

PRIVATE DEFENCE: STRICT CONDITIONS TO BE SATISFIED

Govender v Minister of Safety and Security 2009 2 SACR 87 (N)

1 Introduction

South African criminal courts evaluate criminal conduct with reference to, *inter alia*, the concept of unlawfulness (Grant “The double life of unlawfulness: Fact and law” 2007 SACJ 1; Van Oosten “Wederregtelikheid: ’n skuldtoets?” 1977 THRHR 90). One of the recognised defences excluding unlawfulness is self-defence or private defence. It is the latter term which generally finds favour with modern authors since the term “self-defence” suggests that it is only persons defending themselves who can rely on this defence. Persons defending others can, however, also rely on this ground of justification (Snyman *Criminal law* (2008) 103; Burchell and Milton *Principles of criminal law* (2005) 230; Labuschagne “Noodweer ten aansien van nie-fisiese persoonlikheidsgoedere” 1975 *De Jure* 59; *S v Van Vuuren* 1961 3 SA 305 (E); *R v Mhlongo* 1960 4 SA 574 (A)). Moreover, it is not only one’s person that can be lawfully defended in private defence but also, *inter alia*, property (*Ex parte Die Minister van Justisie: in re S v Van Wyk* 1967 1 SA 488 (A); Van der Merwe “*Ex parte* Minister van Justisie: *in re S v Van Wyk* 1967 1 SA 488 (A) – Noodweer – Beskerming van goedere – Oorskryding al dan nie van perke” 1967 THRHR 168; Stuart “Killing in defence of property” 1967 SALJ 123; Ally and Viljoen “Homicide in defence of property in an age of constitutionalism” 2003 SACJ 121; Du Plessis “When can I fire?: Use of lethal force to defend property” 2004 *SA Crime Quarterly* 1; *S v Mogohlwane* 1982 2 SA 587 (T)), dignity (*S v Ndlangisa* 1969 4 SA 324 (E); Steyn “Noodweer” 1932 SALJ 461 466), liberty of movement (*R v Karvie* 1945 TPD 159; *R v Kleya* 1927 CPD 288; Neethling “Noodtoestand en noodweer: regverdigingsgronde by onregmatige vryheidsontneming as *iniuria*” 1998 THRHR 160) and sexual autonomy (*S v Mokoena* 1976 4 SA 162 (O)).

One acts lawfully in private defence if one uses force to repel an unlawful human attack, which has commenced or is imminently threatening, upon one’s or somebody else’s life, bodily integrity, property or other legally protectable interest, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker and is reasonably proportionate to the attack (Burchell and Milton *Principles of criminal law* 230; Snyman *Criminal law* 103 whose definition was accepted by Satchwell J in *S v Engelbrecht* 2005 2 SACR 41 (W) par 228).

Important theories underlie the existence of private defence. The protection theory is based on autonomous individual rights of legal subjects to protect their legal interests. Legal subjects are thus entitled to inflict evil on others in exercising their rights of protection (Burchell and Milton *Principles of criminal law* 231). The upholding-of-justice theory is based on the premise that individuals acting in private defence protect not only themselves but the entire community and legal order (Snyman “The two reasons for the existence of private defence and their effect on the rules relating to the defence in South Africa” 2004 *SACJ* 178 180; Labuschagne “Van instink tot norm: Noodweer en noodtoestand in strafregtelik-evolutionêre perspektief” 1993 *TRW* 133 ev).

The constitutional basis for private defence as a ground of justification was crisply articulated by Chaskalson P in *S v Makwanyane* 1995 2 *SACR* 1 (CC) para 138 (1995 3 SA 391; 1995 6 *BCLR* 665 paras 55b–c) where it was stated that private 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 section 33(1) (of the interim Constitution, which was in force at the time). To deny the innocent person the right to act in private 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 (see also Kriegler J in *Ex parte Minister of Safety and Security: In re S v Walters* 2002 2 *SACR* 105 (CC) 124 fn 66 and Snyman *Criminal law* 110 fn 55).

