

PUTATIVE PRIVATE DEFENCE IN CRIMINAL LAW

Tuta v The State 2023 (2) BCLR 179 (CC)

1 Introduction

In a country like South Africa, plagued as it is by violent contact crime, it is not surprising that the defences of private defence and putative private defence are often raised by accused in criminal trials. On 17 February 2023, the Minister of Police, Bheki Cele, released the third-quarter crime figures for the period October to December 2022. Some of the South African crime statistics revealed in these figures include 7 555 murders (82.1 per day, which had increased from 74 per day in the previous quarter); 15 545 sexual assaults (169 per day, an increase from 154 in the previous quarter); 50 582 assaults with intent to do grievous bodily harm (550 per day, an increase from 505 in the previous quarter) and 37 829 violent robberies (411.2 per day, an increase from 371 in the previous quarter) (Baxter “Latest SA Crime Stats: 82 Murders Per Day Reveal ‘Unabated Slaughter’ of South Africa’s Citizens” (17 February 2023) www.SAPeople.com (accessed 2023-02-23) 1).

It is trite that, for a conviction in a criminal court, the prosecution is tasked with proving the accused’s liability beyond reasonable doubt. Case law and scholars confirm this (*S v MRC* [2023] ZAMPMBHC 8 94; *S v Kesa* [2023] ZAECMHC 6 25; *S v Mncube* [2023] ZAKZPHC 15 165; *Kapa v S* [2023] ZACC 67; *Mohlalhlane v S* [2023] ZAGPPHC 94 10; *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204 52–3; Hoctor *Snyman’s Criminal Law* (2020) 85; Burchell *Principles of Criminal Law* (2016) 51; Mokoena “The Right to Remain Silent: A One-Eyed Approach to Truth-Seeking?” 2015 2(2) *Journal of Law, Society and Development* 120 130). As an element of a crime, unlawfulness does not simply lie in fulfilment of the definitional elements of a crime. There are instances where, notwithstanding fulfilment of the definitional elements of a crime, the conduct is justified or legally regarded as objectively reasonable. These instances are known as grounds of justification and technically serve to exclude unlawfulness. A ground of justification, if successfully raised, is therefore a complete defence to any criminal charge. There is not a *numerus clausus* of valid grounds of justification in South African criminal law; the test remains whether the accused’s conduct was objectively reasonable in the particular situation.

One such ground of justification is private defence. A person acts in private defence, and therefore lawfully, if they use the minimum force necessary to ward off an unlawful human attack that has commenced, or is imminently threatening, upon their or somebody else’s protected legal

interests such as life, physical integrity, property, reputation or dignity. The defensive act in private defence must be: necessary to protect the threatened interest; directed at the attacker; reasonably proportionate to the attack; and perpetrated with the knowledge that it is performed in private defence (Hoctor *Snyman's Criminal Law* 85; Burchell *Principles of Criminal Law* 122, 125; Kemp *Criminal Law in South Africa* (2018) 98; *R v Attwood* 1946 AD 331 340; *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* [2012] ZAGPPHC 189 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 16(1) *Potchefstroom Electronic Law Journal* 70 71; Botha "Private Defence in the South African Law of Delict: Rethinking the Rethinker" 2013 *SALJ* 130(1) 154 155; Hoctor "General Principles and Specific Offences" 2018 *SACJ* 31(3) 437 438; Hoctor "General Principles and Specific Offences" 2020 *SACJ* 31(3) 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* 140(3) 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).

Unlike private defence, putative private defence is not a ground of justification that excludes unlawfulness. Putative private defence exists where an accused is under the mistaken belief that they are conducting themselves in private defence whereas there is no such ground of justification in the circumstances (Maharaj "Fight Back and You Might Be Found Guilty: Putative Self-Defence" 2015 *De Rebus* 34). According to Snyman, a putative ground of justification is one that does not legally exist (Hoctor *Snyman's Criminal Law* 84). If an accused labours under the genuine but erroneous belief in the existence of a ground of justification, their conduct remains unlawful (*S v Makaula* 2020 JDR 1746 (ECM) 20; *Nene v S* [2018] ZAKZPHC 46 29; *DPP, Gauteng v Pistorius* 2016 (1) v SACR 431 (SCA) 53; *S v Mdlalose* 2020 JDR 1804 (MN) 22; *S v Teixeira supra* 26; *S v Van Zyl* [1996] All SA 336 (W) 340; 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). The accused lacks the knowledge that they are, in reality, acting unlawfully. While the accused's conduct remains unlawful, the absence of knowledge of unlawfulness results in a lack of intention, since knowledge of unlawfulness is an integral part of intention (*S v Dougherty* 2003 (2) SACR 36 (W) 34; *S v Mostert* 2006 (1) SACR 560 (N) 569 f–g; *S v Joshua* 2003 (1) SACR 1 (SCA) 29; *S v De Oliveira* 1993 (2) SACR 59 (A) 63; *S v Campher* 1987 (1) SA 940 (A) 955d–e).

