PRIVATE DEFENCE IN CONTEXT OF THE BATTERED WIFE WHO KILLS HER ABUSIVE HUSBAND/PARTNER

Ann Elizabeth Steyn v The State (reported as S v Steyn 2010 1 SACR 411 (SCA))

1 Introduction

In South Africa where there is a high incidence of domestic violence, it is not surprising to find our reported criminal case law abound with many examples where battered spouses have killed their abusive partners. It is to be noted that all these accused were charged with, and more often than not, convicted of murder (see *S v Campher* 1987 1 SA 940 (A); *S v Wiid* 1990 1 SACR 561 (A); *S v Kalogoropoulos* 1993 1 SACR 12 (A); *S v Arnold* 1995 3 SA 256 (C); *S v Henry* 1999 1 SACR 13 (SCA); *S v McDonald* 2000 2 SACR 493 (N); *S v Ferreira* 2004 2 SACR 454 (SCA); *S v Engelbrecht* 2005 2 SACR 165 (SCA); *S v Mnisi* 2009 2 SACR 227 (SCA); compare also *S v Loubscher* 1979 3 SA 47 (A); *S v Moses* 1996 1 SACR 701 (C); *S v Di Blasi* 1996 1 SACR 1 (A); see also Gobodo-Madikizela and Forster "The Aftermath of Domestic Abuse" in Tredoux, Foster, Allen, Cohen and Wassenaar (eds) *Psychology and the Law* (2005) 364-383; and Peter "Domestic Violence" in Kaliski (ed) *Psycholegal Assessment in South Africa* (2006) 146-161). In all these cases extreme provocation and emotional distress ultimately led to the homicide and caused the accused to invoke either non-pathological automatism (sane automatism) and/or non-pathological criminal incapacity as defences. Consequently, it was argued on behalf of the accused that they either acted involuntarily or without criminal capacity, or at the most with diminished criminal capacity at the time of the homicide due to provocation or emotional distress. In some instances, where a voluntary act and criminal capacity were proved, the provocation/emotional distress even had the effect that the state could not prove intention beyond reasonable doubt for a conviction on murder, but had to concede that only a conviction on culpable homicide was justified, as the accused acted negligently under the circumstances (see Burchell *Principles of Criminal Law* 3ed (2005) 358ff; Snyman *Criminal Law* (2008) 149ff; Carstens and Le Roux "The Defence of Non-pathological Incapacity with Reference to the Battered Wife who Kills her Abusive Husband" 2000 *SACJ* 180; Ludsin "*Ferreira v The State*: A Victory for Women who Kill their Abusers in Non-confrontational Situations" 2004 *SAJHR* 642; and Louw "Recent Developments in the Defence of Non-pathological Criminal

Incapacity" in Kaliski (ed) *Psycholegal Assessment in South Africa* (2006) 50ff).

The notion that a battered (provoked) wife/husband/partner who kills her/his abusive husband/wife/partner may or can invoke private defence (self-defence) has rarely been considered by our courts (see, however, *S v Engelbrecht supra*; and *S v Ferreira supra*). Provocation or emotional distress, in principle, influences the voluntary act committed by the accused and/or the criminal capacity of the accused and may affect the element of intention, but seldom has any bearing on the element of unlawfulness. After all, private defence requires an unlawful, immediate or imminent human attack perpetrated upon the accused or another person (see Snyman 10; *S v Van Wyk* 1967 1 SA 488 (A) 504E-F; *S v Mokgiba* 1999 1 SACR 534 (O) 550; and *S v Mogohlwane* 1982 2 SA 587 (T)). Since the disappointing decision in *S v Eadie* (2002 1 SACR 633 (SCA)), in which the defence of non-pathological criminal incapacity due to provocation was effectively abolished (battered wives now have to rely on sane automatism, which is difficult to prove) (see Snyman 237ff; and *contra* Burchell 430ff), battered wives who now kill their abusive husbands/partners are "left in the lurch" as it were, specifically in view of systematic assaults/attacks perpetrated upon them by their abusive partners. From a legal point of view it seems as though a "reconfiguration" of the principles of criminal law in these instances is called for. The "reconfiguration" of the defence essentially relates to the material requirements for the unlawful human attack, as well as the requirements for the lawful fending off the attack, specifically in context of domestic violence. It is for this reason that the judgment under discussion is particularly instructive and to be noted.

2 The facts

The salient facts, which are relayed here in much detail for the foundational context, appear from the judgment by Leach AJA (Mthiyane JA and Wallis AJA concurring): On the evening of 9 February 2007, the appellant shot and killed her former husband, a man who for years had abused her, both mentally and physically, and who had assaulted her earlier that evening. Pursuant to this incident, the appellant was charged with murder in the High Court, Port Elizabeth. Her plea that she had acted lawfully in self-defence was rejected and she was convicted of culpable homicide. In the light of the weighty mitigating circumstances which were present, the appellant was sentenced to three years' imprisonment, wholly suspended on certain conditions. With leave of the court *a quo*, the appellant appealed to Supreme Court of Appeal solely against her conviction.