In assessing private defence as a ground of justification for allegedly unlawful conduct, courts are ever mindful of the fact that they remain under the restraint of the “moderation in self-defence” principle (as per Steyn CJ in *S v Van Wyk* 1967 1 SA 448 (A) 497; see also *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C); *R v Attwood* 1946 AD 331; *R v Molife* 1940 AD 202). Strict conditions have to be met before a person can escape liability for the infliction of harm on another on the basis of private defence (see also Templeton “*Ntamo v Minister of Safety and Security* 2001 1 SA 830 (Tk) – Action against police for wrongful killing – private defence” 201 *Judicial Officer* 124). In the recently decided case of *Govender v Minister of Safety and Security* 2009 2 *SACR* 87 (N) Msimang J dealt specifically with two such conditions: that the attack which is sought to be warded-off by means of private defence must be imminent; and that the defensive act must be necessary.

2 Facts

An unfortunate and bizarre incident occurred on 28 August 2002 in the Durban residential area of Phoenix which resulted in the fatal shooting of the plaintiff’s ex-husband by a member of the South African Police Service. This incident gave rise to the institution of an action by the plaintiff in her personal capacity and in her capacity as mother and legal guardian of four minor children born from her marriage to the deceased against the Minister of Safety and Security. In terms of the decree of divorce the deceased was under a legal duty to pay maintenance to the plaintiff and as a result of the deceased’s death, the plaintiff had suffered loss for which the defendant was in law liable by reason of the allegedly wrongful conduct of his employee (90a).

It was common cause that during his lifetime the deceased had been engaged in the tow-truck industry, an industry which was rife with allegations of corruption. Bribes were allegedly paid to members of the South African Police Service by

owners of tow-trucks, in return for business being steered their way. The deceased also paid bribes of approximately R200 per single tow to members of the South African Police Service in order to obtain business. The deceased's competitors, however, increased their payments to R500 per single tow, thereby forcing the deceased out of business. Realising the hopelessness of the situation the deceased appealed for assistance to senior members of the South African Police Service, but the appeal yielded no results. This created feelings of frustration on the deceased's part. After the divorce, the deceased left the matrimonial home and took up residence with a schoolteacher attached to a secondary school in Phoenix and the two lived as man and wife (91d). This relationship later also soured and these were the unfavourable circumstances prevailing in the deceased's life on 28 August 2002.

On this day the schoolteacher was at her place of employment when, at approximately 08:00, the deceased abducted her at gunpoint. The two were next seen by members of the South African Police Service later that morning through the upper-level window of a flat at 74 Rocklands Close, Phoenix. The deceased had his left arm around the neck of his hostage and held a silver-coloured firearm in his right hand. The reason why the deceased had staged this hostage situation was to expose what he perceived to be police corruption in the tow-truck industry in Phoenix. The deceased demanded that members of the South African Police Service, who were standing on the ground, put their firearms away. This demand was immediately complied with. When the deceased next demanded to speak to hostage negotiators, the police officers realised that they were confronted with a hostage situation and steps were taken to mobilise the role-players and get them to the scene (91i).

The primary role-players in a hostage situation comprise a team of hostage negotiators and a so-called tactical-intervention unit, the latter being a specialised South African Police Service unit with special training in the release of hostages. The hostage negotiators team comprised of three members: Inspectors Allison and Pretorius and Superintendent Singh. Inspector Pretorius and Superintendent Singh would negotiate directly with the deceased. The negotiating team took up position on the ground alongside a wall separating 74 Rocklands Close from a neighbouring flat (92d).

The tactical intervention unit arrived at 13:30 and took up position on the upper level of one of the flats adjacent to 74 Rocklands Close. The unit comprised, *inter alia*, a sniper, Inspector Nel, and a spotter, Inspector Boschhoff. The commander of the unit was Captain Vosloo, who would communicate with the sniper by radio. The sniper and spotter were positioned at a vantage point and had strict instructions to react if there was immediate danger to, or a life-threatening situation for, the hostage. The team would use their telescopes to observe the exact position of the hostage and the deceased and would continuously report to the commander (92 h).

