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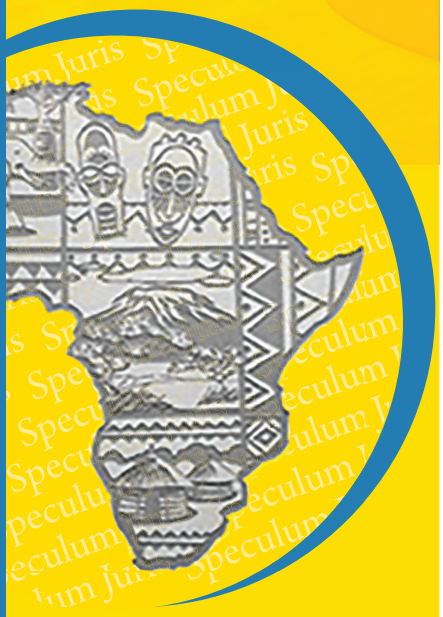

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Speculum Juris

ISSN 2523-2177 • Volume 38, Number 1 (2024)

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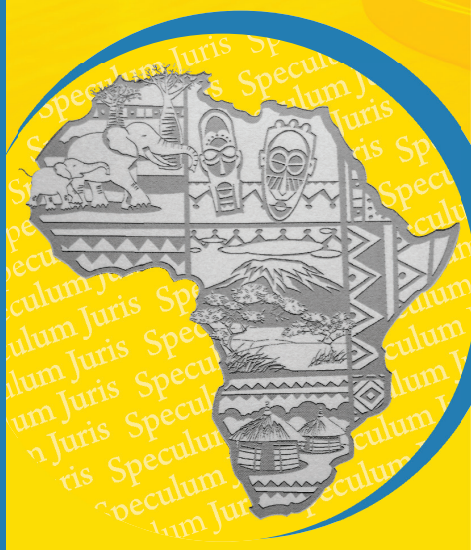
Speculum Juris

Vol 38 No 1 (2024)
Published 31 August 2024

ISSN 2523-2177



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Cite as: Tshehla "Is There a Duty to Flee Before Resorting to the Use of Force in Private Defence? Reading between the Judicial Lines" 2024 (38) Spec Juris 79–94

Is There a Duty to Flee Before Resorting to the Use of Force in Private Defence? Reading between the Judicial Lines

Boyane Tshehla*
Senior Lecturer
Oliver Schreiner School of Law,
University of the Witwatersrand

Abstract

The courts have repeatedly refrained from giving a clear answer to the question whether there is a duty to flee before a person may resort to the use of force (especially lethal force) when acting in private defence. However, a reading of several judgments points to the existence of such a duty even though the courts refrain from directly pronouncing on this issue. The discussion in this article refers to a few such cases to show that even though the courts accept that there is no duty to flee before resorting to the use of force, they invariably emphasise the feasibility of flight in determining whether the requirements of private defence were met in each case. It is generally accepted that the feasibility of fleeing is just one of the factors to be considered in these cases but, it is submitted, this is a factor that seems so core to private defence that it deserves a clear answer from the courts. The question whether fleeing is practical and/or would not expose the victim to danger can only be rightly situated in private defence after answering the question whether the law requires fleeing before fighting when faced with an unlawful attack. So far, the courts have refrained from answering this question and, it is argued that this is undesirable as it leaves potential private defenders in a

* B.PROC (UNIN); LLM (UCT). Boyane.Tshehla@wits.ac.za.

state of uncertainty regarding what the law requires.

Keywords: Private defence; ground of justification; use of force; lethal force; duty to flee

1 INTRODUCTION AND CONTEXTUAL BACKGROUND

If I do not act—I will die immediately; if I act—I will die later.[1]

There are certain rights that are inherent to all human beings and these rights enjoy legal protection.[2] When the enjoyment of these rights is unlawfully disturbed, recourse is available and, generally, the justice system is vested with the responsibility of vindicating these rights and their enjoyment.[3] However, it often happens that the violation of the rights or the disturbance of the enjoyment thereof takes place in a situation where the state is not available to provide relief or the necessary protection at the crucial moment when the need arises.[4] For this reason, the law permits self-help in some situations and one such self-help is private defence. Private defence is a ground of justification that makes it acceptable and lawful for persons to protect certain legally protected interests.[5] According to this ground of justification, if legally protected interests[6] are unlawfully attacked, individuals are authorised to defend such interests (even to the extent of using lethal force where necessary).[7] Someone who causes harm in such a situation will not attract criminal liability provided that the defensive act is necessary; the means employed are proportional to the nature of the attack; and the defensive act is directed at the attacker.[8]

The need for individuals to defend themselves when attacked or their rights are threatened is as old as humankind.[9] Throughout history, individuals have found themselves in situations

1 These words are attributed to Thomas Hobbes. During Hobbes' times, the death penalty was the most likely outcome in a situation where a person had killed another in an act of private defence. Sangero (Sangero *Self-Defence in Criminal Law* (2006) 37) has revisited the quotation and reformulated it thus: "If I do not act I will die or be injured immediately; if I act—perhaps I will die later (and in our times—in most legal systems—it is almost certain that the assumption is: perhaps I will be imprisoned afterwards)."

2 Such protection is contained in international instruments (e.g. the United Nations' Universal Declaration of Human Rights, 1948) and domestic instruments (e.g. the Constitution of the Republic of South Africa, 1996).

3 One of the core attributes of the modern state is that prosecution of crime was usurped from private individuals and vested in the criminal justice system (See Stewart "The Constitution and the Right to Self-Defence" 2011 *University of Toronto Law Journal* 899–919).

4 This justification for private defence is based on the theory that this defence exists in order to replace the state authority. In other words, its purpose is to allow citizens to employ this defence only in situations where the state cannot do so. Generally, see Stewart (*ibid*) and Brudner "Constitutionalizing Self-defence" 2011 *University of Toronto Law Journal* 867–897.