The accused's mistaken belief that they are acting lawfully in private defence must be honest and genuine but need not be rational or reasonable

(Hoctor *Snyman's Criminal Law* 297; Hoctor 2020 SACJ 752; *S v Papu supra* 12; *S v De Oliveira supra* 65d; *Nene v S supra* 29; *S v Mdlalose supra* 22; *S v Ngobeni supra* 13). If, on the facts, there could be no honest and genuine belief on the accused's part in the lawfulness of their defensive act, putative private defence cannot exist. In *DPP, Gauteng v Pistorius (supra* 53) Leach JA (Mpati, Mhlantla and Majiedt JJA and Baartman AJA concurring) rejected the appellant's reliance on putative private defence stating:

"Not only did he not know who was behind the door, he did not know whether that person in fact constituted any threat to him. In these circumstances, although he may have been anxious, it is inconceivable that a rational person could have believed he was entitled to fire at this person with a heavy calibre firearm, without taking even that most elementary precaution of firing a warning shot (which the accused said he elected not to fire as he thought the ricochet might harm him). This constituted prima facie proof that the accused did not entertain an honest and genuine belief that he was acting lawfully, which was in no way disturbed by his vacillating and untruthful evidence in regard to his state of mind when he fired his weapon."

While the accused's mistaken belief in the existence of private defence must be honest and genuine, Hoctor (2020 SACJ 752) correctly questions the court in *S v Makaula (supra* 29) where the court states that the appellant has not "established" the story of an attack by means of an empty bottle on him or that his life was in danger when he stabbed the deceased to death. There is no onus on an appellant to adduce proof of innocence or to lay a factual basis for his mistaken belief in the lawfulness of his defensive actions (Burchell *Principles of Criminal Law* 116). The prosecution must prove liability beyond reasonable doubt. It is trite that the onus rests on the State to prove beyond reasonable doubt that an accused acted unlawfully or that they realised or ought reasonably to have realised that they were exceeding the bounds of private defence (see *S v Ngobeni supra* 11; *S v Motleleni* 1976 (1) SA 403 (A) 407; *S v Ngomane* 1979 3 SA 859 (A) 863; *S v Goliath* 1972 (3) SA 1 (A) 11 and *S v Ntuli* 1975 (1) SA 429 (A) 436). The court in *S v Teixeira (supra* 765) confirmed that it remains the task of the State to prove beyond reasonable doubt that the accused's conduct was not justified but unreasonable and, consequently, unlawful. The investigation should therefore be directed at what the nature of the appellant's mistaken belief was, and not at whether the appellant has laid a factual basis for his mistaken belief. This approach was endorsed by the Appellate Division in the case of *R v Difford* (1937 AD 270 272) (and cited by Hoctor 2020 SACJ 753 and *S v Mdlalose supra* 32):

"No onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

It is trite that, for private defence to succeed as a ground of justification, the test is objective in the sense that the attack and the defensive action must meet certain objective requirements (*Mugwena v Minister of Safety and Security* 2006 (4) SA 150 (SCA) 157). The accused's subjective belief,

whatever it may be, has no impact on the validity of private defence as a ground of justification (Hoctor “General Principles of Criminal Law” 2022 SACJ 35(2) 22 228). The Constitutional Court in *Tuta v The State* (2023 (2) BCLR 179 (CC)) was recently tasked with making a finding on the correct legal test to be applied to the existence of the defence of putative private defence. In this contribution, the Constitutional Court’s decision is analysed.

