of judgment. Such interpretation would, however, be inconsistent with the court's declaration of invalidity of the s 49(2) with prospective effect. It would also be in conflict with the court's assertion that the retrospective taking away of a defence which had been available to the arrestor in a criminal and civil suit at the time, would be 'manifestly inequitable'(para 75).

[11] It is true that this approach results in the anomaly referred to by Schoeman J. But the anomaly is inevitable when effect is required to be given to an unconstitutional statute, which is what the order in *Walters* requires.

[12] In my view the court below, as did the trial court, erred in reading s 49(2) so as to incorporate the *Govender* requirements. For the above reasons the court should have upheld the appeal and set aside the finding of liability in favour of the respondents.

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[5]For a full discussion see Jonathan Klaaren 'Judicial Remedies' in Matthew Chaskalson *et al – Constitutional Law of South Africa* pp 9.5-9.7.

[13] Accordingly the appeal is allowed with costs, including the costs of two counsel. The order of the court *a quo* is substituted with the following:

'The appeal is allowed with costs. The order of the trial court is set aside and replaced with the following:

''The plaintiffs' claims are dismissed with costs''.'

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:
BRAND JA
NUGENT JA
MAYA JA
MALAN AJA