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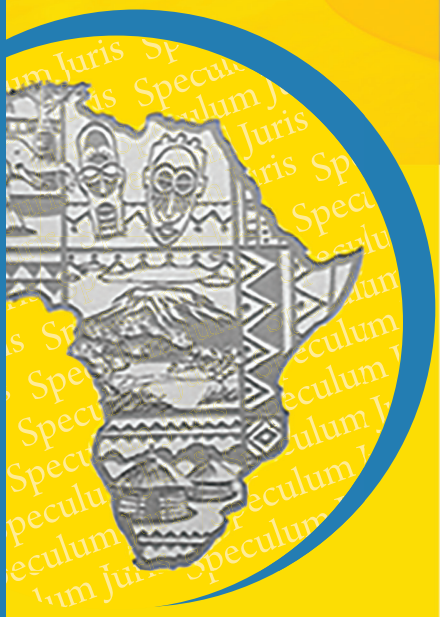

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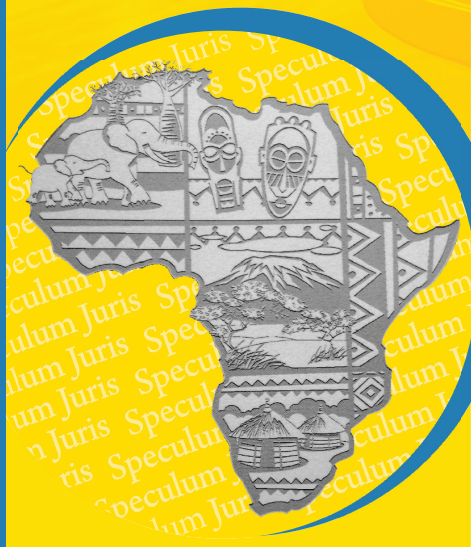

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Premeditated Murder and Private Defence: From Life Imprisonment to Acquittal, *Khan v S* (A89/2023) [2024] ZAGPPHC 190 (15 February 2024)

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Abstract

On 15 February 2024, the High Court of South Africa set aside two murder convictions and a sentence of life imprisonment, thereby acquitting an accused who was convicted on the charge of premeditated murder in the trial court. The sentence was passed in accordance with section 51 of the Criminal Law Amendment Act 105 of 1997, read with Part I of Schedule 2 of the Act after no substantial and compelling circumstances were found that justified the imposition of a lesser sentence. The High Court found that the appellant acted in private defence which led to his total acquittal. In passing this judgment the full bench of the High Court was afforded the opportunity to adjudicate on the proper interpretation of premeditated murder, the application of section 51 of the Criminal Law Amendment Act 105 of 1997 and the proof of the defence of private defence. The decision in Khan v S (A89/2023) [2024] ZAGPPHC 190 (15 February 2024) thus demands critical academic analysis.

Keywords: life imprisonment; premeditated murder; minimum sentence; private defence; unlawfulness

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1 INTRODUCTION AND BACKGROUND

In *Khan v S* (A89/2023) [2024] ZAGPPHC 190 (15 February 2024), the full bench of the High Court of South Africa, Gauteng Division, Pretoria, *per* Mogale AJ (Nyathi J and Kooverjie J concurring) heard an appeal after the appellant was convicted by Mosopa J in the trial court of two counts of murder (read in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997) and one count of attempted murder. The appellant was sentenced to life imprisonment in respect of the two counts of murder and six years' imprisonment for the count of attempted murder. The sentence of life imprisonment for the two counts of murder was based on the fact that the trial court found the murders to have been planned or premeditated. The trial court found no compelling and substantial circumstances justifying a lesser sentence than the prescribed life imprisonment.

Leave to appeal against both the judgment and orders was dismissed by the trial court. The appellant then petitioned the Supreme Court of Appeal and leave to appeal to the full court of the Gauteng Division was granted against conviction and sentence. For purposes of this discussion, only the convictions and appeal against the murder convictions and sentence of life imprisonment, are relevant.