2 Facts in *Tuta v The State*

The applicant was convicted by the High Court on a count of murder and a count of attempted murder. He was sentenced to life imprisonment on the count of murder and 15 years’ imprisonment on the count of attempted murder. He then approached the Constitutional Court to seek leave to appeal and an order setting aside his conviction and sentence. The majority of the court granted leave to appeal, the appeal was upheld, and the conviction and sentence were set aside. The order of the High Court was replaced with an order stating that the accused is found not guilty and acquitted and his immediate release from prison was directed.

The factual background is the following. On 2 March 2018, the applicant accompanied his friend to his residence in Sunnyside, Pretoria. *En route* to his friend’s residence, they realised that they were being followed by an unmarked red motor vehicle with occupants wearing civilian clothing. Upon this realisation, the applicant and his friend panicked and ran away, believing that the occupants of the vehicle intended to harm them. They ran in different directions. It later transpired that the two occupants of the unmarked motor vehicle were, in fact, police officers on duty, patrolling Sunnyside, Pretoria, in civilian clothing.

According to the testimony of the surviving occupant of the vehicle, Constable Makgafela, he and his partner, Constable Sithole, attempted to arrest the applicant after he and his friend ran away. The police officers suspected the applicant of being in possession of a stolen laptop because it appeared to them as if the applicant was hiding a laptop under his tracksuit jacket. They pursued him, first in the unmarked car, and thereafter on foot. Constable Makgafela gave chase. He testified further that, even though he was wearing civilian clothing, he also wore a bullet-proof vest bearing the South African Police Service (SAPS) insignia, which he removed to give chase to the applicant, after realising that it slowed him down. Constable Makgafela and his partner overpowered the applicant. While his partner held the applicant down, Constable Makgafela returned to their vehicle to fetch handcuffs. The applicant, using a flick knife that was in his pocket, then stabbed Constable Sithole. Upon his return to the applicant, the applicant stabbed him (Constable Makgafela) in the head. Constable Sithole was admitted to Muelmed Hospital but succumbed to the stab wound on the same day. Constable Makgafela was hospitalised for 34 weeks and is left with a severely injured left eye that has affected his eyesight (3–5).

The applicant testified in the High Court and admitted to stabbing both police officers. He testified that he thereafter left the scene immediately to seek help and, after failing to receive assistance from security guards in the vicinity, went to his residence. At his residence he told the security guards

there what had happened and also telephoned his sister to tell her what had happened. He explained to her that he had stabbed two men who tried to rob and abduct him. He further testified that his sister accompanied him to a police station, where he reported the incident the following day. He was informed by the police that a case could not be opened because the applicant could not identify his attackers. The applicant then left his contact details and residential address with the police officer on duty. He was arrested later that day at his residence. The applicant handed over the denim jacket that he had been wearing the previous night. When the police demanded he hand over the stolen laptop, the applicant informed them he had not been carrying a laptop at all (6–7).

Despite pleading not guilty to both counts in the High Court, the applicant was convicted on the charges of murder and attempted murder, and he received the minimum sentence for causing the death of a police officer, which is life imprisonment. The High Court found no substantial and compelling circumstances that permitted it to deviate from the minimum prescribed sentence. The applicant was sentenced to 15 years' imprisonment on the count of attempted murder. The applicant's application to the High Court for leave to appeal against his conviction was refused. Thereafter the applicant lodged an application for leave to appeal with the Supreme Court of Appeal. That application was also dismissed on the basis that it had no reasonable prospects of success. Six months later the applicant filed an application to the Supreme Court of Appeal in terms of section 17(2)(f) of the Superior Courts Act (10 of 2013), requesting the President of the Supreme Court of Appeal to reconsider the court's decision to refuse the application for leave as there were exceptional circumstances to do so. The President of the Supreme Court of Appeal dismissed the application for reconsideration. In a further appeal to the Constitutional Court, the applicant advanced two grounds that, he contended, engaged the Constitutional Court's jurisdiction and served as the basis for the applicant's leave to appeal against his conviction. The first ground was the infringement of the applicant's right to a fair trial in terms of section 35(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution). The second ground was that the matter raises an arguable point of law of general public importance that ought to be considered by the Constitutional Court, namely, the High Court's misapplication of the test for putative private defence (14). This discussion is limited to the second ground. Unterhalter AJ (Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring) delivered the majority judgment, while Kollapen J (Mlambo AJ concurring) delivered a dissenting judgment. For the sake of brevity, the discussion is limited to the majority judgment.

