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# *TRIBUTE TO AKHO NTANJANA*


Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

*Production editor*

Well done, Akho!

You have run your race; now, it is for us to take the baton and continue on your well-defined route.

*Thank you for being our guiding light.*

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*Enhancing Judicial Excellence*

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# *'LESS SEVERE ALTERNATIVE' IN THE CONTEXT OF PRIVATE DEFENCE: IS THERE A NEED FOR A CLEAR ROADMAP?*

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## I INTRODUCTION AND CONTEXTUAL BACKGROUND

> *Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim.*[1]

Private defence is an action available to individuals in situations where legally protected interests are unlawfully attacked.[2] It is one of the several grounds of justification[3] available to accused persons. It permits individuals to use force, including lethal force, to defend their rights or even other persons' rights under strictly controlled conditions.[4] This ground of justification has a long history and has notoriously troubled many jurisdictions in its application, especially in the effort to circumscribe its parameters such that, on the one hand, it

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1 *S v Makwanyane* 1995 (6) BCLR 665 para 138.

2 See R v Patel 1959 (3) SA 121 (A), *Ex Parte Minister van Justisie: In Re S v Van Wyk* 1967 (1) SA 488 (A) and *R v Van Vuuren* 1961 (3) SA 305 E, among others, regarding the interests that may be protected through private defence. The full requirements for private defence were captured thus in *Botha v S* 2019 (1) SACR 127 (SCA) para 34: 'The attack upon the person acting in private defence must be unlawful; it must be directed at an interest which legally deserves to be protected; and be imminent but not yet completed. The defence must be directed at the attacker; it must be necessary in order to protect the interest threatened; there must be a reasonable relationship between the attack and the defensive act; and the person attacked must be aware of the fact that she is acting in private defence.'

3 Other well-known grounds of justification include necessity, consent, impossibility, superior orders, etc, which all serve the purpose of negating the unlawfulness of the conduct. For a broader discussion of grounds of justification, see J Burchell *Principles of Criminal Law* (Juta, 2016) 121–248.

4 As stated in *Mugwena and Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) in the context where lethal force is employed, '[g]iven the inestimable value that attaches to human life, there are strict limits to the taking of life and the law insists upon these limits being adhered to' (para 21).

continues to serve its legitimate purpose and, on the other, it is insulated from abuse. Some jurisdictions have resorted to legislative interventions to regulate the defence.[5] South Africa, however, has not taken this route and still relies on the common law. Through court judgments, the principles regulating the defence have been developed and by and large crystallised.[6]

However, a perusal of judgments shows some inconsistency in outcomes in what could be seen as similar cases pointing to some unpredictability of outcomes.[7] The existence of this unpredictability, if this is a correct observation, should be cause for concern as it does not sit comfortably with the principle of legality.[8] Crudely put, if the courts differ significantly in their approach to private defence, what more for the members of the public who may find themselves in the unenviable position of having to rely on private defence? Surely, they need to know with some degree of certainty what is legally permissible and what is not even while alive to the fact that every case is treated on its own merits. The apparent mixed messages from the courts as conveyed by the various judgments selected for the purposes of this discussion[9] cannot be helpful.

The difference in the outcomes among cases – including cases that appear to be similar in material respects – can mainly be explained on the basis of the courts' application of the principle that the defensive act in private defence is subject to the qualification that the avenue chosen by the defender to repel the attack must be the 'less severe alternative.'[10] An extension of this

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5 Examples in this regard are the Republic of Singapore and the Republic of India – two countries using the same criminal code – which turned to legislative intervention to remedy the inconsistency and unpredictability in the application of private defence. See S Yeo 'Bringing clarity to private defence: The Singapore experience' (2010) *NUJS Law Review* 3 at 33–52.

6 See, for example, *Steyn v S* 2010 (1) SACR 411 (SCA) para 16 regarding the purpose private defence serves.

7 Cases where the accused were acquitted on the basis of private defence include *S v T* 1986 (2) SA 112 (O), *Steyn* (note 6 above), *Ernest v S* 2021 (1) SACR 324 (KZP) and *Pillay v S* (451/2022) [2023] ZASCA 113 (27 July 2023). In all these cases, the accused's private defence failed in the trial court and only succeeded on appeal. In *Botha* (note 2 above), the accused met partial success in that she was convicted of culpable homicide instead of murder. There are also cases where private defence failed on appeal and these include *S v Trainor* [2003] 1 All SA 435 (SCA) and *Grigor v S* (607/11) [2012] ZASCA 95 (1 June 2012).