It is a well-known fact that South Africa is plagued by violent crime and that recidivism is at a high rate.[1] In response to the increase in the crime rate, and murder in particular, the legislature enacted section 51 of the Criminal Law Amendment Act 105 of 1997.[2] On 1 May 1998, the legislature implemented sections 51 to 53 of the Act in terms of which minimum sentences are prescribed for certain crimes. A sentencing court may impose a lesser sentence only if it is satisfied that substantial and compelling circumstances exist which justify it.[3] Section 51(1)(a) of Act 105 of 1997 provides that a high court shall sentence a person who has been convicted of a crime referred to in Part I of Schedule 2 of the Act to life imprisonment which, after the abolition of the death penalty, is the most severe form of punishment a court may impose. Part I of Schedule 2 lists, apart from rape, the crime of murder when it was planned or premeditated.[4]

1 Snyman *Criminal Law* 7 ed (2020) 14; Schoeman "Recidivism: A Conceptual and Operational Conundrum" 2010 *Acta Criminologica* 81. In *S v Matyityi* 2011 1 SACR 40 (SCA) para 23 Ponnan JA stated that "despite certain limited success there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming". See also *Khambule v S* (AR 267/2018) [2023] ZAKZPHC (24 March 2023) 35. In the current context, the high crime rate most likely served as an impetus for the appellant's belief that his life was in danger.

2 Snyman *Criminal Law* 389.

3 Compare *S v Dodo* 2001 3 SA 382 (CC) para 10; *S v Mofokeng* 1999 1 SACR 502 (W) 522E; *S v Malgas* 2001 1 SACR 469 (SCA) 482G; Snyman *Criminal Law* 17; Burchell and Milton *Principles of Criminal Law* 23; JD Mujuzi "The Prospect of Rehabilitation as a 'Substantial and Compelling' Circumstance to Avoid Imposing Life Imprisonment in South Africa: A Comment on S v Nkomo" 2008/ *SACJ* 2 and Terblanche "Twenty Years of Constitutional Court Judgements: What Lessons Are There About Sentencing?' 2017*Potchefstroom Electronic Law Journal* 4. In *Malgas* para 25, Marais JA provided a list of rules that a court must consider when interpreting "substantial and compelling circumstances", also referred to in Dodo para 40. The *Malgas* criteria was criticised in *S v Kgafela* 2001 2 SACR 207 (B) 13 where the court remarked that the SCA might welcome the opportunity to reconsider its *Malgas* criteria in order to give a more definitive or formulation to the words "substantial and compelling circumstances". In *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 67 Cameron J held that the prescribed minimum sentences do not apply to offenders between 16 and 18 years of age.

4 South African courts have long recognised planning and premeditation as aggravating factors in the case of murder. See, for example, *S v Khiba* 1993 2 SACR 1 (A) para 4 and *S v Malgas* 2001 1 SACR 469 (SCA) para 34. The SCA in *Netshivhodza v S* (962/2013) [2014] ZASCA 145 (26 September 2014) para 8 warned that "the minimum sentence has been set as a benchmark prescribing the sentence to be ordinarily imposed for specific crimes and should not be departed from for superficial reasons." In *S v Matyityi* 2011 1 SACR 40 (SCA) para 23, Ponnan JA, empasising the high crime rate in South Africa, stated: "And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from minimum sentences prescribed by the legislature for the flimsiest of reasons."

Planned criminality is regarded as being more reprehensible than unplanned, impulsive acts.[5] There must, however, be conclusive evidence that the murder was indeed premeditated or planned.[6] The Constitutional Court (per Ackermann J) unanimously found that section 51 passes constitutional muster.[7]

It has been confirmed numerous times in case law and by legal scholars that, for a conviction in a criminal court, the prosecution must prove the presence of all the definitional elements of the crime and thus the accused's criminal liability beyond reasonable doubt.[8] One such element to be proved is unlawfulness. Instances where the fulfilment of the definitional elements of a crime is justified or legally regarded as objectively reasonable, are known as grounds of justification which serve to exclude unlawfulness. One such ground of justification is private defence.