5 Snyman *Snyman's Criminal Law* (2020) 85. Snyman gives a comprehensive explanation of private defence. He states that "[a] person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack". This explanation is generally accepted among the courts, as will become clear in the discussion in this article and academics (For example, see Burchell *Principles* (2016) 121 and Kemp *et al. Criminal Law in South Africa* (2012) 77.

6 *Ibid*. Legally protected interests include life, "bodily integrity, property or other interest which deserves to be protected".

7 Law reports are awash with cases where attackers were killed in the process of private defence and the accused evaded criminal liability. These include *R v Zikalala* 1953 (2) SA 568 (A), *Steyn v S* 2010 (1) SACR 411 (SCA) and *S v Mdlalose* (CC17/2020) [2020] ZAMPMHC 37 (27 August 2020) to mention just a few.

8 See Le Roux "Private Defence: Strict Conditions to be Established *Govender v Minister of Safety and Security* 2009 2 SACR 87 (N)" 2010 (73) *THRHR* 329 for a succinct explanation of private defence and its parameters.

9 For a detailed exposition of the history of private defence, see Lowery "The Historical Development of Self-Defense as Excuse for Homicide" 1951 *Kentucky Law Journal* 469–471.

where—through the aggression of others—they had to make the crucial decision whether to act in response to such aggression or not. These include situations where an individual is leisurely enjoying drinks at a beer hall before being suddenly attacked by fellow revellers[10] or, someone sleeping in their home and is suddenly and rudely awoken by an intruder.[11] The same applies when inhabitants inside a hut are being threatened by intruders that the hut was about to be burnt down (with its occupants inside) unless the homeowner opened the door.[12] In all these situations (and many more could crop up in the future), the persons affected took a defensive action and all ended up featuring as "the accused" in court because the architects of these incidents (the aggressors) were killed in the process.

There are several cases where, having caused the death of their attackers, the victims of the unlawful attacks had to explain to the court why they did not flee instead of staying to fight.[13] One such case is *Botha v S*.[14] In this case, the accused faced a charge of murder. The salient facts of this case may be summarised thus:[15] The accused was seated at a restaurant when someone unexpectedly arrived, hurled insults at her and subsequently assaulted her. She did not respond to the attack. The attacker left (apparently to smash a car windscreen in the parking lot among her other activities) but then returned and escalated the attack on the accused. The attacker smashed an ashtray on the accused, grabbed her by the hair and lifted her off the ground. The accused retrieved a steak knife from the table and stabbed the attacker once. The attacker died. That, in short, is how the accused moved from a restaurant table to the dock. After a period of about six years and several months in court,[16] the case reached the Supreme Court of Appeal (SCA) where the court ruled (by majority)[17] that she was guilty of culpable homicide. One question that was not answered by the SCA—again—is whether, in a situation where the victim of an attack is faced with an option of resorting to lethal force or fleeing and when such fleeing would not expose the victim to danger, does the law require the victim to flee?

It is submitted that the SCA judgment in *Botha*, creates the impression that the accused was expected to flee instead of using lethal force against the assailant if it was feasible to do so. This impression was also created in the case of *Zikalala*[18] some years earlier where the court seemed to emphasise the fact that the accused could not safely flee in order to avoid the attack. There is an impression because the court, in both *Zikalala* and *Botha* cases, did not definitively express itself on whether the victim of an unlawful attack is required to flee from the attacker before resorting to the use of lethal force.[19] In *Botha* the court stated that: "[i]t is not necessary to decide this question".[20] The court said this after acknowledging that there are two competing

10 *Zikalala*.

11 *R v Stephen* 1928 WLD 170.

12 This is what happened in *S v Ngomane* 1979 3 SA 859 (A).

13 These cases include *S v Ntuli* 1975 1 SA 429 (A), *Zikalala*, *Ngomane* and *Steyn*.

14 *Botha v S* 2019 1 SACR 127 (SCA).

15 The *Botha* judgment gives a full exposition of the facts but here they are just paraphrased (See paras 2–7 of the judgment in this regard).

16 The incident happened on 27 July 2012 and the SCA judgment was delivered on 1 November 2018. The trial took place in the regional court where the accused was convicted of murder and then went to the high court where the murder conviction was confirmed albeit with the form of intention reduced from *dolus directus* to *dolus eventualis* thereby reducing the length of her sentence from 15 years to 12 years imprisonment before it went to the SCA.

17 See *Botha* paras 1–22 for the majority judgment.

18 *Ibid*.

19 A related issue is: what is the position in a situation where the force used by the accused was not meant to cause death but in fact did cause death? Schippers JA (*Botha* para 50) raises this issue pertinently and it is an issue worthy of engagement. However, it falls outside the scope of this discussion as the focus is whether an accused bears a duty to flee before resorting to the use of lethal force.

20 *Botha* para 12.

views on this issue. On the one hand, the view that there is no duty to flee when faced with an unlawful attack and, on the other, "the view that if a safe opportunity for escape exists, any force used in private defence is unnecessary, as injury to the attacked person and the aggressor can be avoided entirely by retreating".[21] The same approach was adopted in *Steyn* where the court also raised this question but left it unanswered.[22]

It therefore remains an open question of whether it is expected or even required of victims of unlawful attacks to flee instead of resorting to the use of lethal force against their assailants. Therefore, this article sets out to assess whether a victim of an unlawful attack, has a duty to flee before resorting to lethal force. Although the courts have left this question without a clear answer, the general sense from the decided cases appears to be that there does exist a duty to flee. Burchell has stated the legal position in this regard thus: "there is no duty to flee in South African law and the accused may be unable to flee".[23] This assertion does not seem to sit comfortably with case law as the discussion below seeks to show. However, Burchell's stance is more of a reflection of the courts' ambivalence on this issue because even the courts assert that there is no duty to flee but then, almost invariably, go on to put some emphasis on whether or not it was possible or feasible for the victim to flee.[24]

The question not answered in all of this is: does such a duty to flee exist? It cannot be a fair and just approach to say (as the current legal position arguably does) that someone does not have the duty to flee and, when they do not flee but fight where they could have done so, blame them for it. In fairness to the courts, none of the cases referred to in this article called for a decision resting solely on the duty to flee. In other words, in none of the cases did the accused say "yes, I could have escaped the attack if I wanted to but I decided to stand my ground". This, it appears, is what enabled the courts to conclude the cases without answering this question.[25] Even with this acknowledgment of the court's possible justification for not addressing the issue, there is still a need to engage with same as it seems to be at the core of private defence. In fact, a sceptical view may be that the courts engineered the absence of a case where the accused directly places the issue before them. In other words, given the courts' current approach, would the accused who plead that they killed their attackers while fleeing was a viable option not be effectively pleading guilty? Perhaps not. But such an admission would significantly tilt the scale against such accused.