8 Regarding the principles of legality and its implications, see Burchell (note 3 above) at 40.

9 *Steyn* (note 6 above) and *Botha* (note 2 above) are examples of the cases showing inconsistency. The two cases will be compared later in the discussion.

10 See note 1 above for the Constitutional Court's exposition of this legal position.

qualification would be that, where force is resorted to, minimum force must be used. In several cases, it was 'minimum force' that turned to be the deciding factor.[11] However, minimum force as a concept appears to be elusive and unamenable to clear and quantifiable measurement the result of which seems to be unpredictability and/or uncertainty to the detriment of those who would like to resort to private defence. Lest it be forgotten, the defenders are usually forced into the defensive acts by the aggressive and unlawful conduct of others and the appreciation of this fact calls for some empathy towards the defenders particularly after it has been established that there was indeed an unlawful attack and the contest is around the other requirements of private defence.[12]

The other side of the same coin – equally worth bearing in mind – is that the very nature of private defence requires the courts to remain vigilant lest vigilantism is allowed to enter the justice system masquerading as private defence. Keeping private defence as an effective refuge for those unlawfully attacked, on the one hand, and protecting it from those who would abuse it when called upon to account for their unlawful actions,[13] on the other, calls for a delicate balancing act. In this process, there seems to emerge some unpredictability of the law's response, especially regarding what is permissible for someone seeking to rely on private defence. Often, the defenders have to act in the dark[14] and only get a lesson regarding the acceptable bounds of private defence later when facing a judge or magistrate.

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[11] Some of the most recent of these cases as of the time of writing – August 2023 – include *Botha* (note 2 above) and *Grigor* (note 7 above) which resulted in convictions based on the form and/or amount of force used.

[12] Sight should not be lost of the words of Steyn CJ in *Van Wyk* (note 2 above) that '[o]ne who invades another's rights, who defiantly ignores the prohibition, warning or resistance of the right-holder so that he can only be presented by the most extreme measures, can with good reason be seen as the author of his own misfortune. It is he who is the outlaw, and if he is prepared to risk death in violating another's rights, why should the defender, who is unquestionably entitled to protect his rights, be viewed as the one acting unlawfully if he uses deadly force rather than sacrifices his rights?' This excerpt is a translation from Afrikaans to English in J Burchell *Cases and Materials on Criminal Law* (Juta, 2016) at 237.

[13] The case of *S v Mophatlane* (CC 47/2005) [2005] ZANWHC 105 (22 December 2005) is a good example. In this case, the accused killed the deceased for colliding into his motor vehicle and later sought to rely on private defence. He was unsuccessful but this underscores the point of private defence's vulnerability to abuse.

[14] They act in the dark both figuratively and literally. The former in that it is not always clear what the law requires of them or permits them to do. They also sometimes engage with their attackers in the dark literally as in cases such as *R v Stephen* 1928 WLD 170 and *S v Ngomane* 1979 (3) SA 859 (A).

It is with this in mind that the discussion in this article focuses on minimum force in the context of private defence. The article is divided into four parts. The first part – the current subheading – contains the introduction and contextual background. The second part outlines the requirements for the defensive act aimed at repelling the unlawful attack in order to lay a basis for the third part of the article which deals with the somewhat elusive nature of minimum force. The discussion seeks to explore the nature of the test applied to private defence and how this test, together with the time-tested approach that courts must not adopt the position of an arm-chair critic benefiting from the wisdom of hindsight,[15] is a mechanism best suited to accommodate a lot of the defenders but it seems to be underutilised or inconsistently applied. The fourth and last part, contains the conclusion and the core submission is that the courts' approach to minimum force appears to be ambivalent and, if this is indeed the case, members of the public surely deserve better from the courts.