At the scene a so-called Joint Operations Centre (JOC) was also established, manned by senior officers. On this day the JOC comprised a scene commander, Superintendent Aarons; the hostage-negotiations coordinator, Inspector Allison who provided the line of communication between the negotiating team and the JOC; and the commander of the tactical intervention unit, Captain Vosloo. Later that afternoon two senior officers, Directors Delpont and Somaroo, also arrived at the scene and formed part of the JOC which had taken up position inside one of the flats. The JOC had the responsibility to take important decisions during the hostage situation.

During the negotiations several demands were made by the deceased, all of which were conceded to by the police. A demand to be allowed to conduct a radio interview with an SABC representative was met and the latter was brought to the deceased. The SABC representative recorded the deceased's complaints with a recording device. A later demand by the deceased to speak to senior officers was also met. However, none of these concessions yielded any fruit or brought an end to the negotiations (93c).

More time passed. Later in the afternoon Inspector Allison, the hostage negotiations coordinator, reported to the JOC that Superintendent Singh and Inspector Pretorius, who negotiated directly with the deceased, were getting concerned about the situation and feared that there was a real danger that harm would befall the hostage. Inspector Allison at that stage was of the opinion that the situation had deteriorated to such an extent that a negotiated outcome was no longer feasible. Based on this experience Inspector Allison, in his capacity as hostage negotiations coordinator, recommended that other and immediate steps be taken to ensure the safe release of the hostage. The JOC thereupon took the decision to engage the tactical route and the sniper, Inspector Nel, was instructed to shoot the deceased on the right collarbone (93e).

The scene was then set for the hostage to be freed. The tactical teams were ordered to be on standby and to enter the premises and free the hostage immediately after the deceased would be wounded. As is the practice, the spotter (who was Inspector Boschhoff on this day) commenced with a countdown. The sniper had to take a difficult shot: he had to shoot out of the room he was occupying, past the burglar bars and also past the burglar bars and curtains in the room occupied by the deceased and the hostage. The sniper's task to target the collarbone was made more difficult by the fact that the deceased continually moved. The countdown thus had to be aborted and restarted on several occasions. Eventually the countdown was completed and the sniper fired a shot. When the tactical team thereafter entered the flat they found the deceased lying next to the window, already dead. The hostage was rescued immediately (93h).

The question for determination by the court was whether the killing of the deceased by a member of the South African Police Service was justified. On this issue the defendant bore the *onus* (cf Madlanga AJP in *Ntamo v Minister of Safety and Security* 2001 1 SA 830 (Tk) 837E. Regarding the burden of proof to establish the defences excluding unlawfulness in criminal cases, see Burchell and Milton *Principles of criminal law* 229).

3 Dispute of fact

There was a dispute of fact as to exactly what the deceased was doing at the time he was shot. This was of cardinal importance as it related directly to the existence or otherwise of an unlawful human attack in the form of an imminent danger, posed by the deceased, as pleaded by the defendant. The sniper, Inspector Nel, testified (94f) that, at the time he fired the fatal shot, the deceased was standing at the window armed with a firearm in his right hand which he had pointed at the hostage. This version was corroborated by one of the primary negotiators who testified that, shortly before the deceased was shot, he (the deceased) came up to the window with his firearm pointed at the temple of the hostage who appeared petrified, threatening to shoot the hostage twice in the head (94g).

After the defendant closed his case, one Mr Michendra Govender was called as a witness in rebuttal by the plaintiff. Mr Govender testified (95b) that he was a resident of one of the flats in the vicinity of the scene and that he had peeped through a window from which he could observe the deceased. Mr Govender was adamant that, at the time the deceased was shot, the deceased was not armed with a firearm, let alone pointing it at the hostage. The witness testified that he could see both the deceased's hands and that he was not holding a firearm in either of his hands but that the deceased and the hostage were relaxing at the time the deceased was shot.