It should be stated outright that the aim of this discussion is not to assess whether there should be a duty to flee an unlawful attack before resorting to the use of force or not. That debate would essentially be about whether it is justified to have a legal position that requires an unlawfully

21 *Botha Ibid* para 39.

22 In *Steyn* para 21, the court stated: "Whether a person is obliged to flee from an unlawful attack rather than entitled to offer forceful resistance, is a somewhat vexed question. But in the light of the facts in this case, it is unnecessary to consider the issue in any detail."

23 Burchell *Principles of Criminal Law* (2016) 126.

24 For a clear demonstration of this approach, see *Botha* para 11, in particular.

25 It is interesting that, in *S v Mdlalose* (CC17/2020) [2020] ZAMPMHC 37 (27 August 2020), the court actually put this question to the accused. This is interesting because this appears to be a legal question that the court itself should be answering. In para 27 of the *Mdlalose* judgment, it is recorded: "A question that arises, and which the Court also posed to Mr Mdlalose while he was testifying, is whether the person who is being attacked must flee if she can do so in order to ward off the attack. Put differently, whether there is a duty to flee. It seems as if there is no general duty on a person attacked to flee, and more so not to flee from his or her own house if he or she is attacked there. Her house or place of residence is her last refuge—her 'castle'—where she may protect herself against any unlawful attack."

attacked person (usually innocent) to flee from such attack or not.[26] The purpose of this article is a limited one, namely to assess what the courts seem to tell us regarding the duty to flee, albeit without the courts doing so directly. The discussion starts with a brief outline of the place and role of private defence as a ground of justification. This is followed by an exposition of the *Botha* judgment as one of the most recent cases focusing on private defence involving the use of lethal force. The focus will then turn to an assessment of the courts' approach in dealing with the duty to flee where, it is submitted, the general sense coming from the judgments is that there is a duty to flee in a situation where the choice is between employing lethal force and fleeing.[27] In conclusion, it is submitted that either the courts or the legislature has to provide a clear answer to the question whether there exists a duty to flee before resorting to lethal force or not.[28]

2 SCOPE AND PURPOSE OF PRIVATE DEFENCE

The right of individuals to protect themselves, others or their property is rooted in human life and/or human instinct.[29] It could be justifiably asserted that it is rooted in common sense. Try depriving a two-year-old child of their favourite toy and see what happens. In fact, it can be said that the foundation of justice (and by extension the justice system) is that, where someone has been wronged, action has to be taken. Seen from this perspective, "tit for tat" has always been an attribute of the justice system.[30] In this line of thinking, therefore, society accepts that wrongs should be righted as a starting point but then takes that responsibility out of the hands of the victims and places it in the state.[31]

Thus, when legally protected interests are under unlawful attack, action should be taken by the state but where the state is unable to do so, individuals are permitted to resort to private defence.[32] From this perspective, private defence is wholly acceptable. What seems to be contentious about private defence (both historically and currently) is when the aggressor/attacker gets injured or even killed in the process of private defence. It is the maiming or killing of another human being that has always been frowned upon. No society countenances the killing of a person but, for obvious reasons, there have to be exceptions to this general stance as it is/was inevitable that persons might have to kill in some instances whether to protect their life, someone else's life or even their property. In English law—one of the main sources of South Africa's common law—there seems to have been what could be called an ambivalent stance on the issue of private defence where it involved the killing of another person.

26 The debate whether an attacked person should flee or stand their ground is raging in countries such as the United States of America where there are proponents both sides of the argument. See, among others, Headley and Alkadry "The Fight or Flight Response: A Look at Stand Your Ground" 2016 *Ralph Bunche Journal of Public Affairs* 1–13.

27 Dealing with this issue, Snyman (*Snyman*'s *Criminal Law* (2020) 89) aptly observed that "[a]lthough the courts have not yet unequivocally held that … there is indeed a duty to flee, there are indications in our case law that create the impression that the courts in fact expect her to flee".

28 The courts have avoided this question for the longest time as *Botha* is just one of the several cases where the courts refrained from answering the question. The other cases include *Zikalala* and *Steyn*. In researching this article, no information indicating any consideration of this issue by the legislature could be found.

29 There is merit in Snyman's assertion that private defence has ancient roots and can be said to have no history because it started at the beginning of time. Snyman *Snyman's Criminal Law* (2020) 85.

30 This attribute is, with modification, reflected in sentencing law as retribution (e.g. see Fish "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" 2008 *Oxford Journal of Legal Studies* 57–71) and also as "just deserts" e.g. see Starkweather "The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining" 1992 *Indiana Law Journal* 853–878.

31 Lowery "The Historical Development of Self-Defense as Excuse for Homicide" 1951 *Kentucky Law Journal* 469.

32 *Ibid*.