## II REQUIREMENTS FOR THE DEFENSIVE ACT IN CONTEXT

The requirements for private defence are clustered into two, namely the requirements for the attack and the requirements for the defensive act.[16] It is generally accepted that, for private defence to succeed, the defender must have used minimum force in order to avert the attack. This attribute of private defence is so fundamental to the defence that it may even qualify as its foundational premise. It is submitted that the minimum force injunction, properly assessed, resides in the requirement for the defensive act that the means used must be a reasonable response to the attack. Anterior to this requirement, however, is the other requirement that the defensive act must be necessary.[17] For this reason, any discussion of the reasonableness of the means used by the defender can only start after crossing the hurdle of it being necessary. Logic seems to dictate against the likelihood of any means used in the defensive act ever being a reasonable response to the attack if the defensive

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15 This judicial admonition was sounded forcefully in *S v Ntuli* 1975 (1) SA 429 (A) and has since been quoted in other cases. See *Botha* (note 2 above) at 49, as just one example.

16 See note 2 above for the full list of the private defence requirements.

17 The other requirement is that the defensive act must be directed at the attacker. According to Snyman, quoted in *Botha* (note 2 above) at 34, there is another requirement for the defensive act in that the defenders must know that they are acting in private defence. These two requirements of the defensive act are not part of this discussion as they do not speak to the issue of minimum force.

act itself was not necessary in the first place. It is therefore not surprising that the inquiry into whether it was necessary for the defender to have embarked on the defensive act and, if it was necessary, whether the measures taken or means used were reasonable is usually an inquiry into whether the resort to force was the least harmful avenue available and such force was used in the manner proportional to the attack. These two requirements of the defensive act are so closely linked that they may be easily conflated but they are different legs of the inquiry and – it is submitted – the different purposes they serve demand that they be considered separately.[18]

It seems to be a generally accepted premise that the defensive act is necessary if it is the only available avenue to avert the attack.[19] It is what makes private defence different from vigilantism and simple retaliation. Private defenders embark on the defensive act because that is the only avenue available to them in a situation where the criminal justice system, the custodian of defensive force on behalf of members of society, is not able or available to perform this task for one reason or another.[20] As Burchell puts it, '[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.'[21] If the victim of an unlawful attack has an opportunity to flee but, instead of fleeing, resorts to the use of force to repel the attack, such victim runs the risk of a conviction. 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'.[22] Moreover, the requirement that the attack must be necessary has also been interpreted to include that resorting to the authorities for relief may

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[18] The approach in *Botha* (note 2 above) is a good example of how to deal with the two requirements. There the court first found that the defensive act was necessary (*Botha* note 2 above) at 11 and then moved to whether it was a reasonable response to the attack (*Botha* note 2 above) at 12–13.

[19] Burchell *Principles* (note 3 above) at 126. For the purposes of this discussion, the acceptability and/or justifiability of this premise is not challenged save to state that it seems problematic to subject someone – usually not the aggressor in the situation – to such a requirement. However, a critique of the premise can only be properly conducted by assessing its interpretation and application by the courts – a task beyond the scope of this article.

[20] There may be different theoretical moorings for private defence but the overarching one is that it is a mechanism excused or justified because the state is not able or available to avert the attack at the crucial moment. This much is clear from a look at the history of private defence. In this regard, see J Lowery Jr (1951) 'The historical development of self-defense as excuse for homicide' *Kentucky Law Journal* 39: 4, *https://uknowledge.uky.edu/klj/vol39/iss4/* (accessed 19 August 2023).

[21] Burchell *Principles* (note 3 above) at 126.

[22] Burchell *Principles* (note 3 above) at 126.

be an impossibility or impracticality. This was demonstrated in the case of *Schultz*[23] where, convicting someone who had produced a firearm to stop a person from stealing/taking away his property, the court reasoned that:

> *the property was removed in broad daylight. The accused was never in danger and he knew that if the property did in fact belong to him, he could easily recover it by ordinary legal proceedings. In the circumstances it cannot be said that it was necessary to resort to private defence.*[24]

Once it has been decided that the defensive act is necessary, the next question to pose is: What form might it take to avert the attack? Would simply pushing the attacker aside have averted the attack? Would hitting the attacker with fists have achieved the purpose? For an attacker in possession of a weapon, would hitting the attacker with the gun instead of shooting or hitting such attacker with the handle of an assegai instead of stabbing have averted the attack? As can be seen in *Botha*,[25] these are the questions that become relevant for consideration when dealing with this requirement.[26]

As it should be clear by now, the inquiry has passed the stage of deciding whether to employ force or not and is now at the stage of what form the force must take. The case of *Jack Bob*[27] provides a good example in this regard. In this case, the deceased attacked the accused by pushing him against a fence and dragging him for some distance before striking him with several fist blows and then producing a knife. The accused dispossessed the deceased of the knife and stabbed the deceased to death. On a charge of murder, the court had to consider whether what the accused did was 'a reasonable thing which a reasonable man might have done.'[28]

Basically, the question was whether the accused had exceeded the bounds of private defence by doing more than what was required to ward off the attack. The court observed that the accused thought the deceased was going to kill him and that he snatched the knife from the deceased quickly knowing that, if he did not do so, the deceased would kill him. The court, it appears, considered the fact that the accused had been overpowered by the deceased who was stronger and more muscular than him. The live issue was whether; after dispossessing the deceased of the knife, the accused should simply have

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23 *R v Schultz* 1942 OPD at 56.