Msimang J also evaluated (97c–h) the evidence of one of the plaintiff's earlier witnesses, Mr Coles, a cameraman employed by eTV who had filmed footage of the scene seconds before the fatal shot was fired. The deceased's right forearm could be seen to be resting on the windowsill. Msimang J concluded (97h) that the deceased's right hand was not sufficiently visible to enable the court to make a positive finding on the issue whether the deceased had held a firearm in his right hand. Comparing the merits and demerits of the evidence of Mr Govender and Mr Coles with that of the police officers on the issue, the former evidence was preferred. The dispute of fact was accordingly resolved against the defendant and it was found that, at the time when the fatal shot was fired, the deceased did not have a firearm pointed at the hostage (97j).

4 Condition that attack must be imminent

Private defence is neither a means of exercising vengeance, nor is it a form of retaliation or lawfully meting out punishment (Snyman *Criminal law* 106). The requirement that the attack must have commenced or be imminent (*ad defensionem, non ad vindictam*) thus introduces a temporal connection between the apprehension of attack and the defensive act (see Satchwell J in *S v Engelbrecht* 2005 2 SACR 41 (W) para 346). Burchell *Cases and materials on criminal law* (2007) 212 fn 42 refers to the Canadian Supreme Court in *R v Lavalee* 1990 1 SCR 85 [55 CCC (3d)] 97 where the rationale for the "imminence" condition was described as "obvious", being that "the law of self-defence is designed to ensure that the use of defensive force is really necessary . . . If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence" (see also Van Warmelo "Noodweer" 1967 *Acta Juridica* 5).

In casu Msimang J, after careful consideration of the facts as well as the circumstances surrounding the shooting, was not satisfied that "a reasonable man, in the position of the police officers, would have concluded that the risk of death or serious injury to the hostage was imminent" (98e–f). Msimang J (98 fn 8) referred to the *South African Concise Oxford Dictionary* (2002) 577 where the word "imminent" is defined, *inter alia*, as "about to happen". Satchwell J in *S v Engelbrecht supra* para 348, however, clearly states that dictionary references to "imminence" not only include something "which is about to happen" but also behaviour which is "expected" or "foreseen", especially where there is a pattern of behaviour (*contra* Snyman *Criminal law* 106 fn 38).

On this point specifically the correctness of Msimang J's conclusion relating to the imminence of death or serious injury to the hostage can be questioned. It could be argued that the tactical-intervention unit's special training in and experience of hostage situations, coupled with the patterned deterioration of the hostage situation, gave rise to them entertaining a reasonable apprehension that

physical harm would inevitably be visited on the hostage and possibly themselves. To an experienced hostage negotiator a so-called “pattern” or “cycle” of behaviour on the part of a hostage taker (for instance that the hostage taker becomes increasingly aggressive, agitated and restless over a number of hours before tragedy comes to pass) is surely recognisable. Referring to the pattern of domestic violence Satchwell J in *S v Engelbrecht supra* para 349 was of the view “that where abuse is frequent . . . such that it can be termed a ‘pattern’ . . . then it would seem that the requirement of ‘imminence’ should extend to encompass abuse which is ‘inevitable’. It follows that premeditation of the defensive act is not necessarily inconsistent with reliance placed upon this ground of justification” (para 350).

It is trite law that one may in certain instances act in anticipatory private defence to prevent the first blow (see Broom J in *R v Hope* 1917 NPD 145 146; Snyman *Criminal law* 106; Scott “Noodweer: Beoordeling van afweershandeling” 2001 *De Jure* 404). It is also trite law that the conduct of a person who alleges to have acted in private defence must be judged in the light of the knowledge which that person had of his attacker (Labuschagne 2002 *Obiter* 359ff; Steyn J in *S v T* 1986 2 SA 112 (O) 128). Steyn J in *S v T supra* 129 refers to an article by the late Prof Labuschagne in *Gedenkbundel HL Swanepoel* (1976) 168 under the heading of “Noodweeroordadigheid” and translates that

“[t]he prior conduct of both the attacker and the defender is relevant with respect to the question as to whether the limits of private defence have been exceeded. A person who has given previous indications of being easily and quickly provoked to extreme violence, can be warded off immediately and possibly with extreme methods. In such a case the reasonable man’s response is not necessarily relevant; what is relevant is what the person acting in private defence knew about the attacker.”