The essential background to the case indicates that the appellant was 53 years of age at the time of the fatal incident and had married the deceased in 1971. The marriage relationship had substantially deteriorated over time. The deceased was extremely jealous of the appellant and often accused her of forming relationships with other men. In addition, the deceased drank heavily and often abused the appellant, both mentally and physically. He often told her that he would slit her throat with a smile on his face. He also

regularly locked her in her bedroom, at times for extended periods. So often did this occur that she took to keeping food in her room to sustain her should she be imprisoned in this way. On one occasion she was locked in her bedroom for an entire weekend. Eventually the appellant divorced the deceased. After the divorce, the appellant was admitted to a clinic where she was treated for depression. Although the appellant and the deceased were the joint owners of the former matrimonial home, and it had been their intention to convert a section of the house into a "granny flat" in which she would reside, the appellant was advised by a psychiatrist not to return to the house. Consequently, after returning from the clinic she took up residence in a flat for which the deceased undertook to pay the rent. Unfortunately, financial restraints forced the appellant to give up this arrangement and after two months she moved back to the former matrimonial home where, although she no longer shared a bedroom with the deceased, her life with him returned to what it had been before. The deceased continued to abuse her mentally and physically and she did all the domestic duties expected of a housewife. She often fled to her bedroom, which became both her sanctuary and her prison. At times she locked herself in to prevent the deceased from assaulting her while, on other occasions, the deceased ordered her to her room or himself locked her in. The appellant was not in good health. She had required surgery to her back after sustaining an injury but had continued to experience back and body pain for which she took anti-inflammatory medication. She had also undergone a resection of her colon which resulted in her being obliged to eat small amounts of food regularly throughout the day. In addition, not only did she require medication for an ulcer which had to be taken after food but she was also on medication for high blood pressure, cholesterol and depression. Consequently the appellant made arrangements with her medical aid to return to the clinic for treatment.

On the day of the incident, the deceased telephoned the appellant and told her to take meat out of the freezer for him to braai that evening. She did so, and also prepared potatoes to accompany the meal. The deceased arrived home after dark. He had clearly been drinking and was not in a good mood. He went to light a fire on which to cook the meat. The appellant poured the deceased a drink, took it to him and then seated herself on one of the padded benches. She eventually plucked up sufficient courage to tell the deceased that she had contacted her medical aid to ascertain if it would pay for treatment for her anxiety at the clinic. On hearing this, the deceased erupted. He verbally abused her in foul and offensive terms, telling her that she had been born mad and would die mad. He then jumped up from where he was sitting, grabbed her by the throat and began to hit her. When the appellant's pet German Shepherd dog jumped up, it drew the deceased's attention away from the appellant, and he released her in order to chase it out of the room. She seized the moment to make her escape, and ran to her bedroom where she locked herself in. The deceased shouted after her that she was to stay in her room and that she would get nothing to eat that night. The locked-in appellant, however, urgently needed to take her prescribed medication and needed to have something to eat before doing so. Unfortunately she did not have any food in her room that night and, in

desperation, decided for the first time to ignore an instruction from the deceased to remain in her room and go and fetch one of the cooked potatoes she had earlier left in the kitchen. Scared and upset as a result of the earlier assault, she armed herself with her .38 revolver which she hoped would dissuade the deceased from attacking her again. On her way to the kitchen, the deceased saw the appellant and his reaction was both immediate and violent. He screamed that he had told her to stay in her room and that he had already told her that she would get nothing to eat. Holding the steak knife that he had been using, he jumped to his feet and rushed at her, shouting that he was going to kill her, a threat which appeared to be deadly serious. Fearing for her life, she instinctively raised her revolver and fired a single shot at the deceased before turning and fleeing back to her room where she locked herself in. She then telephoned a friend of hers, a policewoman, who rushed to the house to assist her. It was then ascertained that the deceased had been fatally injured, the bullet having passed through his hand (which had presumably been held up in front of him) before entering the body through the right upper anterior chest wall some 9,5 cm below the right clavicle, passing through the right lung and exiting the right chest posteriorly about 15 cm above the sacral bone. The bullet caused a right-sided haemothorax and the collapse of the right lung. From the position where he had been shot in the braai room, the deceased managed to get into the kitchen before he collapsed and died from loss of blood.