A person acts in private defence, and thus lawfully, if he/she uses the minimum force necessary to ward off an unlawful human attack, which has commenced or is imminently threatening, upon his/her or somebody else's protected legal interest such as life, physical integrity, property, reputation or dignity. The defensive act in private defence must be vital for the protection of the threatened interest. In other words, the fact that the appellant acted against the deceased must have been necessary. The defence must also be directed at the attacker, be reasonably proportionate to the attack and be perpetrated with the knowledge that it is performed in private defence. There is no such thing as coincidental private defence.[9]

2 FACTS IN *KHAN v S*

The appellant was a businessman who owned various properties in Pretoria West, Atteridgeville, and Laudium. He is naturalised South African citizen of Pakistani origin. At the date of the incident that resulted in the double murder conviction, the appellant was contacted and informed that a group of people were at one of his properties. The appellant immediately made his way to the specific property and upon his arrival, the group identified themselves as the Concerned Tshwane Residency Group ("CTR").[10] The group was represented by the deceased who required

5 Terblanche *The Guide to Sentencing in South Africa* 3 ed (2016) 270–271.

6 Compare Lewis JA (Scott, Lewis and Van Heerden JJA concurring) in *S v Makatu* 2006 2 SACR 582 (SCA) paras 12–14.

7 *S v Dodo* para 33.

8 Cf *S v MRC* (CC 35/2023) [2023] ZAMPMBHC 8 (22 February 2023) 94; *S v Kesa* (CC19/2020) [2023] ZAECMHC 6 (13 February 2023) 25; *S v Mncube* (CCP42/2021) [2023] ZAKZPHC 15 (15 February 2023) 165; *Kapa v S* (CCT 292/21) [2023] ZACC 1 (24 January 2023) 67; *Mohlalhlane v S* (A208/19) [2023] ZAGPPHC 94 (23 February 2023) 10; *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204CA) para 52 to 53; Burchell *Principles of Criminal Law* 5 ed (2016) 51 and Mokoena "The Right to Remain Silent: an One-eyed Approach to Truth-seeking?" 2015 *Journal of Law, Society and Development* 120 130.

9 Burchell and Milton *Principles of Criminal Law* 122 125; Snyman *Criminal Law* 85; Kemp *Criminal Law in South Africa* (2018) 98; *S v TS* 2015 1 SACR 489 (WCC) ; *S v Papu* 2015 2 SACR 313 (ECB) 10; *S v Ngobeni* [2014] ZASCA 59; *S v Mkhize* [2014] ZASCA 52; *Ehrke v S* (A 1068/2009) [2012] ZAGPPHC 189 (23 August 2012) 12; *S v Grigor* [2012] ZASCA 95; *Ngubane v Chief Executive Director of Emergency Services, Ethekwini Metropolitan Services* 2013 1 SACR 48 (KZD) 27; *S v Steyn* 2010 1 SACR 411 (SCA) 16; *S v Engelbrecht* 2005 2 SACR 41 (W) 228; *S v Ferreira* 2004 2 SACR 454 (SCA) 45; *S v Trainor* 2003 1 SACR 35 (SCA) 41; *S Mkosana* 2003 (2) SACR 63 (BCH) 90; *S v Makwanyane* 1995 3 SA 391 CC 138; Hoctor "General Principles and Specific Offences" 2014 *SACJ* 63 65; Goosen "Battered Women and the Requirement of Imminence in Self-defence" 2013 *PELJ* 70 71; Botha "Private Defence in the South African Law of Delict : Rethinking the Rethinker" 2013 *SALJ* 154 155; Hoctor "General Principles and Specific Offences" 2018 *SACJ* 437 438; Hoctor "General Principles and Specific Offences" 2020 *SACJ* 751 752; Goosen and Hoctor "Comparing Self-defence and Necessity in English and South African Law – *R v Riddell* [2018] 1 All ER 62; [2017] EWCA Crim 413" 2019 *Obiter* 191 193; Walker "Determining Reasonable Force in Cases of Private Defence – A Comment on the Approach in *S v Steyn* 2010 (1) SACR 411 (SCA): Comments" 2012 *SACJ* 84.