Again, this prior knowledge about the attacker may have been acquired by the hostage negotiator during the preceding hours of negotiations.

It follows that Msimang J *in casu* possibly concluded too readily that the imminence requirement was not met.

5 Condition that defence must be necessary

The *raison d’être* underlying this condition is that a person will only be permitted to resort to “self-help” if it is the only manner to avert the attack and protect the threatened interest(s). Not only must the fact *that* the victim retaliated have been necessary, but the *manner* in which he retaliated must also have been necessary. The question often articulated is whether the force used was reasonably necessary in the circumstances (*S v Motleleni* 1976 1 SA 403 (A) 406 C; *S v Ntuli* 1975 1 SA 429 (A) 436; *S v Goliath* 1972 3 SA 1 (A) 26; *S v Ngomane* 1979 3 SA 859 (A) 863; Labuschagne “Oorskryding van die grense van noodweer: *Ngomane* 1979 3 SA 859 (A)” 1979 *SACC* 271; *S v Dougherty* 2003 2 SACR 36 (W) 50; Snyman “Private defence in criminal law – An unwarranted raising of the test of reasonableness – *S v Dougherty* 2003 2 SACR 36 (W)” 2004 *THRHR* 325). Although the reasonableness of the defensive act must be judged objectively, subjective elements relating to the persons present and circumstances prevailing form part of the judgment (*S v Nyokong* 1975 3 SA 792 (O) 794; *S v Motleleni supra* para 406). Holmes AJA (as he then was) admonished that a court in these cases should “take into account the exigencies of the position” (*R v Patel* 1959 3 SA 121 (A) 123D; *Union Government (Minister of Railways and Harbours) v Buur* 1914 AD 273 286).

Against this background Msimang J (98h–99a) was of the opinion that the means of private defence which was used was not the only or less dangerous means whereby the danger could be avoided. It was not disputed that the deceased's brother, who was also a member of the South African Police Service, was present at the scene and that he had offered to mediate by talking his brother into surrendering. This offer was rejected by the police. Whether accepting the offer and using the deceased's brother as a mediator would have yielded a positive result, remains speculation. Msimang J, however, accepted that "the brother's offer, had it been accepted, was likely to present an alternative, more reasonable and less dangerous solution to the impasse" (99c).

The correctness of this assumption stands to be questioned. Holmes AJA in *R v Patel* 1959 3 SA 121 (A) (Steyn CJ and Beyers JA concurring), in evaluating the reasonableness of the defensive act, correctly stated that

"it may well be that the danger could have been averted by less drastic means. But, as already mentioned, one must beware of being an arm-chair critic. The accused was suddenly confronted by an emergency not of his own creating. He had to act quickly. Delay on his part might well have proved fatal".

Exactly the same can possibly be said of the facts *in casu*. The sniper, Inspector Nel, as well as the members of the Joint Operations Centre (JOC), who issued the order of commencing with the countdown, was highly skilled and experienced in dealing with hostage situations, while the deceased's brother was not. Moreover, the reason why the deceased had staged the hostage situation in the first place was to expose what he perceived to be police corruption – his brother also being a member of the South African Police Service. His brother was present during the whole ordeal and yet the deceased never demanded to speak to him. Could it reasonably be expected of a hostage negotiator at that late stage of the negotiations to abandon all professional procedures strictly followed by the tactical-intervention unit and employ somebody with no training in hostage negotiations? Being the deceased's brother, this mediation could just as well have added to the deceased's emotional turmoil and the ordeal could well have ended in tragedy.

6 Decision

Msimang J concluded (98h–99e) that the defendant's plea of private defence cannot succeed, the reason for this being twofold: one, there was no imminent or real risk of death or serious injury and, two, there was a more reasonable and less dangerous solution to the impasse. This implies that the defendant's defensive act was not reasonable in the circumstances. The defendant was accordingly found to be liable for all damages which the plaintiff may prove.