Lowery chronicled the history of private defence and noted that, in English law, private defence that involved the killing of another human being was taken so seriously that those involved in it could only be saved by the King's pardon.[33] In the absence of the King's pardon, they were at the risk of their properties being taken away from them and/or being condemned to death. However, private defence was clearly permitted in instances where the persons involved in private defence were doing so in the execution of the law.[34] Put differently, those involved in private defence were not protected by the law if they were not doing so in the execution of the law. It should be noted that such execution of the law does not seem to have been wide enough to include a probable argument that people acting in private defence are acting on behalf of the state; an argument often used to justify private defence.[35] [36] The law did not recognise private defence, with the result that those involved in it would be convicted of a crime. As Lowery put it,

> [b]y the 18th century the use of the king's pardon was accepted as the means of overcoming the substantive problem presented by the law which still did not recognize self-defense or misadventure as an excuse to the charge of homicide.[37]

The dilemma, it seems, was that the law did not recognise private defence, while society generally accepted it—a classic case of a state of incongruence between the law and the legal convictions of the community. It was only in the sixteenth century that the law recognised private defence[38] in a manner similar to (or closely resembling) the form in which it is currently practised. Even then it was not a direct recognition of private defence that serves as a full defence (i.e. one that leads to acquittal). In fact, the statute that dealt with private defence did not recognise private defence as a full defence but instead dealt with the forfeiture of belongings of the person who caused death in the process of private defence. It was only the courts, through interpretation of the said statute, that adopted the approach that private defence is a full defence.

It is this law, with its protective attitude towards human life and bodily integrity, that was later exported to other countries including South Africa which, together with countries such as India, Singapore, the United States of America (USA) and, closer to home, Botswana, that South Africa is still grappling with. In all the mentioned countries, unlike in South Africa, there are legislative provisions that regulate the circumstances in which force (in particular lethal force) is permissible. The four countries referred to (a tiny minority among many countries) have all taken some steps to legislatively regulate private defence such that there is some clarity regarding the permissible boundaries regarding the use of lethal force. The USA is divided with some states supporting the "stand your ground" rule and others the "retreat before fight rule".[39] Even with the division among states in this regard in the USA, there is at least some clarity as to what is expected of the victim of an unlawful attack. In India,[40] the criminal code provides for the circumstances and extent to which force may be employed while in Singapore,[41] similarly,

33 *Ibid.*

34 *Ibid*.

35 See Snyman *Snyman's Criminal Law* (2020) 85 regarding the justification of private defence.

36 According to Lowery 469, the acts covered would be limited to "where committed in execution of the law. Such cases as killings under the king's warrant, or in the pursuit of justice, or the killing of an outlaw, or a thief caught in the act, or other manifest felon who resists capture".

37 Lowery 1951 *Kentucky Law Journal* 470.

38 *The Statute of 24 Henry VIIP*, 1509.

39 See Engels "An Existentialist Analysis of 'Stand Your Ground' Laws" 2018 *Public Affairs Quarterly* 141–158.

40 Agrawal "The Right of Private Defense in Indian Criminal Justice System" 2020 https://ssrn.com/abstract=3626681 (accessed 1-12-2023).

41 Yeo "Bringing Clarity to Private Defence: The Singapore Experience" 2010 *NUJS Law Review* 33–52.

there is a statutory outline of the permissible limits in this regard. In Botswana, the Constitution and the Penal Code provide for private defence[42] and the courts have stated that, for this defence to succeed, it is required that the accused was "cornered" and "had no escape route"[43] but similarly gave the impression that victims of an unlawful attack bear no duty to flee.[44]

In all these countries, it seems, the legislative efforts were necessitated by the thorny issue of the use of force in private defence similarly faced by South Africa. In South Africa, a country without a penal code but reliant on the common law,[45] the courts have been skirting this issue for the longest of time and, in 2023, there was no definitive answer as yet. This much is evident in the *Botha* judgment discussed in the next subheading.

3 THE *BOTHA* CASE: SNAPSHOT OF THE FACTUAL MATRIX AND ISSUES

The appellant faced a charge of murder.[46] On the day of the incident that gave rise to the charge, the deceased had attacked the appellant at a restaurant. The relevant facts are that the appellant was seated at one of the tables outside the restaurant when she was confronted by the deceased who insulted her, assaulted her and then left. The deceased later returned and started to assault the appellant further. The appellant grabbed a knife from the table and stabbed the deceased to death. The appellant was later charged with murder and tried in the regional court. The court rejected her argument that she acted in private defence and she was convicted of murder. She appealed to the high court. In the high court her appeal was partially successful in that the form of fault was changed from *dolus directus* to *dolus eventualis* resulting in a shorter sentence.[47] But as the murder conviction still stood, she further appealed to the SCA and in that court she was also partially successful, with the court changing the conviction of murder to that of culpable homicide.[48]

In short, the outcome of this case's journey through the courts was that private defence was rejected as a defence and the case was then decided on the basis of fault.[49] In this regard, the SCA found that intention in any form was not present but there was fault in the form of negligence hence the conviction of culpable homicide. The essence of the judgment may be summarised thus: A person attacked another unprovoked (unless the extra marital affair—by some stretch

42 While s 4(2) [a] of the Constitution of the Republic of Botswana 1966 and s 16 of the Botswana Penal Code (Act No. 2 of 1964 as amended) provide for private defence, they both do not contain detailed provisions regarding the circumstances under which force may be used. In short, the provisions do not go much further than just recognising private defence.

43 For example, in *S v Sosela* (CTHFT-000040-08) [2009] BWHC 93 (15 April 2009) para 8, the court stated that: "Dealing first with the question of self-defence, for the accused to succeed in his defence, he must show on a balance of probabilities that the following circumstances existed: i) that he was cornered and he had no escape route; ii) that he was repelling an unlawful attack; and iii) that the force he used was no more than reasonable in the circumstances."

44 In *S v Gaborekwe* (CTHLB-000038-12) BWHC (19 Mar 2015), however, the court stated that "[a]ccording to settled law, if the accused person had been under threat from her brother, she would not have been obliged to take to her heels in flight; nevertheless, she should have demonstrated, by her conduct, that she had no desire to fight and was prepared to taken avoiding action if the opportunity presented itself". From these two judgments, it appears that there may be some lack of clarity whether victims of unlawful attacks bear a duty to flee or not. If so, then Botswana is in a position similar to that of South Africa despite providing for private defence in both the Botswana Constitution and the Penal Code

45 The place of private defence in South African law was cemented by the Constitutional Court in *S v Makwanyane* 1995 6 BCLR 665 (see para 138 in particular) and more recently reaffirmed in *Tuta v The State* 2023 2 BCLR 179 (CC) albeit indirectly because, in *Tuta*, the issue before court was putative private defence.