3 Parties' submissions

The applicant contended that the Constitutional Court had jurisdiction on the basis that the case raised an arguable point of law of general public importance that ought to be considered by the court. In making this submission, the applicant relied on the statement by Madlanga J (Jafta J and Nkabinde J concurring) in *Paulsen v Slip Knot Investments 777 (Pty) Limited* (2015 (3) SA 479 (CC) 30), namely that the interests-of-justice factor aims to

ensure that the Constitutional Court does not entertain any and every application for leave to appeal brought to it. Coming to this court's non-constitutional appellate jurisdiction, Madlanga J considered the question whether the interests of justice do not come into the equation and opined that they do. Madlanga J stated that this is what the words "which ought to be considered by that Court" in section 167(3)(b)(ii) of the Constitution are directed at. If it is not in the interests of justice for the Constitutional Court to entertain what is otherwise an arguable point of law of general public importance, then that point is not one that "ought to be considered by [this] Court". The interests-of-justice criterion is firmly entrenched in the Constitutional Court's jurisprudence on applications for leave to appeal involving constitutional matters. Madlanga J further stated that, whatever its true provenance in respect of applications for leave to appeal on constitutional matters from the Supreme Court of Appeal, he was unable to conceive of any basis why it should not be applicable in that case. On the non-constitutional appellate jurisdiction, the court in *Paulsen* borrowed from the Constitutional Court's existing jurisprudence on interests of justice.

The applicant's written submission in *Tuta* was that there was an incorrect application of the test for putative private defence by the trial court. He contended that the trial court had failed to apply the correct legal test to determine whether his defence, that he acted in putative private defence, was reasonably possibly true (18). Some confusion arose as the applicant's written submission did not exactly correspond with his oral submission. While the written submission made reference to a misapplication of the test for putative private defence, during oral submissions, the applicant argued that the trial judge misunderstood the test. The applicant's submissions relied primarily on the contention that the trial court failed to articulate the test for putative private defence correctly and that it conflated the requirements for fault and negligence when articulating the test. This incorrect understanding of the test for putative private defence, the applicant argued, constituted a failure of justice (23).

The respondent submitted that it was not in the interests of justice for leave to be granted. The respondent also relied on the Constitutional Court's decision in *Paulsen* (*supra* 30) but emphasised the words of Madlanga J in *Paulsen* that "the interests of justice factor aims to ensure that the court does not entertain any and every application for leave to appeal brought to it" (25). The respondent further submitted that the applicant's legal counsel had the opportunity to raise any complaints with the trial judge but failed to do so. The submission was accordingly that the applicant's rights were not infringed, and no irregularities occurred (26).

The respondent further submitted that the applicant was well aware that he was pursued by police officers. The police officers were wearing bullet-proof vests with the South African Police Service's insignia, and it was not disputed that the streetlights were on when the applicant was spotted by the police. The respondent contended that the police officers had clearly identified themselves to the applicant. It followed that the applicant did not act in putative private defence and the convictions should stand (27).

4 The test for putative private defence

At his trial in the High Court, the applicant relied on the defence of putative private defence. The Constitutional Court referred to the decision in *De Oliveira* (*supra* 14–16) where Smalberger J (Nienaber JJA concurring) distinguished clearly between private defence and putative private defence:

“It subsequently transpired that the defence was rather one of putative private defence (‘putatiewe noodweer’). From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way (*S v Ntuli* 1975 (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability (‘skuld’). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone, his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person’s death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.”