10 *Khan* para 6.

proof of the appellant's ownership of the property in question. The group demanded to see the title deed of the property.

The appellant testified that he had previously sought the court's assistance to interdict the CTR group from illegally occupying his properties. The deceased, in count 1, was a member of CTR and was due to appear in the Pretoria Magistrates' Court on 3 February 2020 for violent and illegal dispossession of immovable property. The appellant pleaded not guilty to the charges, and a written plea explanation in terms of section 115 of Act 51 of 1977 was admitted into evidence.[11] Central to the evidence was video footage which had recorded the initial argument between the appellant and the group of people, including the deceased. The footage depicts the altercation between the CTR group members and the appellant at the scene. The recording did not, however, encapsulate the altercation until the end.

The state called two witnesses to testify on its behalf. Both witnesses were members of the CRT group. They testified that on the day of the incident, they were together with other people, including both the deceased (in count 1 and count 2), when they proceeded to the appellant's property.[12] The appellant was contacted to come to the scene. On his arrival, he was asked to produce the title deed as proof of his ownership of the property. The appellant responded that he would bring it on the next Monday and suggested that they should then meet at the police station. There was a forceful and violent struggle at the appellant's gate between the appellant and members of the group. The first witness (Moopane) testified that, during that struggle, the appellant turned towards him and fired a shot that missed him, but the bullet hit the deceased (in count 2), who was behind him. The witness testified that he had then fled the scene and saw the appellant walking towards the deceased (in count 1), who was lying on the ground. The appellant then fired two shots at the deceased (in count 2), who was also on the ground.

The second state witness (Oliphant) testified that the appellant shot the deceased in the chest (in count 1) while the deceased was raising his hands in retreat.[13]

During cross-examination, both witnesses testified that the appellant was the only person who carried a firearm. The second state witness confirmed that he was carrying a bottle containing a soft drink and not a firearm. The appellant's explanation in the trial court that the second witness was carrying a holster, was therefore incorrect.

The appellant testified that the demand from the group to produce his title deed was aggressive. He noticed some group members were armed and concealed their firearms under their shirts. He testified that he attempted to close the gate of the property manually, but was prevented from doing so by the group, after which a violent and forceful struggle ensued. The appellant specifically recalled a firearm being pointed at him after which he then took out his firearm. An attempt was made to grab his firearm, but he managed to break free from their grip. The appellant testified that during this struggle, he was pushed away and lost his balance. While he stumbled in a backward motion inside the yard, he started firing shots with his licensed firearm, a 9mm Parabellum Caliber Block Model 19 semi-automatic pistol, at the members who tried to overpower him. The deceaseds' deaths (in counts1 and 2) were caused by injuries sustained during the shooting. The appellant denied that he acted unlawfully as he feared for his life.[14] The appellant further testified that he was threatened by this group and that they wanted to kill him. According to the appellant, one of them uttered the words: "You do not know how many people I have killed before". Someone also pointed a finger at him. He testified that he saw something at the back of the second state witness's T-shirt that looked like a holster, which gave

11 *Ibid* para 7.

12 *Ibid* para 8.

13 *Ibid* para 10.

14 *Ibid* para 12.

him the impression that there was a firearm. He also saw a person in a green T-shirt carrying a firearm on his waist. Based on these observations and utterances, he believed that his life was in danger.[15]

A witness testifying for the appellant confirmed that one of the people in the group wearing a green T-shirt was armed and entered the premises with a cocked firearm. He testified that one Rasheed recorded the video footage and called the 10111-emergency number attempting to seek assistance from the police but that his call was not responded to.[16] Pieterse, a ballistic expert, testified as to the probable position the appellant was in when both the deceased were shot. According to him, there was an absence of "shored exit wounds" on the bodies of both the deceased. The bullet trajectory, according to this witness, showed that the person was shooting without aiming and was not stable on his feet. The trial court accepted the expert evidence.