46 The facts of this case were provided above in the introduction. Here only the salient features that speak to the issue of duty to flee are repeated (see paras 1–22 of the judgment for the full exposition of the facts).

47 See paras 2–4 of the *Botha* judgment for the facts. What is provided here is a summary of the salient facts.

48 *Botha* para 22.

49 This was the verdict of the majority judgment (the majority judgment is contained in paras 1–22).

of imagination—qualifies as provocation)[50] the attacked person used the only means available to her in the heat of things, which caused her to end up with a culpable homicide conviction. Worse, if the original conviction in the trial court had stood, it would have been murder with the form of intention being *dolus directus* and had the judgment of the high court remained unchanged, it would still be a murder conviction albeit with the form of fault being *dolus eventualis*. In the SCA, however, there was a strong dissenting judgment in terms of which the accused would have been acquitted.[51] In the two subheadings below, the approach of the SCA's two judgments is evaluated.

The *Botha* case—arguably—presented an opportunity for the SCA to settle the debate about whether South African law subscribes to "flight before resorting to lethal force" or not. After all, one of the reasons—if not the main reason—the trial court gave for convicting the accused of murder was, as eloquently summarised by the SCA, the fact that she did not flee.[52] The SCA stated the following:

> In considering the means that the appellant had at her disposal at the crucial moment, the magistrate found that 'it was clear' that the appellant could have removed herself from the dangerous situation in which she was. Stated differently, she should have avoided using any force at all by taking a safe opportunity to escape.[53]

It is submitted that this was an opportunity for the court to clarify whether the appellant had a duty to remove "herself from the dangerous situation"[54] or to avoid "using any force at all by taking a safe opportunity to escape".[55]

3 1 The Majority Judgment and Its Approach

The court identified two key issues as those requiring attention in the appeal, namely whether the defensive act by the appellant "was necessary to avert the attack"[56] and whether "the means used were a reasonable response to the attack".[57] It is clear that the court was satisfied that the requirements for the attack[58] were met and, therefore, found it unnecessary to deal with them. The focus was on the requirements that the defensive act must meet and, even in this regard, the court found only these two requirements deserving of attention and, therefore, did not deal with the met requirement that the defensive act must be directed at the attacker.[59]

Regarding the requirement that the defensive act must be necessary to avert the attack, the court's answer was in the affirmative.[60] There can be no quarrel with this. The accused was attacked and the nature of the attack was such that she could not have been expected to endure it. As the court put it, "the assault was such that she could not reasonably be expected to fold

50 The source of the conflict (or animosity) between the deceased and the accused in *Botha* was the fact that the accused had an extra-marital affair with the deceased's husband (See *Botha* paras 2 25).

51 *Botha* para 63.

52 The full judgment of the trial court was not accessed for the purposes of this discussion, hence the lack of certainty regarding the reasons the trial court gave. Suffice to say that, for the purposes of this discussion, the judgment of the SCA seemed sufficient as the issue is merely whether victims of unlawful attack are required to flee before employing lethal force and what court judgments seem to tell us in this regard.

53 *Botha* para 36.

54 *Ibid.*

55 *Ibid.*

56 *Ibid* para 10.

57 *Ibid.*

58 These requirements are well known. They are that: (1) there must be an unlawful attack; (2) on legally protected interests; and (3) the attack must have commenced or imminent (but must not have been completed).

59 *Botha* para 10.

60 *Ibid* para 11.

her hands and do nothing in order to avert the attack".[61] The court started by taking issue with the fact that the trial court criticised the accused for not having moved away from the scene after the initial attack. The court found this criticism to be unjustified because the accused had explained why she did not move away.[62] The court accepted the accused's reasons that she did not move away because she did not think the deceased would come back and that when the deceased came back "a lot of things went through her mind such that she eventually did not move away";[63] that she had not used her own car to the restaurant;[64] that she did not know what would happen if she went into the restaurant;[65] and that she could not call for help because her cell phone battery was flat.[66] It did not deal with whether there was a duty on her part to move away. Put differently, should the accused have moved away from the scene if she did not have a reasonable explanation for not doing so? The court then also accepted the evidence of the accused that the attack happened unexpectedly, and she could not think rationally.[67] Again, the accused's saving grace (or at least part thereof) seems to be the fact that she was not thinking rationally at the time. This begs the question: if the accused was thinking rationally, was she expected to endure the attack or find a way to escape?

Having found the defensive act to have been necessary, the court then moved to the requirement whether the defensive act was a reasonable response to the attack.[68] This is the requirement that made the accused's private defence plea unsuccessful. The court quoted Snyman at length regarding what constitutes reasonable means to avert the attack.[69] The court then stated that it was

> not persuaded that it was reasonable for the appellant to direct a stabbing movement with a steak knife towards the deceased who was standing behind her, pressed against her back, grabbing her hair, with her upper body close to hers.[70]

The court reasoned that the accused could have explored alternative means to avert the attack instead of stabbing the deceased in the way that she did.[71] According to the court, the accused could have aimed the knife at the lower body of the deceased "or used any other means short of directing the stabbing movement towards the deceased's upper body".[72] The court also pointed out that the parties were both women even though the deceased was bigger than the accused and

61 *Ibid.*

62 *Ibid.*

63 *Ibid*.

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid* para 12.

69 *Ibid* para 13. This is the excerpt from Snyman that the court relied on: "[T]here should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a reasonable relationship between the attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration. One must consider the possible means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence".

70 *Ibid*.

71 *Ibid.*

72 *Ibid.*

that the deceased was not using any weapon in the attack.[73] The court further found it to be an important consideration that the accused's evidence was that she did not feel that her life was in danger.[74]

Having found that the accused failed to meet the requirements of private defence,[75] the private defence had to fail but that was not the end of the matter. The court went on to consider fault and found that the accused acted negligently in the circumstances.[76] She was, therefore, guilty of culpable homicide.