In *De Oliveira supra*, Smalberger J correctly opined that an accused who kills another, believing his life to be in danger, when, objectively, it is not, still acts unlawfully. Where such an accused kills another in the mistaken but genuine belief that his life is in danger, the accused lacks the intention to act unlawfully (*Tuta v The State supra* 46). As stated above, knowledge of unlawfulness is an integral part of intention. If it is lacking, the Constitutional Court correctly pointed out, the accused cannot be guilty of murder. Such an accused may still be guilty of culpable homicide depending on whether his belief that his life was in danger was reasonable. Putative private defence thus clearly excludes culpability in the form of intention, not unlawfulness. Culpability on a charge of murder is judged according to what the accused subjectively believed. Put differently, intention is a purely subjective state of mind (*S v Mdlane* [2023] ZAGPJHC 206 19; *S v Dube* 2010 (1) SACR 65 (KZP) 6–8; *S v Humphreys* 2013 (2) SACR 1 (SCA) 13; *S v Makgatho* 2013 (2) SACR 13 (SCA) 10). The required culpability on a charge of culpable homicide is negligence. Negligence is determined on the basis of the reasonableness of that belief (*Tuta v The State supra* 46; *S v Van As* 1976 (2) SA 921 (A) 927; *S v Ngubane* 1985 (3) SA 677 (A) 134; *S v Savoi* 2014 (1) SACR 545 (CC) 91).

It should also be briefly stated at this point that the test for unlawfulness and the test for negligence are often confused with one another, and used interchangeably in our case law. This is unfortunate. It is trite that the test for unlawfulness is whether the accused’s conduct was objectively reasonable and therefore justified in light of all the surrounding circumstances. Given the fact that there does not exist a *numerus clausus* of valid grounds of justification in South African criminal law, an accused’s conduct may still be regarded as being objectively reasonable despite the absence of a known ground of justification in the circumstances. To determine unlawfulness, the accused’s conduct is viewed *ex post facto* and objectively and the question is asked whether the *boni mores* regard the conduct as objectively

reasonable or socially adequate in the circumstances. The accused's conduct is not measured against that of the reasonable person in the same circumstances (Burchell *Principles of Criminal Law* 114; Hoctor *Snyman's Criminal Law* 81; Snyman "The Two Reasons for the Existence of Private Defence and Their Effect on the Rules Relating to the Defence in South Africa" 2004 *SACJ* 178; *S v Engelbrecht supra* 332). The test for negligence as a form of culpability, on the other hand, is that of the reasonable person in the same circumstances as the accused. Here the accused's conduct is measured against that of the fictitious reasonable person or *diligens paterfamilias* (Burchell *Principles of Criminal Law* 421; Hoctor *Snyman's Criminal Law* 187; *S v Botha* 2019 (1) *SACR* 127 (SCA) 18; *S v Ntuli supra* 436; *S v Melk* 1988 (4) *SA* 561 (A) 578). The words of Smalberger J in *De Oliveira (supra* 14–16) – that "[t]he test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way" – tend to obscure the difference in these two tests (see also *S v Ntuli supra* 436 where Holmes JA, (Hofmeyr JA and Van Zijl AJA concurring) held that "[t]he test for private defence is objective ... would a reasonable man in the position of the accused have acted in the same way?").

Before evaluating the merits of the applicant's submissions, Unterhalter AJ in *Tuta* first had to establish whether the Constitutional Court had jurisdiction to hear the matter. As stated previously, the applicant relied on putative private defence. He submitted that he had genuinely believed that his life was in danger at the hands of two assailants and that he had stabbed these assailants to protect himself, not realising that they were police officers. His belief was both genuine and reasonable. Although he was not objectively acting in self-defence, he submitted that he is guilty of neither murder nor culpable homicide (47). The trial court did not accept this submission but rather that of the surviving constable, who testified that he had informed the applicant, on apprehending him, that he and the deceased were police officers. This finding, the court found, excluded the applicant's reliance on putative private defence as he could not have held a genuine belief that his life was in danger. It follows that the stabbing of the police officers was intentional (48).

The applicant's second ground of appeal before the court was that the trial judge had failed to have regard to all the evidence led at trial from which the applicant's subjective state of mind might have been inferred. The submission was that, had the trial judge done so, he would have concluded that it was reasonably possibly true that the applicant did not realise that his assailants were police officers and that he genuinely believed that his life was in danger. The State would then not have discharged its burden to prove the applicant's liability on the counts of murder and attempted murder (49). Unterhalter AJ held that this ground of appeal ran into a "threshold difficulty" (50). The incorrect application by the trial court of the well-established legal defence of putative private defence raised neither a constitutional issue nor an arguable point of law. If the trial court made no error of law in formulating the test for putative private defence, then the misapplication of the correct test to the evidence before the trial court is not a matter that engages the Constitutional Court's jurisdiction. The failure by a trial court properly to evaluate the evidence is not an error of law but an error of fact and the court's jurisdiction does not extend to such issues (50). In oral

submissions, however, the applicant submitted that the trial court had, in addition, failed to formulate the correct test for putative private defence and then applied the wrong test to the evidence. That is an error of law, which carried the risk of an unsound conviction and an unfair trial. That engaged the Constitutional Court's jurisdiction, according to Unterhalter AJ (51).