7 Evaluation

The first reason advanced by Msimang J for rejecting the defendant's plea of private defence is unconvincing. The conclusion reached by the judge, that there was no imminent risk of death or serious injury, is based on an "impression":

"[O]ne gets a distinct impression that the officers were of the view that the negotiations had been tedious, protracted and had extended over a number of hours without bearing any fruit . . . It was getting dark, which would bring about the dangers of poor visibility and increase the risk of a failed rescue attempt" (98f–g).

The assumption that the JOC had made the decision to intervene merely because the negotiations had been tedious and it was getting dark cannot be supported.

Being a specialised South Africa Police Service unit, a tactical-intervention unit is undoubtedly issued with night vision scopes which embody technology to create images that are as clear as day. This enquiry was never made by the court.

The second reason advanced by the court for rejecting the defendant's plea of private defence, namely that the defensive act was neither reasonable nor necessary, can also be questioned. When determining unlawfulness the ultimate question remains whether the conduct was contrary to the community's perception of justice or the legal convictions of society, or whether the conduct was objectively reasonable (Snyman *Criminal law* 98; *Clark v Hurst* 1992 4 SA 630 (D) 659B–C; *S v I* 1976 1 SA 781 (RA) 788; *S v Goliath* 1972 3 SA 1 (A) 25). The concept of reasonableness was not sufficiently explored or addressed by the court *in casu*. Satchwell J in *S v Engelbrecht supra* para 329 stated that the test for reasonableness has never been high nor low but simply "reasonable", which is a relative concept depending on the circumstances of each case (cf Snyman 2004 *THRHR* 325). Satchwell J in *S v Engelbrecht supra* paras 331–333 proceeded by referring to the words of Hefer JA in *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 367F who stated that the value judgment which the application of the general criterion of reasonableness requires is based on considerations of morality and policy and the court's perception of the legal convictions of the community, and that this value judgment entails a consideration of all the circumstances of the case. The "legal convictions" test would naturally be informed by the foundational values of the Constitution, being human dignity, equality and freedom.

Whether the defensive act was reasonable and necessary in the circumstances remains a purely factual question. In a country engulfed by continuous crime waves where the community on a daily basis calls for the combating of crime and the protection of the sanctity of human life and personal safety, it is quite conceivable that the community's perception of justice may reflect this basic need for safety and survival.

The question whether the defendant possibly acted in supposed or putative private defence was also not addressed (see *S v Van Antwerpen* 1976 3 SA 399 (T); *S v De Oliveira* 1993 2 SACR 59 (A); *S v Joshua* 2003 1 SACR 1 (SCA); *S v Trainor* 2003 1 SACR 35 (SCA); *S v Mokoena* 1976 4 SA 162 (O); Labuschagne "Die poort tot gelykstelling van noodweer en putatiewe noodweer? Opmerkinge oor die effek van die dader se voorafgaande kennis van die geweldsgeneigdheid van die aanvaller" 2002 *Obiter* 359 ev; Labuschagne "Putatiewe noodweer: Opmerkinge oor 'n dadersubjektiewe benadering tot misdadomskrywing" 1995 *THRHR* 116; Neethling "Section 49 of the Criminal Procedure Act 51 of 1977, private defence and putative private defence: *Coetzee v Fourie* Case No 61/2003 (SCA) unreported" 2004 *TSAR* 602). In fact, the court correctly formulates the test for *putative* private defence ("The question which must however still be determined is whether, notwithstanding the said finding on the dispute of fact, the circumstances prevailing at the crucial time were such, that the police officers were *justified in entertaining a reasonable apprehension that physical aggression would be visited on the hostage*" (98a–b; own emphasis) but then proceeds to evaluate the existence of *objective* private defence (98e–h). If the mistake on the part of the police officers were found to be genuine as well as reasonable, the defendant would have had neither *dolus* nor *culpa* (Burchell and Milton *Principles of criminal law* 514).

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