3 2 The Minority Judgment and Its Interface with the Majority Judgment

The minority judgment[77] differed markedly from the majority judgment. The judgment started with a focus on the evidence and presented the general view that the trial court, the high court and the majority judgment of the SCA misinterpreted or, in some instances, ignored the evidence.[78] Having gone through the evidence in detail, the judgment then focused on the issue of unlawfulness; whether private defence was applicable in this case.[79] Unlike the majority judgment, this judgment listed both the requirements of the attack and the requirements of the defence but arrived at the same conclusion as the majority judgment, namely that at issue before the court were only two requirements of the defensive act.[80] These are: whether the defensive act was necessary; and whether the means employed by the accused to ward off the attack were reasonable. While the majority judgment found that the first requirement was met but the second was not, the minority judgment found that both were met.[81]

After pointing out why the majority judgment's findings are not supported by the evidence in many respects, this judgment raises the issue of the duty that the attacked person bears.

73 *Ibid.*

74 *Ibid.*

75 *Ibid* para 34. It is trite that all the requirements must be met for private defence to succeed. Even though the majority judgment, unlike the minority judgment, does not specifically refer to the requirements of the attack, it is apparent that the court's view was that the accused met all the requirements for the attack (i.e. there must be an unlawful attack; on legally protected interests and such attack must have commenced or be imminent). The accused also met two of the requirements for the defensive act (i.e. that the defensive act must be necessary and that such defensive act must be directed against the attacker) but did not meet the third requirement, namely, whether the means used were reasonable means to ward off the attack. It is worth noting that, according to Snyman, there is a fourth requirement for the defensive act, namely that the persons attacked must know that they are acting in private defence. Snyman is quoted in this regard the minority judgment.

76 *Ibid* paras 8–10.

77 The minority judgment is contained in paras 23–63 of the *Botha* judgment.

78 *Ibid* paras 40 43–5 47 55.

79 *Ibid* para 34.

80 *Ibid* para 35.

81 *Ibid* para 56.

Schippers JA succinctly captured the core issues thus:

> On the level of the law, Snyman's view is that there is no duty on the attacked party to flee, since private defence concerns defence of the legal order i.e., the upholding of justice. Fleeing is no defence, but capitulation to injustice. Just as there is no duty on a police officer to run away from the criminal, there is no duty on an attacked person to flee from the aggressor where the police are not present to protect her. According to Snyman, our legal system, that expects subjects to respect and promote the rule of law, cannot simultaneously expect them to flee from an unlawful attack, as that is tantamount to expecting them to turn their backs on the rule of law so that injustice may carry the day. On the other hand, there is the view that if a safe opportunity for escape exists, any force used in private defence is unnecessary, as injury to the attacked person and the aggressor can be avoided entirely by retreating. **It is not necessary to decide this question**. Suffice it to say that the possibility of safe retreat is a factor to be taken into account in deciding whether the force used in private defence was reasonable.[82]

This crucial issue in private defence has, again, been left in a state of ambiguity to the detriment of those who may wish to rely on private defence. That aside, the judge proceeded to consider whether the means adopted by the accused were reasonable,[83] a crucial issue that marks the difference between the two judgments on the existence or otherwise of private defence in this case. The judge referred to the issue of choice of weapon and, relying on Gardiner and Lansdown, pointed out that, to paraphrase, emergency situations do not allow the luxury of a careful choice of weaponry.[84]

The two judgments, it seems, agree on the important aspects in this case. On the side of the requirements of the triggering act (or the initial/attacking act), there was agreement that the deceased unlawfully attacked the legally protected interests of the accused.[85] On the side of the defensive act, the attack was of such a nature that it was necessary for the accused to ward it off and in warding it off, the accused aimed her defensive act at the attacker (i.e. the deceased).[86] The difference between the two judgments centres on whether or not the defensive act, and the manner in which it was executed, was reasonable in the circumstances.[87] This is a question of proportionality: was the defensive act executed in a manner that was proportional to the nature of the attack in the sense that it was the requisite measure to stop it? Or did the accused go overboard thereby exceeding the acceptable limits for private defence? The majority judgment found that the accused went overboard while the minority judgment found that she was well within the four corners of private defence. In both judgments, there is reference to the fact that the appellant satisfactorily explained why she did not leave the restaurant after the first attack[88] and this goes to the centre of the issue in this discussion, namely was she obliged or expected to leave the restaurant in order to avoid the attack?

82 *Ibid* para 39 (emphasis does not appear in the judgment but was added to show how the court raised this key issue and then avoided deciding it).

83 *Ibid* para 55.

84 *Ibid* para 49.

85 *Ibid* para 35. In fact, the majority judgment did not even refer to the requirements of the attack which seems to accentuate their obviousness in this case.

86 *Ibid.*

87 *Ibid* paras 12 13 35.

88 *Ibid* paras 11 38.

4 IS THERE A DUTY TO FLEE IN SOUTH AFRICAN LAW?

Whether a person is obliged to flee from an unlawful attack rather than entitled to offer forceful resistance, is a somewhat vexed question.[89]

The "vexed question"[90] of whether to stand one's ground or flee when facing an unlawful attack manifests in different ways and different contexts. The most common ones would be, first, where the attack takes place, for instance in the victim's home; and the second, when the attack is against the person (body and limb) wherever such attack may be.[91] These two issues presented themselves to the court in *S v Mdlalose*[92] where the accused was attacked by the deceased (his girlfriend) in the sanctuary of his home and he killed her when there was a clear opportunity for him to flee. The court, however, did not give definitive answers to the twin questions before it, namely: whether it mattered that the attack was in the accused's home; and whether he had the duty to flee because there was an opportunity for him to do so without exposing himself to danger. While the court was alive to these two issues, the verdict did not rely on their decision. However, the court made an observation that seems to place significance on the fact that the attack took place in the accused's home when it stated that "[t]he attack happened in his home where he is supposed to be safe".[93] The accused was acquitted because his version of events was reasonably true and possible, even though the court did not believe him. With these questions remaining unanswered, one is back at perusing the various judgments and—reading between the judicial lines—assessing what the legal position is.