3 ANALYSIS

It is well-known that an appeal court may only interfere where there is a misdirection of the law and/or facts.[17] Sentencing is also the prerogative of the trial court and should not lightly be interfered with. In *Sithole v S*,[18] Yende AJ (Van Der Westhuizen J concurring) referred with approval to what was stated by Zondi JA in *Ndou v The State*,[19] namely that

> sentencing is within the discretion of the sentencing court. An appeal court's power to interfere with sentences imposed by a trial court is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, or that the trial court misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

The issue in this appeal was whether the trial court was misdirected in finding that the offence committed was premeditated and that there was an intention to commit the crimes in the form of *dolus directus*.[20] The essential function of an appeal court is to determine whether the trial court came to a correct conclusion.[21] The appellant's grounds of appeal pertaining to conviction i was, in essence, that the trial court had erred in rejecting the defence of the applicant (private defence) and further accepting the evidence of the state, despite glaring contradictions. It was contended that the trial court had failed to apply the law applicable to private defence correctly. It was further contended that the trial court had failed to evaluate the evidence presented by the state and defence properly and further had failed to consider the objective expert evidence of the ballistic expert.[22]

On the finding of premeditation, it was argued by the appellant that there was a misdirection. The trial court found that the appellant had arrived there with his cocked pistol, ready to fire. The

15 *Ibid* para 13.

16 *Ibid* para 14.

17 In *Nyathi v S* [2024] 121 para 12, Coetzee AJ (Van der Westhuizen, J concurring) correctly held that, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. See also *S v Hadebe* [1997] ZASCA 86 para 13; *S v Monyane* [2006] ZASCA 113 para 15 and *S v Francis* [1990] ZASCA 141 para 19.

18 [2024] 39 para 32.

19 [2019] ZASCA 85 para 21. See also *Bogaards v S* [2012] ZACC 23 41.

20 Cf Snyman *Criminal Law* 160; *S v Humphreys* 2013 2 SACR 1 (SCA) para 12, and *S v Ferreira* 2004 2 SACR 454 (SCA) 475C-D.

21 See *Cole v Government of the Union of S*A 1910 AD 263, 272; *Van Rensburg v Van Rensbur*g 1963 1 SA 505 (A) 510A and Theron JA (Maya, Bosielo, Pillay and Petse JJA concurring) in *Quartermark Investments v Mkhwanazi* 2014 3 SA 96 (SCA) 103A.

22 *Khan* para 5.

explanation that his firearm was always cocked was regarded suspicious, as such a firearm could be discharged by accident.[23] Turning to the issue of premeditation, the High Court in *Khan* referred with approval to what was stated by the Supreme Court of Appeal, *per* Makaula AJA (coram Mocumie and Hughes JJA, Makaula, Smith and Weiner AJJA) in *Baloyi v S*,[24] namely that a finding of premeditation employs inferential reasoning. The presiding officer must interrogate the facts of each case and adduce from them whether the commission of the offence was premeditated or not. Makaula AJA made it clear that an accused armed with a weapon, is not always intent on premeditation.[25]

The High Court in *Khan* opined that the trial court had misdirected itself by not accepting the appellant's explanation that his firearm was always cocked. It did so without supporting expert evidence. The fact that the appellant requested Mr. Rasheed to seek the assistance of the police demonstrated that there was no premeditation.[26]

The trial court accepted scientific evidence that the accused was moving backward when the deceased started shooting and that the bullet trajectory in the bodies of the deceased is in line with such movement at the time of the shooting. Based on this, the full bench of the High Court found that the trial court had misdirected itself by finding that the appellant had *dolus directus* to commit murder. The undisputed bullet trajectory finding demonstrated that the person who was shooting at the deceased did so without aiming and was not stable on his feet This evidence corroborates the appellant's version that he was stumbling backwards when he started shooting. The expert evidence is proof that there could not have been an intention on the part of the appellant to commit the act. The trial court consequently erred in its finding that the fact that the deceased was shot multiple times on the upper part of the body demonstrated that the appellant had *dolus directus*.[27]

The full bench of the High Court found that the trial court placed excessive emphasis on the evidence of the State witnesses. The appellant argued that the court was highly critical of his version and found that he was dishonest without providing reasons for the finding.[28] It is trite that an accused's version cannot be rejected only because it is improbable. It can only be rejected based on the inherent probabilities if it can be said to be so improbable that it cannot be reasonably possibly true. The full bench of the High Court pointed out that the trial court was required to consider the totality of the evidence to determine whether the essential elements of a crime have been proved.[29] Mogale AJ quoted with approval the statement of Nugent J in *Van*

23 *Ibid* para 19.