The court was laden in its consideration of whether the trial judge did make an error of law in his formulation of the test for putative private defence (54). The record filed by the parties with the court did not correspond with the papers referred to by counsel during oral submissions. The High Court judgment filed by the parties was also not the judgment referred to by counsel during oral submissions. The judgment in the record filed with the court was an unsigned *extempore* judgment that stated:

"[T]he accused defence firstly amounts to private defence, or more commonly known as self-defence. A defence excluding unlawfulness, where the test is objective, and secondly, putative self-defence which relates to the accused state of mind and where the test is objective. The test to be applied in respect of the accused, he generally held it mistakenly believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable doubt." (21, 55)

The judgment signed by the judge, which is available on SAFLII and found in the court file stated:

"The accused's version, as mentioned above is that he acted in self-defence, and that he did not know that the people who attacked him were policemen executing their duties. As mentioned above, his defence amounts to putative self-defence. The test is subjective, in other words, what the accused had in mind, objectively considered. It follows that the accused's defence firstly amounts to private defence, or more commonly known as self-defence, a defence excluding unlawfulness, where the test is objective, and secondly putative self-defence, which relates to the accused's state of mind and where the test is subjective, in respect of whether the accused genuinely, albeit mistakenly, believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable grounds." (22, 56)

The court inferred that the trial judge, having handed down the *extempore* judgment in court, edited that judgment afterwards and produced the signed judgment that was placed in the court file (57). It is clear that the *extempore* judgment, as it was transcribed, contains a clear error of law where it states that "putative self-defence which relates to the accused state of mind and where the test is objective". That is incorrect. The court again referred to the decision in *De Oliveira* (*supra* 63), where it was held that, when an accused on a charge of murder relies upon putative private defence, the trial court must decide whether the State has proved beyond reasonable doubt that the accused subjectively had the intention to commit murder or whether the accused held the honest but mistaken belief that he was entitled to act in private defence (58). In deciding which of the two conflicting documents was the lawful judgement, the court referred to common-law authorities (60) and finally held that the *extempore* judgment must stand. The court held that, following a conviction, an accused is entitled to know the reasons a court relied upon to exercise its coercive powers of punishment. Those reasons must be clearly and precisely formulated. An accused convicted of a crime must be able to understand the basis of the court's decision, not least so as

to exercise the right to seek leave to appeal. That is properly done when the accused stands before the court and the judgment is handed down. An accused convicted and sentenced by a court must be able to rely upon the reasons a court provides when its judgment is given (60). That is the curial pronouncement that reflects the authority of the court. A person convicted of a crime should not be required to suffer the *ex post* reformulations and explanations that a trial judge considers, on reflection, to best express the reasons for the judgment. This approach, it was held, better accords with the constitutionally entrenched rights of an accused to a fair trial and the duties of a court to pronounce with finality upon the case before it (61). The *extempore* judgment of the trial judge was accordingly taken to state the legal test the judge relied upon to assess the putative private defence (64).

The relevant passage from the *extempore* judgment (quoted above) demonstrates that the trial judge held the test for putative private defence to relate to the accused's state of mind, but that the test was nevertheless objective. The court considered different ways in which to interpret this statement. One possible interpretation was that there was a transcription error or that the word "objective" was said in error and the trial judge meant to say "subjective" (66). The trial judge was contrasting private defence, a defence excluding unlawfulness where the test is objective, and putative private defence, which relates to the accused's state of mind. It would make logical sense then to cast putative private defence as a defence tested on a subjective basis, and hence the court's inference that the trial judge may simply have misspoken. The court then made reference to paragraph 8 of the signed judgment, where the following sentences appear: "[a]s mentioned above, his defence amounts to putative self-defence. The test is subjective, in other words, what the accused had in mind, *objectively considered*" (emphasis added).