24 *Schultz* (note 23 above) as translated by Burchell from Afrikaans to English in Burchell *Cases* (note 12 above) at 230. It should be noted that the court, in *Van Wyk* (note 2 above), rejected the reasoning in *Schultz*.

25 Botha (note 2 above).

26 See in particular paras 12 and 13 of the *Botha* judgment (note 2 above).

27 *R v Jack Bob* 1929 SWA 32.

28 Burchell *Cases* (note 12 above) at 228.

gotten rid of the knife by throwing it away or it was still reasonable to stab the deceased therewith. The court acquitted the accused because, according to the court, if what the accused was saying was true, then the steps he took were reasonable ones to avert the attack but, the court added, the other reason was that, even if the court did not believe the accused, there still existed doubt whether the steps he took were reasonable or not. That, the court reasoned, would still entitle the accused to an acquittal. This finding, it seems, allowed the court to proceed without answering the question of whether it was incumbent on the accused to throw the knife away after dispossessing the deceased thereof. The significance of leaving this question unanswered, at the principle level, was to come alive in *Botha*[29] later. In *Botha*[30] – a case where the appellant had stabbed the victims to death – Schippers JA asked counsel what the accused should have done after realising that what was in her hand was a knife.[31]

This makes it abundantly clear that the inquiry into the reasonableness of the means employed in the defensive act is a crucial stage in private defence because, as *Ngomane*[32] and *Botha*[33] demonstrate, employing the force that goes beyond what is reasonable to avert the attack means that the bounds of private defence have been exceeded.[34] Private defence, being an all-or-nothing defence, means that the defence must fail.[35] Proportionality is an important aspect in dealing with this requirement and, by now, the courts have made it clear that it does not require equality of arms in the mathematical sense.[36] While it is settled that proportionality is an important ingredient of reasonableness as long as it is paired with the caveat that such proportionality does not require mathematical similarity between the attack

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29 *Botha* (note 2 above).

30 *Botha* (note 2 above).

31 *Botha* (note 2 above) para 53.

32 *Ngomane* (note 14 above).

33 *Botha* (note 2 above).

34 See *Grigor* (note 7 above). In this case what doomed the defence was the fact that the accused stabbed the complainant several times which indicated that he went overboard. The accused's contention that he did this because the complainant kept on aggressively advancing towards him after the initial stabbing was rejected by the court as improbable.

35 In *Botha* (note 2 above), for example, all the requirements but one were met yet the defence failed.

36 As the court explained in *Steyn* (note 6 above) 19, relying on Burchell, 'modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all the factors into account, the defender acted *reasonably* in the manner in which he defended himself or his property.'

and the means employed to avert it,[37] its application remains problematic. What is clear is that the defenders are required to use the least harmful of the means available to them at the time of the attack and proportionality demands that regard be had to several factors in assessing whether the means employed are a reasonable response to attack.[38] This approach is clear in cases such as *Ngomane*,[39] *Zikalala*[40] and *Botha*.[41] In *Ngomane*,[42] the defence failed because the accused could have, among other things, used the handle of the assegai instead of stabbing the accused with the assegai. In *Zikalala*,[43] the defence succeeded because using the knife was the only available means that could effectively avert the attack and, in *Botha*,[44] the defence failed because the accused could have hit the deceased with the handle of the knife or aimed her stabbing movement towards the non-sensitive parts of the deceased's body.[45] From the approach in these cases, minimum force seems to be the threshold albeit it an elusive one.

## III MINIMUM FORCE: A SLIPPERY THRESHOLD?

Case law seems to suggest that the victim of an unlawful attack is expected or even obliged to use minimum measures to avert it.[46] In short, the necessity and the reasonableness aspects of private defence require that, of the available options at the disposal of the victim, the one that is less harmful but still effective is the one that can, justifiably, be used. This choice has been aptly described as the victim's back being 'to the wall'[47] which signifies that the

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37 See Burchell *Principles* (note 3 above) 128 as well as *Steyn* (note 6 above) at 18.