24 (2022) ZASCA 35 (1 April 2022) para 17.

25 Cf *Kekana v S* [2014] ZASCA 158 para 5; *Benedict Moagi Peloeole v Director of Public Prosecutions, Gauteng* (740/2022) [2022] ZASCA 117 para 17.

26 *Khan* para 21.

27 *Khan* para 17. See also *S v Ferreira* 2004 2 SACR 454 (SCA) 475c-d and *S v Humphreys* 2013 2 SACR 1 (SCA) para 12.

28 *Khan* para 29.

29 S *v Libazi* 2010 2 SACR 233 (SCA) para 17. In *Ximba v The State* (957/2022) [2023] ZASCA 6 (19 January 2024) para 26 the SCA reiterated that the correct approach is to weigh up all the elements which point towards the guilt of an accused against all those which are indicative of his innocence. Proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides should be taken. In *Michael Jantjies v The State* (Case no 532/2022) [2023] ZASCA 3) 15 January 2024 para 13 the Court held that the High Court had materially misdirected itself by not taking into account the entirety of the evidence.

der Meyden:[30]

> The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning appropriate to the application of that test in any particular case will depend on the nature of the evidence the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.

The full bench of the High Court held that the appellant acted lawfully in believing that his life or property was in danger. The version of the appellant was reasonably possibly true.[31] The appellant alleged that he had acted in private defence since he feared for his life when a firearm was pointed at him.[32] The full bench of the High Court correctly held that, in a defence excluding unlawfulness, the test is objective. Unfortunately, the full bench of the High Court seemed to have obscured the defences of private defence and putative private defence in holding that "the test to be applied is whether the appellant genuinely believed the attack was imminent and had to act to ward off an attack".[33] The court clearly here refers to a purely subjective test which, having just stated that the test for a defence excluding unlawfulness, which on the facts is private defence, is objective. The subjective test of "whether the appellant genuinely believed" is applicable to putative private defence and not to private defence.[34] Unlike private defence, putative private defence is not a ground of justification that excludes unlawfulness. Putative private defence exists where the accused is under the mistaken belief that he is conducting himself in private defence whereas there is no such ground of justification in the circumstances. For putative private defence to exclude the appellant's intention, his mistaken belief that he is acting lawfully in private defence must be genuine and honest but need not be rational or reasonable.[35] While the appellant's conduct remains unlawful, the absence of knowledge of unlawfulness would exclude his intention, since knowledge of unlawfulness is an integral part

30 1999 1 SACR 447 (W) at 449I-450B.

31 In *S v Van Aswegen* 2001 2 SACR 97 (SCA) 101a-e the SCA confirmed that no onus rests on the appellant to convince the Court of the truth and of any explanation he gives. If the appellant gives an explanation, even if that explanation is improbable, the Court is not entitled to convict him unless it is satisfied, not only that the explanation is improbable; but that it is false beyond any reasonable doubt. If there is any reasonable possibility of his explanation being true, he is entitled to an acquittal. See *S v Mbuli* 2003 1 SACR 97 (SCA) 110. See also Mabindla-Boqwana JA in *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024) 60. This stems from the fact that the duty to prove that the appellant is guilty lies squarely with the prosecution; a rule that is trite in South African law. See, for example, *S v MRC* (CC 35/2023) [2023] ZAMPMBHC 8 (22 February 2023) 94; *S v Kesa* (CC19/2020) [2023] ZAECMHC 6 (13 February 2023) 25; *S v Mncube* (CCP42/2021) [2023] ZAKZPHC 15 (15 February 2023) 165; *Kapa v S* (CCT 292/21) [2023] ZACC 1 (24 January 2023) 67 and *Mohlalhlane v S* (A208/19) [2023] ZAGPPHC 94 (23 February 2023) 10. The onus does not shift to the appellant if he has raises a criminal defence such as private defence. This was confirmed by Smalberger JA in *S v De Oliveira* 1993 2 SACR 59 (A) 63H-64A; Brand AJA in *S v Shackell* 2001 2 SACR 185 (SCA) para 30 and Zulman JA in *S v V* 2000 1 SACR 453 (SCA) 455B.