The second sentence, cited by the court, had no analogue in the *extempore* judgment, but it was considered to be a clear indication of what the trial judge considered the test to be for putative private defence to which he had sought to give expression in his *extempore* judgment (67). The court was then tasked with considering what the trial judge understood by the gloss upon the test for putative private defence, namely that the accused's state of mind had to be ascertained "objectively considered" (68). The pertinent question was whether the trial judge invoked a consideration of reasonableness in determining the accused's state of mind and that, even if the accused acted in the genuine but mistaken belief that his life was in danger, putative private defence was considered to require his mistake to be reasonable. Unterhalter AJ correctly held that, if that was what the trial judge held, there was definite confusion as how the defence of putative private defence impacts the required culpability in respect of the crimes of murder and culpable homicide (69). An accused who holds the genuine but mistaken belief that his life is endangered lacks the intention to act unlawfully and this renders him not guilty of murder. The issue is simply what belief the accused held at the relevant time. Whether the accused's mistaken belief, though genuinely held, was reasonable or not, determines whether the accused had the required culpability of negligence for a conviction of culpable homicide.

The court found that there was an appreciable risk that the trial judge, in formulating the test for putative private defence in the signed judgment, imported objective considerations of reasonableness into the test, and thereby disregarded how putative private defence excludes intention for the crime of murder. Any ambiguity on this score had to be resolved in favour of the applicant (70).

The erroneous importation by the trial judge of reasonableness into the test for putative private defence in the signed judgment affected the Constitutional Court's interpretation of what was said in the *extempore* judgment (namely, that the test for putative private defence is objective). It cast doubt, in the court's view, on the possibility that the statement in the *extempore* judgment was either a transcription error or a slip of the tongue. That is so because the signed judgment indicates that the trial judge did consider putative private defence, on a charge of murder, to require some objective degree of reasonableness. At the very least, the contents of the signed judgment supported the conclusion that the trial judge was confused as to the test for putative private defence (71). An analysis of the signed judgment indicated to the court that the trial judge was not clear as to the distinction between the concepts of private defence and putative private defence in his appreciation of the requirements for putative private defence. The possibility that, in characterising the test as objective in the *extempore* judgment, the trial judge meant to import some considerations of reasonableness into his appreciation of the test for putative private defence could accordingly not be discarded (73). This left the court unable to confirm that the *extempore* judgment gave expression to an obvious error, and thus the relevant passage of the *extempore* judgment (quoted above) had to be read as it appeared from the transcript.

On pronouncing on the correct test for putative private defence, Unterhalter AJ held that the trial judge had made a "conspicuous error of law" in the *extempore* judgment (74). The court held that putative private defence is not determined on the basis of a test that is objective (also confirmed in *Director of Public Prosecutions, Gauteng v Pistorius supra* 52; *S v Ntuli supra* 436; *S v De Oliveira supra* 63; *S v Pakane* 2008 (1) SACR 518 (SCA) 19; *S v Sataardien* 1998 (1) SACR 637 (C) 644). Burchell (*Principles of Criminal Law* 131) states that "a distinction must be drawn between private defence as a defence excluding unlawfulness, which is judged objectively, and 'putative' or 'supposed' private defence, which relates to the mental state of the accused".

The Constitutional Court held that the central issue at the trial of the applicant should have been whether the State had proved beyond reasonable doubt that the applicant subjectively had the intention to commit murder (74). If it was reasonably possibly true that the applicant entertained the honest but mistaken belief that his life was threatened by the occupants in the unmarked red motor vehicle, and that he was entitled to act in private defence, then the State would not have proved its case. The reasonableness of the applicant's subjective belief is irrelevant to this enquiry. The reasonableness of the applicant's subjective belief is only relevant to the question of whether the applicant was guilty of culpable homicide (Burchell *Principles of Criminal Law* 421; Hoctor *Snyman's Criminal Law* 183; *S v*

Ngema 1992 (2) SACR 651 (D) 656; *S v Goosen* 1989 (4) SA 1013 (A) 1027; *S v Bernardus* 1965 (3) SA 287 (AD) 307). In *S v Burger* (1975 (4) SA 877 (A) 877 879), Holmes JA (Trollip JA and Galgut AJA concurring) described the determination of negligence with reference to the criterion of the reasonable person or *diligens paterfamilias* as follows:

“*Culpa* and foreseeability are tested by reference to the standard of a *diligens paterfamilias* (‘that notional epitome of reasonable prudence’ – *Peri-Urban Areas Health Board v. Munarin*, 1965 (3) S.A. 367 (A.D.) at p. 373F) in the position of the person whose conduct is in question. One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life’s pathway with moderation and prudent common sense.”

