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SAGA SNIPPETS

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Civilian Arrest and the Use of Force

By John Welch

In the April edition of Snippets, I discussed how the killing or injuring of a human being may be justified in terms of our common law. The Criminal Procedure Act provides for the only other justification. The use of force is a serious matter. The taking of a life, even when you think it should be taken, is even more serious.

The South African Police Service (SAPS) is mandated by section 205 (3) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution) 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. Civilians, therefore, may execute arrests only in accordance with the provisions of section 42 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA).

This section provides that "*Any private person may without warrant arrest any person-*
(a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;
(b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
(c) whom he is by any law authorized to arrest without warrant in

respect of any offence specified in that law;
(d) whom he sees engaged in an affray".

One should think very carefully before attempting to execute an arrest. Not only could you err regarding the identity of the person or the crime allegedly committed, you should also think of what to do with the person after the arrest. Also bear in mind that should you have erred regarding any aspect of the arrest, you could be held liable for damages based on unlawful arrest. In terms of section 47 of the CPA male persons from the age of 16 to 60 years may be called upon by police officers to assist with an arrest.

Depending on the circumstances (and the charges brought) one will usually rely on private or self-defence or section 49 of the CPA. These defences are referred to as grounds of justification since they negate the *prima facie* unlawfulness of the defender's act. This means that in a criminal prosecution (such as murder) the State must prove all elements of the crime.

The use of force, including deadly force, in arrest situations is presently governed by section 49(2) of the CPA, as amended by Section 7(2) of the Judicial Matters Second Amendment Act, 1998 (Act No. 122 of 1998), which reads as follows:

"*If an arrestor* (means any person authorised under this Act to arrest or to assist in arresting a suspect) *attempts to arrest a 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 the suspect resists the attempt, or 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 purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

Continued....Civilian Arrest and the Use of Force

(b) That there is a substantial risk that the suspect will cause imminent or future 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."

Accordingly, in terms of the new provision, an arrestor will be able to use such force as may be reasonably necessary and proportional in the circumstances, to effect the arrest of a suspect, provided that s/he may only use force that is likely to cause death or serious injury to the suspect, in order to protect the arrestor or any other person from death or serious injuries, or the strong likelihood thereof, either immediately or in the future.

Because the original section 49(2) of the CPA did not explicitly provide for substantial proportionality when comparing the force used against the alleged perpetrator in the execution of an arrest against the crime allegedly committed, this unsatisfactory position was indirectly alluded to in ***S v Makwanyane*** 1995(3) SA 391 (CC), where Chaskalson P wrote: "*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. 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 in line with the Constitution."*

In ***Govender v Minister of Safety and Security*** 2001 (4) SA 273 (SCA) the court ruled that: *"Section 49(1)(b) must generally speaking be interpreted so as to exclude the use of a firearm or similar weapon (something that is potentially lethal) unless the person authorized to arrest, or assist in arresting, a fleeing suspect has reasonable ground 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."*

In the case of ***Ex parte Minister of Safety and Security: in re S v Walters*** 2002 (4) SA 613 (CC) the Constitutional court tabulated the main points regarding the use of force by police officers and others in carrying out arrests thus:
(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 is it always the best;
(c) Arrest may never be used to **punish** a suspect;
(d) When arrest is called for, **force may be used only** where it is **necessary** 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 arrestor 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 arrestor 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 arrestor** attempting to carry out an arrest **to kill a suspect in self-defence or defence of any other person**.
[The emphasis of the salient points is the author's.]

Based on the new constitutional interpretation of the use of force and the revised section 49, persons, when executing an arrest, are entitled to use **potentially lethal force only if such force is immediately necessary and proportionate** in the circumstances to **protect the arrestor or someone else from imminent or future death or grievous bodily harm**.

The reasonableness of a person's decision to use force must be based on the facts that exist at the time of the incident on the scene and of which the person is aware (or ought to reasonably have been aware) at that time. Allowance must be made for the fact that one often is expected to make split-second decisions in circumstances that are tense, uncertain and rapidly evolving and without the advantage of 20/20 hindsight.
A member may use deadly force only when s/he believes on reasonable grounds that the force is necessary to protect the arrestor or other persons from imminent or future death or grievous bodily harm.

Since civilians are not law enforcement officers they do not have to act like them, however,

Continued....Civilian Arrest and the Use of Force

the suspect needs to be aware that he is about to be arrested. Therefore, provided it is feasible to do so and would not increase the danger to you or others, a clear verbal warning must be issued to a suspect to submit to authority before force is used.

Warning shots are not required by law (neither am I in favour of them). The feasibility of a warning shot is dependent on whether it is both safe and opportune to fire such (*vide* ***Minister van Wet en Orde v Ntsane*** *1993 (1) SACR 256 (A)).*

The law does not permit policemen or other persons to make pre-emptive strikes based on the possibility that a person will pose a threat or prove dangerous, because that potential exists in most cases. Instead, a person must rely on facts that justify a reasonable belief in the probability of a threat to life or grievous bodily harm, either presently or in the future. This has often been wrongly interpreted that the good guy must first wait to get shot at before s/he may defend himself – this is not the case.

Except for the instances specifically provided for in section 49(2) and those referred to in the cited cases above, the harm resulting from the failure to apprehend the fugitive would not justify the use of deadly force. Although force may be used to stop a fleeing suspect, even one who had just committed a serious violent crime, the killing or injuring of the suspect may be condoned on the basis of the person having prevented the suspect from causing future harm to someone.

