

WHEN CAN I FIRE?

Use of lethal force to defend property

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Can you use lethal force to protect your property, and if so, when? South Africans are confused about how much force they can use in defending themselves from crime, and mistakes in this area could have disastrous consequences. While the law remains unclear, the constitutional right to life is likely to be given precedence over the right to protect property.

The 2003 ISS National Victims of Crime survey concluded that South Africans are much more fearful of crime today than they were in 1998 (see article by D Mistry in this issue). This growing panic has prompted a wide range of self-protective measures, including many people arming themselves in anticipation of a criminal encounter. There have been a number of recent, well-publicised incidents of the use of lethal force in defending property. These have been accompanied by media statements to the effect that killing in defence of property is acceptable under South African law.¹

This situation poses dangers of its own. Ever since the debate surrounding the changing law on use of force in effecting an arrest hit the headlines, South Africans have been confused about when they can and cannot use their guns to defend themselves. If they err on the side of caution, they could lose their lives. If they err on the side of violence, they could lose their liberty.

This article focuses on just one aspect of this debate: the use of lethal force to defend property. While the case law remains unclear, the guiding principles today suggest that killing another person in order to retain property is unlikely to be deemed lawful by the courts.

The right to defend yourself

In common law, the controlling principle on the right to use force to defend one's self or one's property is

proportionality: the defensive act may not be more harmful than necessary to ward off the attack. Although there are no hard and fast rules, courts weigh up the interests protected by the defensive act against the interests infringed by the unlawful attack.

In determining whether a crime victim acted reasonably, the courts judge each case on its own merits. Certainly, an owner who is confronted by a robber is not expected to abandon his property. He is entitled to protect it, and the court will consider all the circumstances² when deciding whether the means of defending the property were reasonable.

This right to self-protection can provide a defence to a charge of assault or even, in some cases, murder. Our law allows you to defend yourself, another person, your property or the property of another against a current or imminent unlawful attack.³ When a person pleads private defence, his claim is that the injury he caused was, in the circumstances, lawful and permissible.

This *common law* defence is often confused with the *statutory* provision contained in Section 49 of the Criminal Procedure Act as amended,⁴ which allows for the use of force when *effecting an arrest*. Despite certain similarities, these defences should not be conflated with each other as they are used for different purposes and have different requirements.

Various requirements must be met before the defensive act will be considered lawful. The attack must be:

- commenced or imminent;
- against a legally recognised interest;⁵ and
- unlawful.

The action made in defence must be:

- necessary to avert the attack;
- reasonable in terms of the amount of force used; and
- directed against the attacker.

Thus, the action taken must be in response to a currently pending aggressive action, and the law specifically rules out any action being taken, on the one hand, pre-emptively or, on the other, in 'revenge'.

What does the case law say?

The first authoritative decision that dealt with the use of lethal force to protect property was *Ex Parte Minister of Justice: In re S v Van Wyk*.⁶ In this case, a shopkeeper whose shop had been repeatedly broken into took desperate measures to protect his belongings and rigged a shotgun in such a way that the intruder would trigger the device upon breaking into the store. One night an intruder broke in, set off the device and received a fatal wound. On a charge of murder, the shopkeeper invoked private defence and the court upheld his defence, acquitting him on all charges. The court reasoned that a person may, in exceptional circumstances, use lethal force to protect his property when there is no other way in which the goods can be retained. The only limit the court imposed was that the value of the goods should not be of a trivial nature. This decision was later followed in *S v Mogohlwane*.⁷

In terms of these two decisions, killing in defence of property could be justified in situations where valuable property was being stolen. However, these judgements were handed down almost 40 years ago – long before South Africa's shift to a human rights democracy. If faced with similar facts today, the courts would undoubtedly arrive at a different decision.

Changes under the new constitution

South Africa's new constitutional democracy turned our legal system on its head. The Bill of Rights

protects various fundamental human rights, including the right to life⁸ and the right to property.⁹ In cases of private defence, it is inevitable that these rights will need to be weighed against each other. The court's balancing act would have to comply with the requirements as set out in section 36 of the Bill of Rights: was the infringement reasonable and justifiable in an open and democratic society based on principles on human dignity, equality and freedom? Applying this test, it is unlikely that any reasonable court would consider it justifiable to take another person's life in defence of property.

Consider the following scenario. You are woken in the middle of the night by the sound of breaking glass. You look out of your bedroom window and see a thief stealthily driving your new sports car down the driveway. You shout at the thief to get away from your car, but he ignores you and continues to drive away. In desperation, you grab your gun and fire at the thief, killing him.

Your defence is that you were protecting your valuable property and that there was no other way of preventing the thief from stealing the vehicle. Also, the theft was still in progress, so your defence would comply with the requirements that the defensive act should be aimed at an attack that is not yet completed.