Such search seems to reveal that, whether attacked in the home or elsewhere, the law adopts the same stance, namely that the victim is legally authorised to defend the attacked legal interests by resisting the attacker's efforts. However, differences emerge when the victim's defensive act is evaluated. As the discussion in the next two subheadings seeks to show, the consistent approach seems to be that while necessary force may be used to avert the attack, caution should be exercised before employing lethal force which, in any event, must be a measure of last resort. Another consistency is that it is unclear whether—in both situations—the victim of an unlawful attack is legally obliged to try to flee before employing lethal force.

4 1 "A Man's House Is His Castle"? Not Quite, It Seems

Dealing with private defence where the victims are attacked in their homes, Snyman opined that it can "with reasonable certainty be accepted that there is no duty on the attacked party (X) to flee".[94] This seems to suggest that, when attacked in their home, victims are permitted to use

89 *Steyn* para 21.

90 This is how the issue was characterised in *Steyn* where it was left unanswered.

91 To these two could be added "attack against property (wherever that happens)". However, this category is not included in this discussion. This is because, it is submitted, the issue of "fleeing before fighting" should not arise in that situation. It is more to "do nothing or defend." Of course, it could be that the attack on property is accompanied by violence against the victim but in that case this is more than just attack on property and, it is submitted, the discussion on "flight before fight" covers the core issues. *S v Mogohlwane* 1982 (2) SA 587 (T) is a good example in this regard. In this case the deceased threatened the accused with an axe and dispossessed him of his belongings. The accused went home, armed himself with a knife and returned to the scene to demand his belongings. The deceased, again, threatened him with the axe and the accused stabbed him with the knife causing his death. It is submitted that, properly considered, the private defence involved here was not purely in order to protect property. It is was more about overcoming the attack visited on the accused when he tried to recover his property. So, this is about protection of property where the attacker uses force or threat thereof instead of it being the use of lethal force purely to protect property.

92 *S v Mdlalose* (CC17/2020) [2020] ZAMPMHC 37 (27 August 2020).

93 *Ibid* para 44.

94 Snyman *Snyman's Criminal Law* (2020) 89.

lethal force even if it is feasible to flee. This is clear from Snyman's explanation that:

> The law does not expect X to flee from her own house if she is attacked there. Her house or place of residence is her last refuge—her "castle"—where she may protect herself against any unlawful attack.[95]

It is not clear that case law supports this assertion in respect of the use of lethal force as, it seems, in cases where victims were attacked in their homes, this fact did not serve as the determining factor.[96] It was merely one of the relevant factors considered. One such case is *S v T*[97] where the accused was a 16-year-old and the deceased was of similar age, even though the deceased was stronger than the accused and had the habit of bullying the accused. On the day of the incident, the deceased and his friends went to the accused's house where they demanded that the accused come outside and fight one of them. When the accused refused, the deceased entered the house and attacked the accused demanding that he must go outside to engage in the fight. The accused resisted the deceased and, when his efforts seemed to fail, pulled out a firearm. He fired one shot and it killed the deceased. The accused was convicted of culpable homicide by the trial court, which rejected his reliance on private defence. The accused appealed to the high court which overturned the conviction and sentence. The high court made some pertinent points, one of which was that

> the correct legal position is that where the victim is not in danger of his life, but nevertheless could avoid being maimed or seriously injured only by using a firearm against his attacker, he is entitled to do so and, if necessary even to shoot and kill his attacker.[98]

The other point was that "the correct legal position here is that the physical integrity of the person attacked is surely not subordinate to his attacker's right to live".[99] These two points made by the court were a clear rejection of the magistrate's findings as the magistrate had justified the conviction on the basis of these findings. It is noteworthy, however, that the high court did not put much emphasis on the fact that the accused was attacked in his home. In other words, it does not seem that the fact that he was attacked in his home was decisive in whether or not he could stand his ground to the point of killing the attacker. More pertinent to the question raised in this article, the court seems to have sent a mixed message regarding the duty to flee or, as commonly known, the " flight before fight" approach. The court first explained that the correct legal position is that the victim does not have to flee from the attacker but to use a firearm if necessary and such victim may even kill even if the danger faced is not that of death but of being seriously injured.[100] Having stated the legal position thus, the court went further and explained why the accused could not avoid the attack by employing other mechanisms. In this regard, the court stated:

> Accused was fully aware of the danger in which he found himself and considered various ways of escaping from it. He was of the opinion that escaping or locking himself in one of the rooms of the house would not do. He gave acceptable reasons for that view and cannot be faulted on that score.

95 *Ibid*.

96 In some jurisdictions, the law attaches substance to the saying that "a man's home is his castle" with the result that people attacked in their home are entitled to stand their ground even to the extent of killing the attacker. In other words, the case turns on the fact that the victims were attacked in their home (See Engels 2018 *Public Affairs Quarterly* 141–158 for a discussion of the practice in the United States of America).

97 *S v T* 1986 (2) SA 112 (O).

98 *Ibid*.

99 *Ibid*.

100 *Ibid*.

The essence of the court's approach, it seems, is that even when in their homes, the victims of an unlawful attack are expected to escape or at least consider escaping. There is no clear message that says: this is your house and you must not give way to an unlawful attack.

This interpretation seems to find support in the case of *Stephen* where the accused was convicted of culpable homicide after stabbing an intruder and fatally wounding him. There the court emphasised the point that while resisting attack to one's property is permissible, killing someone in the defence of property is not. It is only if the resistance to the thief/intruder is met with violence by such thief/intruder that the resort to force, including deadly force, is justifiable. Even then, the victim is expected to resort to lethal force after giving warning. The accused in *Stephen* failed to satisfy the requirements of private defence because he did not give any warning to the intruder before stabbing him. Moreover, this happened in a situation where there was no clear danger to the accused and/or his property. The accused had just heard the intruder come in through the bedroom window and ran to the kitchen, retrieved a knife and stabbed him.