The Constitutional Court held that the trial judge’s invocation of an objective test for putative private defence constituted an error of law. This error of law was fundamental to the accuracy of his findings as to the liability of the applicant on the charges of murder and attempted murder (74; see also *R v Bhaya* 1953 (3) SA 143 (N) 840). The trial judge had believed Constable Makgafela’s evidence and had summarily disbelieved the applicant. Crucially, he disbelieved the part of the applicant’s testimony that he was not informed by Constable Makgafela that his pursuers were not assailants but, in fact, police officers. In following this strict, binary approach, the trial judge had failed to consider whether the applicant in fact appreciated what had been communicated to him by Constable Makgafela. The applicant’s evidence was that he was sworn at by his pursuers in a language he did not fully understand (76). The trial judge should have carefully assessed the applicant’s version in order to ascertain whether it might have been reasonably possibly true. Such assessment necessitated thorough consideration of what occurred after the applicant stabbed the police officers.(76)

As discussed above, the applicant testified that he told the security guards in the vicinity that he was being pursued and sought help immediately after the stabbing. He subsequently went to his residence and reported the matter to the security guards there as well. He also telephoned his sister upon his arrival at his residence and told her what had happened. He explained to her that he stabbed two men who tried to rob and abduct him. The applicant and his sister went to the police station to report the matter the following day. The police declined to open a case because the applicant could not identify his attackers. The applicant was arrested at his residence later the same day. From Constable Makgafela’s testimony that he did not know the applicant, the court inferred that the police only knew of the applicant’s place of residence as a result of the applicant’s report to the police (77). Even though this evidence was not challenged by the State, the trial judge rejected it as “inconsistent and improbable” (78), without explaining how the police came to learn of the applicant’s identity and physical address save for the applicant’s report to the police, as he testified. The Constitutional Court regarded the applicant’s conduct after the stabbing incident to accord with his version that he was under the impression that he was being attacked by assailants, that he was in mortal danger and that he had stabbed Constable Makgafela in the belief that he needed to protect himself.

Had the trial judge applied the test for putative private defence correctly and focused his assessment on the applicant's state of mind, he could (and would) not simply have rejected the post-stabbing conduct of the applicant as improbable (78). The applicant's evidence regarding his post-stabbing conduct was uncontradicted and borne out by his arrest at his place of residence later the same day. This evidence was clearly supportive of the applicant's account of his state of mind at the time of the stabbing. The trial judge's outright rejection of the applicant's post-stabbing conduct was regarded by the court as indicative of the fact that the trial judge did not have the applicant's state of mind at the forefront of his assessment (79). Instead, the trial judge's assessment of the applicant's defence was marked by what he reasoned to be objective considerations and probabilities. This was the ambiguity that lay at the heart of the trial judge's formulation of the test for putative private defence. The trial judge made the fundamental error of judging the mind of the applicant on the basis of "what the accused had in mind, objectively considered", and hence on the basis of reasonableness. That is not the correct test. The correct test for putative private defence, to exclude intention on a charge of murder, is simply what the subjective state of mind of the accused was.

The majority of the court consequently found that the trial judge had made a fundamental error of law, which was fatal to the applicant's conviction and sentence by the trial court. The applicant's appeal on this ground succeeded, his conviction and sentence for murder and attempted murder were set aside (80), and his immediate release was ordered (81).

5 Conclusion

The Constitutional Court in *Tuta v The State* (*supra*) has eradicated all possible confusion regarding the correct test to be applied to the defence of putative private defence. Private defence should also be clearly distinguished from putative private defence. Private defence is a ground of justification that excludes unlawfulness if various objective criteria are met. The test for private defence is therefore objective. Given that all crimes have unlawfulness as an element, no criminal liability can ensue if private defence is raised successfully. 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. No criminal liability can ensue on a charge of an intentional crime if putative private defence is raised successfully. An accused who puts up a putative private defence can still be convicted for a crime of negligence if the State manages to prove negligence on the accused's part beyond reasonable doubt.

Jolandi Le Roux-Bouwer
University of South Africa