32 *Khan* para 22.

33 *Ibid* para 22.

34 Le Roux-Bouwer "The Defence of Putative Private Defence in Criminal Law: *Tuta v The State* 2023 (2) BCLR 179 (CC) (31 May 2022)" 2023 *Obiter* 926; Maharaj "Fight Back and You Might be Found Guilty: Putative Self-defence" 2015 *De Rebus* 34.

35 Snyman *Criminal Law* 297; Hoctor 2020 *SACJ* 752; *S v Papu* 2015 2 SACR 313 (ECB) para 12; *Nene v S* [2018] ZAKZPHC 46 (4 May 2018) para 29; *S v Mdlalose* 2020 JDR 1804 (MN) para 22 and *S v Ngobeni* [2014] ZASCA 13. Where the appellant acted under the genuine but erroneous belief in the existence of a ground for justification, his conduct remained unlawful. See *S v Makaula* 2020 JDR 1746 (ECM) para 20; *DPP, Gauteng v Pistorius* 2016 1 SACR 431 (SCA) para 53; *S v Teixeira* 1980 3 SA 755 (SCA) para 26 and Botha "Putative Self-defence as a Defence in South African Criminal Law: A Critical Overview of the Uncertain Path to Pistorius and Beyond" 2017 *Litnet* 3.

of intention.[36]

The full bench of the High Court seemed to further evaluate the defence of putative private defence (as opposed to private defence) by quoting the finding of the trial court in the following terms:[37]

The trial court's finding on putative private defence was:

> The defence of putative private defence is not available to him based on his version. He cannot say that he mistakenly thought that his life was in danger as he was grabbed and an attempt was made to disarm him of his firearm by the group, and more specifically, he saw a person cocking a firearm and pointing the firearm at him.
>
> The accused failed to meet the requirements available for the defence of private defence, as he was not attacked, and his life was not threatened. Both the deceased were not armed, they were not posing a real threat to the appellant, and the accused cannot say whether they were a part of the group that grabbed him. The threat was imminent if the person with a green T-shirt and Mr. Oliphant were the ones shot as they were posing a real threat to the appellant. The trial court finds that the appellant's version excludes the applicant's reliance upon putative defence.

In this regard the trial court failed to take into account the appellant's testimony pertaining to the altercation between the parties.

Surprisingly, the full bench of the High Court then quotes the decision of Smalberger JA in *S v De Oliveira*[38] where it was held that

> the difference between private defence and putative private defence was significant: A person who acted in private defence acted lawfully, provided his account satisfied the requirements laid down for such defence and did not exceed its limits. In putative private defence it was not lawfulness, which was an issue, but culpability. If an accused honestly believed his or her life or property to be in danger but objectively viewed were not, the defensive steps he or she took could not constitute a private defence. If, in those circumstances, he or she killed someone, his or her conduct was unlawful. His or her erroneous belief that his or her life or property was in danger may well exclude *dolus*, in which case liability for the person's death based on intention will also be excluded, at worst for him or her, he or she could then be convicted of culpable homicide.[39]

The full bench of the High Court concluded that "the appellant was genuine in his belief that his life was in danger and that he had the right to protect himself and his property".[40] This leads the reader to believe that the full bench of the High Court was of the opinion that the appropriate defence regarding the facts was putative private defence, just to be met by the following sentence, indicating otherwise: "The appellant's belief that his life was in danger was not a mistake. Hence the issue of putative private defence does not come into play."[41] With this statement the full bench of the High Court made it clear that the defence of putative private defence was not applicable on the facts and that the correct defence was indeed private defence. This inference is, however, again proven incorrect by the full bench of the High Court's

36 So confirmed in *S v Campher* 1987 1 SA 940 (A) 955d-e; *S v Dougherty* 2003 2 SACR 36 (W) 34; *S v Mostert* 2006 1 SACR 560 (N) 569 f-g and *S v Joshua* 2003 1 SACR 1 (SCA) 29.