A similar approach was adopted in *Ngomane* years later. In this case, the accused had stabbed and killed an intruder with an assegai. This was after the intruder had demanded that the accused should open his hut for him (the intruder) to enter. When the accused refused to comply, the intruder threatened to burn the hut down. The accused reacted to this by opening the hut door but then stabbed the intruder as he was making his way in. The court found that the accused had not met the requirements of private defence mainly because, to paraphrase, it was not necessary for him to defend any legally protected interests at the stage when he stabbed the deceased and, worse, he engaged in the use of lethal force by stabbing the deceased in a situation where he could have resorted to other means such as hitting the deceased with the handle of the assegai. The court does not seem to have placed any premium on the fact that the accused was attacked and threatened in his home. Put differently, the fact that this was the accused's home seems to have been a neutral factor in the court's judgment.

Then came the case of *Steyn*, in which the accused, who was subjected to ongoing abuse at the hands of her husband, killed him. On the fateful night, the husband had instructed the accused to remain in her room but the accused left the room in order to get something to eat. Before leaving the room and anticipating an attack from the accused, however, she had armed herself with a revolver. When the husband saw her, he predictably, went on the attack after which the accused fatally shot him.[101] The trial court convicted the accused and she was only saved on appeal where, again, while the court was alive to the fact that the attack took place at the home of the accused (albeit home to both protagonists), it did not seem to put a premium on this fact. Instead, what seems to have saved the accused were other factors such as the fact that she could not have resisted the attack in any other way and, even then, the court seemed to put significance on the fact that the accused could not have safely escaped the attack.[102]

The overall message from the above cases appears to be that when it comes to private defence, a person's home is not necessarily his/her castle at least as far as that relates to the permissible measures to avert an unlawful attack. In all these cases, this approach emerges in the form of the court invariably considering whether the accused first considered fleeing before employing lethal force. It is hard to maintain that under South African law, there is no duty to flee from an unlawful attack if victims are expected to consider fleeing, even in the sanctuary of their homes when facing an unlawful attack.

101 See *Steyn* paras 1–10 for the court's detailed exposition of the facts.

102 *Ibid* para 21.

4 2 Attack Against Body and Limb

It is said that a defensive act is necessary if it is the only available means to avert an attack.[103] According to Burchell "[w]here the threat is one of personal injury, a defence might not be necessary, in the circumstances, if the attack can be avoided by retreat or escape".[104] From this perspective, Burchell situates the question of a duty to flee or absence thereof within the requirement that the defensive act must be necessary. If the victim of an unlawful attack has ample opportunity to flee but instead of fleeing resorts to the use of force to repel the attack, such victim may not satisfy this requirement. If this is the correct interpretation of Burchell's assertion, then it would seem that there exists a duty to flee. In all fairness, it should be stated that Burchell is referring to a situation where the threat is that of personal injury. But this distinction does not solve the problem or support the assertion that there is no duty to flee in South African law. If anything, it may be argued that it supports the converse proposition, namely that there is a duty to flee. This interpretation is supported by Burchell's further assertion that "[a] person is justified in acting in defence only if the attack cannot be averted in any other way".[105] Having said this, Burchell proceeds to state that "there is no duty to flee in South African law".[106] How can it be said that there is no duty to flee in South African law if the defensive act is justified if it is the only available avenue to avert the attack and someone who resorts to lethal force may only do so if it is the only available avenue to avert the attack?

The court's approach in *Botha* has been discussed above and it is clear that the fact that the accused could not flee the scene weighed heavily on the court.[107] It was the accused's satisfactory explanation for not fleeing that convinced the court that the defensive act was necessary. *Botha* follows a long line of decisions that took the same approach of justifying the existence of the necessity to embark on the defensive on the fact that the fleeing option was not viable under the circumstances.[108] This approach, as confirmed in *Botha*,[109] leaves the feasibility of fleeing before resorting to force as just one of the factors to be considered in deciding whether or not the defensive act was necessary.

5 CONCLUDING REMARKS

The foregoing discussion sought to show that the law on private defence could be described as murky and, to the detriment of those who would like to rely on it, unpredictable. South Africa is not alone in this situation as similar experiences have been observed in countries such as India, Singapore and Canada. The law relating to private defence in all the mentioned countries is—unlike in South Africa—codified. There are penal codes that regulate private defence but this does not make their experiences different because their criminal law codes have roots in the common law; the same roots as South African criminal law. South Africa relies on the common law and, as this discussion sought to show, the courts have not provided a clear answer regarding the acceptable boundaries when embarking on private defence involving the use of lethal force.

103 Burchell *Principles* (2016) 126.

104 *Ibid*.

105 *Ibid*.

106 *Ibid*.

107 See *Botha* paras 11 37 38.

108 The same approach was followed in other cases such as *Zikalala* and *Steyn*.

109 *Botha* para 39.

It cannot be ignored nor is it an insignificant fact that South Africa is a country experiencing high amounts of violent crime. Crime statistics paint a dire picture.[110] If anything, the high rate of violent crime, including home burglaries, may indicate that many people are likely to find themselves having to act in private defence. Accepting that legal principle should not be sacrificed at the altar of convenience and/or expediency by moulding the legal approach to accommodate the country's crime anomaly, it is still a fair point to require that there be clarity regarding what is permissible on the part of those who may have to defend themselves, their property and/or others. This is a responsibility on the shoulders of either the courts or the legislature. The courts, however, seem well-placed to provide the necessary clarity, not least because on more than one occasion, they had the opportunity to give judicial guidance on this. The burning issue—one that can be clarified in one sentence by a court—is whether a person faced with a choice between fleeing or using lethal force can only use such lethal force if fleeing is not viable. Leaving it at the level of "fleeing is just one of the factors to consider"[111] does not seem to go far enough.

110 South African Police Service "Police Recorded Crime Statistics: Republic of South Africa, Second Quarter of 2023-2024 Financial Year (July 2023 to September 2023)" https://www.saps.gov.za/services/downloads/2023-2024_-_2nd_Quarter_WEB.pdf (accessed 1-12-2023).

111 *Botha* para 39.