In terms of the Van Wyk decision, you would almost certainly succeed with this defence. However, in light of the constitutional changes noted above, it is very possible that you would find yourself in danger of being convicted of murder.

On the other hand, you could argue that the Bill of Rights also protects your right to your property, and that the constitution does not provide for a hierarchy of rights.¹⁰ This is perhaps so, but recent decisions have indicated that the right to life cannot be arbitrarily infringed, allowing for lethal force only in situations where lives of innocent persons require protection.¹¹

The landmark decision in *S v Makwanyane*¹² entrenched the right to human life by abolishing the imposition of the death penalty in South Africa. The court also made passing reference to the need to bring other aspects of South African law in line with the

constitutional emphasis on the sanctity of human life. With reference to section 49 of the Criminal Procedure Act, the court warned that if the state was no longer permitted to take a life in punishment of a *convicted criminal*, then how could the law allow anyone to take the life of a person they are trying to arrest.

The same reasoning would surely apply to someone who takes the life of the thief who steals his property. Evading lawful arrest is equally, if not more, serious than theft.

Similarly, the more recent decision of *Govender v the Minister of Safety and Security*,¹³ followed the Makwanyane reasoning in respect of using deadly force. The court held that the use of lethal force in effecting an arrest may only be used if the fleeing suspect poses an immediate threat of bodily harm to members of the public. This decision was later followed in the constitutional court case of *Ex Parte Minister of Safety and Security and other: In re S v Walters and Another*.¹⁴ In short, these cases confirm that use of deadly force can only be justified when the suspect poses a threat to the lives and safety of others.

If we apply this to the car theft scenario above, then it is clear that you would not be able to use lethal force to prevent the theft of your vehicle. You would have to resort to other non-lethal methods of trying to prevent the crime. If during your lawful attempts to prevent the theft, the thief retaliates and poses a threat to your life or anyone else, only then would you legally be entitled to use necessary force to defend yourself or others.

It is important to remember that before you can act in self-defence, the attack against you should have commenced, or at least be imminent. For example, if the thief pulls out a firearm and aims in your direction, then you would be justified in using lethal force to protect your life. However, you cannot shoot the unsuspecting thief on the premise that if you confront him, he would place your life in danger. The pre-emptive strike principle is not applicable in private defence cases.

Consider another set of circumstances. You wake up one night and discover that an intruder has broken

into your living room. The thief is armed with a firearm and is sneaking through the house, gathering valuable items as he proceeds.

You know that if he is startled he might shoot you or your family. Can you lawfully shoot him? Do you have to take your family and flee from your home? Do you have to wait for him to attack you or your family?

Unlike the scenario with the car thief, this time the intruder is in your home. However, the same legal principles apply. You cannot use lethal force to prevent him from walking out with your TV. Instead, you or your family would have to be in immediate danger. It could be argued that the mere fact that the intruder is in your home is sufficient threat to justify your using lethal force against him. Again, each case could be judged separately, but the *legally* safe option would be to avoid using lethal force until you have no other option.¹⁵ Rather avoid confronting intruders. It could save your life and keep you out of jail.

In short

The principle is simple: *the life of the attacker can only be taken in order to protect your or someone else's life or to prevent serious bodily harm*. It is unlawful to use lethal force in any other circumstances. In other words, your property is not worth the life of the person that is stealing it from you!

Endnotes

- 1 News24, 26th of May 2004.
- 2 These include: the value of the property, nature and extent of the danger, the time and place of the occurrence, etc.
- 3 Self-defence is commonly referred to as private defence. Private defence captures the broader scope of legally recognised interests.
- 4 Act 57 of 1977.
- 5 Most legal systems have approached the question of what interests may be protected by private defence in a casuistic way, with the result that not all potentially recognisable interests have been recognised as the subject of self-defence. Examples of legally recognised interests include: life, limb, property, dignity, personal freedom, chastity and sexual integrity.
- 6 1967 (1) SA 488 (A).
- 7 1982 (2) SA 587 (T).

- 8 Section 11 of the Constitution.
- 9 Section 25 of the Constitution.
- 10 This approach is supported by CR Snyman, *Criminal Law sixth edition 2003* at 108, who argues that lethal force may be used when it is your last available alternative to defend your property.
- 11 Lethal force would also be justified to prevent serious bodily harm and to prevent rape.
- 12 1995 (3) SA 391 (CC).
- 13 2001 (2) SACR 197 (SCA).
- 14 Case unreported.
- 15 When judging whether or not the defence was reasonable in the circumstances, the court will avoid assuming the role of an armchair critic and will take the traumatic and emergency nature of the incident into account.