3 The judgment

In essence the Supreme Court of Appeal had to assess the question whether the appellant did act in private defence when she shot and killed the deceased. This assessment entailed that the court had to evaluate the veracity of the testimony of the appellant. The court noted that the trial court found her to be a wholly satisfactory witness whom there was no reason to disbelieve, and correctly concluded that her version could reasonably possibly be true and that her guilt or otherwise had to be determined on her own version. In this regard the court noted that the trial court formed a good impression of the appellant and found her to have been a reliable witness.

The court then considered whether the trial court was correct in concluding that, on her own evidence, the appellant had acted unlawfully. In this regard the trial court found that when the appellant left her bedroom in order to fetch a potato from the kitchen, a reasonable person in the appellant's position would have foreseen the possibility that the deceased, in the condition and mood he was in, might attempt to attack her. It held that a reasonable person would therefore not have proceeded to place herself in a position of danger where she might be forced to use her pistol to defend herself. Accordingly it concluded that the appellant had acted unreasonably and that the fatal incident could have been avoided if she had telephoned for help and waited for assistance before she left her room. The reasoning of the court was therefore that the appellant had acted negligently and was guilty of culpable homicide. In assessing this stance taken by the trial court, the Court of Appeal entertained the argument on behalf of the appellant that

the trial court had misdirected itself by confusing the question of unlawfulness with the test of negligence or *culpa*, and the submission that the issue of whether the appellant was guilty of negligence or *culpa* would only arise once it had first decided that her conduct was unlawful. This argument, the court ruled, was not without substance as it is indeed so that when an accused raises a plea of private defence, the court's initial inquiry is to determine the lawfulness or otherwise of the accused's conduct and that, if found to be lawful, an acquittal should follow. At the same time, however, the court was quick to observe that it was clear from its judgment that the court *a quo* specifically turned its attention to the question of the lawfulness of the appellant's conduct and, in considering that issue, the courts often do measure the conduct of the alleged offender against that of a reasonable person on the basis that reasonable conduct is usually acceptable in the eyes of society and, consequently, lawful. In this regard, and in view of the circumstances of the present case where the facts were known, the court ruled that it was unnecessary to decide whether the trial court misdirected itself in the manner suggested as the court of appeal could itself determine the lawfulness of the appellant's conduct on those facts. The court therefore stated and reiterated the fact that every case must be determined in the light of its own particular circumstances, and it was impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. The court further observed that it is to be noted that there should be a reasonable balance between the attack and the defensive act as "one may not shoot to kill another who attacks you with a flyswatter" (see Burchell 243; and Snyman 113-114, as quoted by the court). The court, once again, listed the factors relevant to the decision in context of private defence as the following: (i) the relationship between the parties; (ii) their respective ages, gender and physical strengths;(iii) the location of the incident; (iv) the nature, severity and persistence of the attack; (v) the nature of any weapon used in the attack; (vi) the nature and severity of any injury or harm likely to be sustained in the attack ; (vii) the means available to avert the attack; (viii) the nature of the means used to offer defence; (ix) the nature and extent of the harm likely to be caused by the defence (also see Snyman 107ff).

The court, in dealing with the argument on behalf of the state that the appellant could have fled to her bedroom and thus could have avoided being assaulted without the necessity of shooting at the deceased, remarked that whether a person is obliged to flee from an unlawful attack rather than entitled to offer forceful resistance, was somewhat of a vexed question. However, the court ruled that in light of the facts in this case, it was unnecessary to consider the issue in any detail. In addition the court observed that it could not have been expected of the appellant to gamble with her life by turning her back on the deceased, who was extremely close to her and about to attack her with a knife, in the hope that he would not stab her in the back (see also the reliance placed on *S v Trainor* 2003 1 SACR 35 (SCA) [13]). The court further ruled that the appellant could not be faulted for offering resistance to the deceased rather than attempting to flee from him.

Ultimately, in considering the lawfulness of the appellant's conduct, the court stated that it was necessary to keep in mind that she was obliged to act in circumstances of stress in which her physical integrity and indeed her life itself were under threat. It was necessary in such circumstances to "adopt a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence". In adopting that approach, the court found that the appellant did not act unlawfully. She found herself in a position of great danger in which her life was under direct threat. There can be no doubt that in these circumstances she was entitled to use deadly force to defend herself. Had she not done so, it might well have cost her her life. The court observed that in these circumstances her instinctive reaction, as she described it, of shooting at the deceased, who was seemingly hell-bent on killing her, was reasonable and the court *a quo* erred in finding otherwise. Consequently the court allowed the appeal and the conviction and sentence were set aside.