Deadly force may be directed at the driver or occupant of a moving vehicle, if you have reasonable grounds to believe that the force is necessary to protect yourself or others from imminent or future death or grievous bodily harm, and the use of deadly force does not create danger to the public that outweighs the likely benefit of its use. The use of potentially deadly force in these circumstances should be limited to extreme cases only.

When a decision is made to use deadly force, you may continue its application until the suspect(s) surrenders or no longer poses a threat to life or a risk of grievous bodily harm.

Where the use of, or need for, deadly force is no longer required or justified, it must be discontinued immediately. Where deadly force is permissible, such action should be directed at bringing an imminent danger to a timely halt.

A practical guideline once the decision to use potentially deadly force has been made is: Be quick on the draw but slow to re-holster. Anyone carrying a firearm for self-protection must have had the best possible training, aimed at empowering one to be psychologically and physically prepared to face and deal with life-threatening situations. Since the use of force during a violent confrontation requires split-second decision making, there is usually insufficient time to ponder all possibilities and alternatives and legal and other consequences. One therefore must have considered all these issues prior to taking up arms. Because when the high-risk situation arises, one needs to focus thereon only – nothing else. It is a matter of life or death – yours or the criminal's.

Since every case is fact-specific, the above must be seen as guidelines and not legal advice. Proper legal advice, based on the relevant facts, is required when one faces a criminal prosecution or civil claim for damages.

WFSA - SAGA's International Connection

April 2018
By John Welch

Some time ago I reported that as part of SAGA's international relations, we are a member of the World Forum for Shooting Activities, as well as a member of the Executive. WFSA had its Annual General Meeting on 7 March 2018 in Nuremberg, Germany and SAGA was represented by Mark Barnes of America. The 4 main discussion points on the agenda were: (i) legislation; (ii) statistics; (iii) environment; and (iv) image.

On behalf of Chris Cox (NRA Executive member and chair of the Committee for Legislative Action), another member reported that the June-meeting of the UN-based committee on arms control, will focus on the marking of ammunition and increasing the marking requirements on firearm parts and components, which the US opposes, and on the efforts to include gender based violence and sustainable development goals in the PoA/ITI, which Russia strongly opposes. There will certainly be an attempt to link all the current instruments such as the ATT and the firearms protocol into one global instrument. There will also be an attempt to widen the scope of the arms trade treaty. At the EU level they appear to be drafting technical specifications for alarm/signal weapons and for the marking of firearms.

Sub-committee chairman Jacobs highlighted the need to have research and studies based on real facts and numbers made by universities, independent organizations or neutral organizations as it will aid WFSA in the defence of the lawful ownership of civilian firearms.

Of interest to South Africans is Mark Barnes' presentation of the study conducted by Dr David Klatzow on the validity of ballistic fingerprinting as a reliable forensic tool and the feasibility to establishing an effective national ballistic imaging database. As Barnes said, "*The outcome was very interesting, as it showed that the tracing of a firearm based on ballistics fingerprint is both unreliable and unrealistic*". Klatzow conducted the study at the request of a large part of the firearms community.

Regarding the environment, two matters were of great importance, lead and noise. The chairman provided participants with an update on the lead issue, in particular the DIN Spec 19384 initiative by the German industry to create a regulation for the certification of conformity of hunting ammunition whose aim is to respect the rules of ethical hunting by using ammunition with the best possible killing effect, possibly using material other than lead. It was proposed to convene a workshop on noise at shooting ranges, as from a roundtable discussion it emerged as a common topic in several countries.

WFSA agreed to again be involved in IWA 2019, as it has been for many years. The meeting also approved of the new WFSA website.

In South Africa we know that we cannot rely on our government to promote the right to keep and bear firearms, hunting and sport shooting. We, accordingly need to rely on national and international pro-firearm institutions to promote these and to ensure that responsible law-abiding citizens continue to enjoy their rights. Questions regarding lead and noise pollution have surfaced here, and it would not surprise me if legislation in this regard is introduced at some stage. Our government supports the ATT; therefore, they probably will support the UN initiatives to strengthen the treaty and to join all related instruments. If there is one thing that the treaty once again proved, and in fact reiterated, it is that the treaty has not prevented terrorism, international organised crime and the diversion of arms and ammunition for unlawful purposes.

Feedback Items:

HuntEx 2018

A big "Thank You" to all those members who visited our stand to renew their membership and buy insignia, especially the new items. To all our new members, who joined at HuntEx, a warm welcome.

HuntEx was once again busy with lots of interesting things to see and buy.

Show dates for next year have been set for 25-28 April 2019.

Court Case

There is no news on the expected judgement from the Constitutional Court case that was heard on 7 February 2018 about the constitutionality of Sections 24 and 28 of the Firearms Control Act (Act 60 of 2000). Members will be advised as soon as we have news.

In the mean time, please take note of when your firearm licences are due to expire and make sure you re-apply MORE than 90 days before the expiry date.

Firearm Amnesty

Police Minister Bheki Cele confirmed on 15 May 2018 during his budget vote that he intends continuing with the amnesty started by his predecessor. However we doubt whether it will commence on 1 June 2018 as it still has to go to Parliament and the conditions have not as yet been finalised. Once we have an update we will advise members.

Watch this space …for more interesting firearm snippets