37 *Khan* para 24.

38 1993 2 SACR 59 (SCA) 63I-64B.

39 *Khan* para 26.

40 *Ibid* para 28.

41 *Ibid* para 28.

concluding remark[42] that

> the State failed to prove beyond reasonable doubt that the appellant had the intent to commit murder when believing that his life and his property were threatened. He testified he was entitled to act in private defence. No evidence refutes the version that he was acting in private defence is found to be reasonably possibly true. As a result, the appellant acted lawfully in defending himself and his property; this excludes criminal liability.

This conclusion, with respect, leaves the reader confused. In stating that "the State failed to prove beyond reasonable doubt that the appellant had the intent to commit murder", the court implies that the appellant did successfully rely on the defence of putative private defence where the absence of knowledge of unlawfulness excluded the appellant's intention. The last sentence, namely "[a]s a result, the appellant acted lawfully in defending himself and his property; this excludes criminal liability" implies that the appellant did successfully rely on the defence of private defence where the unlawfulness of his conduct was excluded.

The Constitutional Court in *Tuta v The State* 2023 (2) BCLR 179 (CC) (31 May 2022) has eradicated all possible confusion between the defences of private defence and putative private defence. Private defence is a ground of justification which excludes unlawfulness if various objective criteria are met and the test for private defence is therefore objective. Putative private defence relates to a subjective mistaken but genuine belief in an accused's psyche which excludes knowledge of unlawfulness and, consequently, intention. The test for putative private defence is therefore subjective.[43]

The only inference left is that the full bench of the High Court was disarranged on the distinction between the defences of private defence and putative private defence. This inference is undeniably confirmed by the full bench of the High Court's final summary:[44]

> In summary, the evidence reflects that this was a spur-of-the-moment incident that escalated by several events that led to the shooting incident. The CTR had no legal authority and was not lawfully entitled to enquire or demand that the appellant prove ownership of his property by providing them with the title deed, neither was the CTR lawfully permitted to become aggressive and threatening when the appellant informed them, they would receive the title deed on Monday at the police station. There was a forceful and violent struggle with the appellant at his gate. Some of the CTR members were allegedly armed with a firearm and pointed at the appellant. As he was pushed and stumbling backwards, he discharged his firearm, genuinely believing that his life was in danger at the hands of the aggressive members of the group. His belief was genuine and reasonable and lacked the intention of unlawfulness.

It is unclear what the full bench of the High Court meant by "lacked the intention of unlawfulness". If it means that the appellant lacked knowledge of the unlawful nature of his conduct, one must accept that the appellant acted under putative private defence and not private defence. Nevertheless, the appeal was upheld and the convictions of murder and attempted murder were set aside. An order for the appellant's immediate release was made.[45]

4 CONCLUSION

The appellant in *Khan v S* (A89/2023) [2024] ZAGPPHC 190 (15 February 2024) proceeded from two convictions of murder and a minimum sentence of life imprisonment ordered by the trial court to a total acquittal by the High Court. This radical outcome in conviction and

42 *Khan* para 30.

43 See also Le Roux-Bouwer "The Defence of Putative Private Defence in Criminal Law: *Tuta v The State* 2023 2 BCLR 179 (CC) (31 May 2022)" 2023 *Obiter* 926–938.

44 *Khan* para 32.

45 *Ibid* para 34.

sentence calls for critical analysis.

A very significant and concerning aspect from a reading of the full bench of the High Court decision is the court's disarranged stance on the distinction between the defences of private defence and putative private defence. The two defences were seemingly conflated and confused by the High Court, leaving the reader with discomfort and uncertainty as to the basis on which the acquittal was made. In light of clear and concise decisions such as *Tuta v The State* 2024 (1) SACR 242 (CC) (31 May 2022) on the issue, such confusion is unfortunate.