38 The relevant factors to be considered are listed in *Trainor* (note 7 above) at 13, relying on Snyman.

39 *Ngomane* (note 14 above).

40 *R v Zikalala* 1953 (2) SA 568.

41 *Botha* (note 2 above).

42 *Ngomane* (note 14 above).

43 *Zikalala* (note 40 above).

44 *Botha* (note 2 above).

45 This was the finding in the majority judgment. The minority judgment held that the means were a reasonable response to the attack. This difference aside, both judgments seem to support the view that the victim of an attack must resort to the least harmful of the available means.

46 This is the trend that emerges from perusal of cases such as *T* (note 7 above), *Zikalala* (note 40 above), *Ntuli* (note 15 above), *Stephen* (note 14 above), *Trainor* (note 7 above) and *Grigor* (note 7 above) to mention just a few of the cases where the courts either impliedly or expressly endorsed the approach.

47 C Ward '"Stand your ground" and self defence' (2015) *Faculty Publications* 9 https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2841&context=facpubs (accessed 19 August 2023).

choice is between enduring the unlawful attack and employing force to repel it. It goes without saying that if there is only one available avenue or means, then the question of choice falls away. This requirement or limitation – it is submitted – applies to both the necessity of the defensive act and the reasonableness of the means employed. This is in line with the position of the Constitutional Court in *Makwanyane*.[48]

Similarly, in *Attwood*[49] the court subjected private defence to the limitation that the means the victim used 'were not excessive in relation to the danger, and that the means he used were the only or least dangerous whereby he could have avoided the danger.'[50] It can, therefore, be said that the fact that the victim is required to use the less harmful means to avert the attack is uncontested. This may seem to be a tall order for the victims of an attack as they are required to exercise choice, often including selection of weaponry and the manner in which it should be used in order to remain within the four corners of private defence, in situations of exigency. However, such victims are assisted in this regard by the approach of the courts that, as the court reiterated in *Patel*,[51]

> *[m]en faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pro and cons. Allowance must be made for the circumstance of their position.*

This approach seems to provide some protection for private defenders in a situation where they are faced with a legal position that requires the court to subject their conduct to the objective test. Without factoring the exigency of the situation into the equation in this manner, the victim of an attack would be faced with the mammoth task of squaring up with the fictitious reasonable person. Taking this approach, therefore, dilutes some of the attributes of the fictitious reasonable person by accommodating the specific experiences or realities of the victim without making the test a subjective one. As stated in *T*,

> *[t]he very objectivity of the test however demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted.*[52]

The elusiveness of minimum force presents itself in several ways when one looks at several cases but its most striking feature has to be the expectation that the defenders must aim at the part of the body less likely to result in death

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48 *Makwanyane* note 1 above.
49 *R v Atwood* 1946 AD 331.
50 *Atwood* as quoted in *Ernest* note 7 above para 20.
51 Burchell *Cases* (note 12 above) at 223.
52 Burchell *Cases* (note 12 above) at 224.

or use the object to hit the assailants instead of shooting or stabbing them. While this expectation undoubtedly resonates with the approach that the least harmful means must be employed, the lack of consistency in its application may be problematic. Just two Supreme Court of Appeal (SCA) judgments should suffice to demonstrate this. These are *Steyn*[53] and *Botha*.[54] What do these cases tell us when it comes to the use of minimum force and the application of the minimum force requirement? In *Steyn*, the SCA overturned the conviction and acquitted the accused. The accused had shot and killed her abusive husband who, on the day of the incident, had ordered her to stay in her room and became violent and attacked her when she came out of the room contrary to his instructions. The accused did not fire any warning shot or aim at any less sensitive part of the body such as the legs. She shot the deceased in the upper part of the body.[55] The SCA focused on the circumstances under which the accused found herself and found that:

> *she was obliged to act in circumstances of stress in which her physical integrity and indeed her life itself were under threat. It is necessary in such circumstances to adopt a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence.*[56]

In *Botha*,[57] the accused had an extramarital affair with the deceased's husband. On the day of the incident, the accused and the deceased's husband were seated at a restaurant when the deceased arrived and attacked the accused. The accused stabbed the deceased with a steak knife fatally wounding her. She was convicted of murder in the regional court and appealed to the High Court where she was partially successful in that the form of intention was changed from *dolus directus* to *dolus eventualis*. Still not happy, she then appealed to the SCA where the conviction changed from murder to culpable homicide. Among others, the conviction of the accused rested on the finding that she could have used the knife in a different manner than she did. The court found that instead of stabbing the deceased, the accused 'could have aimed at the lower body or used any other means short of directing the stabbing movement towards the deceased's upper body'.[58]

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53 *Steyn* (note 6 above).