4 Assessment

In assessing this judgment one is in the first instance struck by the robust and principled stance taken by the court in allowing the appeal with recognition of the requirements for private defence in context of domestic violence. In addition, this judgment is, as far as it could be established, the first reported judgment of the Supreme Court of Appeal where a battered wife who killed her abusive husband successfully invoked private defence as a ground of justification in context of domestic violence. In this regard it is submitted that the judgment is to be welcomed. This judgment follows in the wake of the significant judgment in *S v Engelbrecht* (*supra* par [340] 132f), where it was also recognized that the defence of private defence or self-defence as justification against unlawfulness was available to abused women who killed their abusive spouses and partners with the *caveat* that the facts and circumstances of each case fell to decide the outcome. Also of note in the *Engelbrecht* judgment (*supra* par [342] and [343] 132h-i), is the ruling that the unlawful "attack" against which the abused woman defends herself or others could be one individual incident, a series of violations or an ongoing cycle of maltreatment, and further (par [345] 133c-d), that all those rights which were enshrined in the Constitution constituted the interests which were deserving of protection in this defence (private defence) of justification. According to this judgment, the requirement of "imminence" of the attack (in context of private defence) should be extended to encompass abuse which was "inevitable" (see par [349] 134c-d).

Although the judgment under discussion did not deal directly with the judgment in *Engelbrect* (*supra*), it is nevertheless submitted that many of the judicial sentiments expressed in *Engelbrecht* resonate in the judgment of *Steyn*. The judgment in *Engelbrecht* certainly serves as a subtext for the present decision. The court in the judgment under discussion (with reliance on Burchell 243) stated that there should be a reasonable balance between the attack and the defensive act, and that modern legal systems do not insist upon strict proportionality between the attack and defence. The *ultimate* and

proper consideration, in these cases, is whether, taking all the factors into account, the defender acted *reasonably* in the manner in which he/she defended himself/herself properly (see par [19] of the judgment). The word "reasonably" refers to the *boni mores* in context of the element of unlawfulness and should not be confused with the test for criminal negligence (in context of fault). It was also noted, albeit *obiter*, that the element of unlawfulness preceded that of fault and that the issue of negligence or *culpa* would only arise once it had first been decided that the appellant's conduct was unlawful (see par [17] to [19] of the judgment).

The significance of the judgment under discussion in context of private defence becomes apparent with reference to the court's observation that "it is *necessary* to keep in mind that she was obliged to *act in circumstances of stress* in which her *physical integrity*, and indeed *her life*, were under threat" (as per par [24] of the judgment) (author's own emphasis) (compare *S v Engelbrecht supra* par [345] 133c-d: "all those rights which were enshrined in the Constitution constituted the interests which were deserving of protection in this defence [private defence] of justification ... Interests which were attacked and which an abused woman could protect, include *her life*, *bodily integrity*, *dignity*, *quality of life*, *her home*, *her emotional and psychological wellbeing*, *her freedom* ... In short she defended her status as a human being") (author's own emphasis). It is submitted that the Supreme Court of Appeal, by implication, emphasised that when battered women who kill their abusive husbands invoke private defence, the defensive act directed at the unlawful attack should be assessed with reference to the abused wife's constitutional rights in context of the scourge of domestic violence. This assessment also entails that the crystallized common-law requirements for the determination of the proportionality between the attack and the defence (as per par [19] of the judgment) ultimately depends on an accumulative assessment of *all* the circumstances. There is thus specific judicial recognition and understanding that in context of domestic violence with concomitant emotional distress a court cannot "measure with nice intellectual callipers the precise boundaries of legitimate self-defence (see *S v Ntuli* 1975 1 SA 429 (A) 437 per Holms JA). It is submitted that this approach is correct and certainly accords with the "reconfiguration" of the justification of private defence in context of domestic violence as enunciated in *S v Engelbrecht* (*supra*). Although this defence, against the backdrop of domestic violence and dysfunctional relationships, should be carefully scrutinised by the courts as not to afford a battered woman "a licence to kill", the ambit, scope and boundaries of private defence need to be balanced by the values and norms underpinning the Constitution. Such an assessment must also take cognisance (by way of expert evidence) of the very nature of battered women's lives and their experiences of domestic violence while simultaneously dispelling stereotyping which may adversely affect judicial consideration of a battered woman's claim to have acted in private defence (for instance why the appellant did not flee rather than offer forceful resistance to the attack) (see par [21] of the *Steyn* judgment; and *cf S v Engelbrecht supra* par [26] and [29] 54g-55b and 56a-d).

In conclusion, it is submitted that the judgment in *Steyn* is a logical extension (at least by implication) of the judgment in *Engelbrecht* (*supra*). It is therefore essential that these two judgments should be read and interpreted together as the leading precedents in instances where battered wives invoke private defence in justification of killing their abusive husbands/partners. In view of the judgment in *S v Eadie* (*supra*) in which the defence of non-pathological criminal incapacity due to provocation was effectively curtailed, as well as the substantive and formal difficulties facing the battered woman who invokes the defence of sane automatism, it is submitted that the judgment in *Steyn* offers an additional and effective defence (private defence), within boundaries, to battered women who kill their abusive husband/partners.

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