54 *Botha* (note 2 above).

55 As the court explained at para 10, the bullet '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'.

56 *Steyn* (note 6 above) para 24.

57 *Botha* (note 2 above).

58 *Botha* (note 2 above) para 13.

Even a cursory comparison between *Botha*[59] and *Steyn*[60] reveals a measure of inconsistency in the SCA's approach. While accepting that '[e]very case must be determined in the light of its own particular circumstances',[61] a look at the two cases shows that the accused in *Botha*[62] seems to have been subjected to a harsher treatment by the SCA than the accused in *Steyn*.[63] Just a few comparative points between the two cases may illustrate this: while the accused in *Botha*[64] was already under severe attack, the one in *Steyn*[65] was averting an imminent attack; the accused in *Steyn*[66] used a firearm while the accused in *Botha*[67] used a knife; the accused in *Steyn*[68] armed herself in anticipation of an attack while the accused in *Botha*[69] reached for the table for anything she could use to avert the attack and that happened to be a knife.[70] In both cases, the deceased were stronger than the accused. Yet the one got convicted and the other acquitted. The difference in outcomes in the two cases, it is submitted, evidences the slippery nature of minimum force as a threshold for private defence. It does not help matters that, in *Botha*,[71] the main judgment and the minority judgment underscored the apparent inconsistency in approach.[72]

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59 *Botha* (note 2 above).

60 *Steyn* (note 6 above).

61 *Steyn* (note 6 above) at 19.

62 *Botha* (note 2 above).

63 *Steyn* (note 6 above).

64 *Botha* (note 2 above).

65 *Steyn* (note 6 above).

66 *Steyn* (note 6 above).

67 *Botha* (note 2 above).

68 *Steyn* (note 6 above).

69 *Botha* (note 2 above).

70 Note that the majority judgment in *Botha* (note 2 above) accepted the state's version that the accused knew that what she had picked up from the table was a knife (para 9) while the minority judgment accepted the accused's version that she did not know that what she picked up from the table was a knife (para 40).

71 *Botha* (note 2 above).

72 This is not a general posture against the courts delivering majority and minority judgments as that is usually healthy for jurisprudential development. In this case, however, this contributes to the general sense of inconsistency this article seeks to bemoan as it leaves the lower courts without a clear roadmap. Ordinarily, it could be said that there is no cause for concern as the *stare decisis* rule dictates that the majority judgment is the law but, in this case, the difference appears to be in the application of private defence as opposed to the legal principles that govern it and that is where the problem seems to lie. The principles are clear enough but their application seems too murky to serve as a guide for the lower courts.

## IV CONCLUDING REMARKS

The foregoing discussion seeks to show that the requirement of minimum force is a necessary and justifiable attribute of private defence. While South African law has undoubtedly accepted this attribute, there remain some problems regarding how the minimum force threshold is applied. There has been a laudable move of diluting the reasonable person test to accommodate the specific circumstances pertaining to each case. While this approach works in favour of those faced with the unenviable decision of resorting to private defence, it does not yet give them adequate protection. The unpredictability of private defence remains and the inconsistency in the application of the accepted principles as seen in cases such as *Steyn*[73] and *Botha*[74] does not help matters. While accepting that there cannot be a one-size-fits-all approach as cases differ, it is imperative that there be consistency in the application of the requirements of private defence. It does not seem fair that accused persons in similar situations may end up not being treated in a like manner as seems to be the case when it comes to the expectation that, in the use of force, the defender must aim for the less sensitive part of the body. While it is submitted that it may be too exacting to demand of defenders to be aiming at certain parts of the victims' bodies in situations of emergency, this reservation becomes less important when compared to the apparent lack of consistency in the courts' approach.

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73 *Steyn* (note 6 above).

74 *Botha* (note 2 above).