e-MANTSHI

A KZNJETCOM Newsletter

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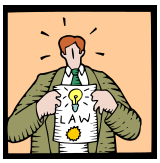
Welcome to the hundredth and sixty third issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Chief Justice has issued directives in terms of section 8 (3) (b) of the Superior Courts Act 10 of 2013 for the management of courts during the lockdown period. These regulations have been published in Government Gazette no 43241 dated 21 April 2020. The directives can be downloaded here:

https://www.justice.gov.za/legislation/notices/2020/20200420-gg43241gen246-COVID19-OCJ.pdf

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Recent Court Cases

1. LR v S (CA&R 41/19) [2020] ZAECGHC 31 (29 April 2020)

It is not correct that once a child attained majority, and co-guardianship had ceased, that a maintenance order terminated automatically and the respondent was no longer obliged to make payment to the child in accordance therewith.

Rugunanan, J:

[1] This is an appeal against conviction. The matter was previously struck off the roll of this Court on 13 November 2019 due to the appellant's non-appearance or non-appearance by a legal representative on his behalf. At the resumed hearing of the matter the appellant appeared in person, prior to which he filed a formal application for its re-instatement. On good cause being shown, and there being no opposition to the application, the appeal was re-instated for hearing by this Court.

[2] On 20 December 2018, in the Magistrates' Court, Humansdorp, the appellant was convicted on a charge of failing to pay maintenance and sentenced to a term of 6 months' imprisonment conditionally suspended for 5 years. The allegation against him was that he contravened the provisions of section 31(1)[1] of the Maintenance Act. [2] The contravention for failure to pay maintenance was alleged to have occurred in the period July 2018 to November 2018 when the appellant did not make monthly payments of R1 350 which accumulated to an arrears amount of R6 750 by the time he stood trial. His sentence incorporated an order that this amount be paid in full on or before 31 January 2019.

BACKGROUND AND EVIDENCE

[3] Only two parties featured in the trial proceedings before the Magistrate, namely, the complainant S[…] M[…] K[…] ("S[…]") who testified on behalf of the State and the appellant who testified in his own defence. The undisputed factual backdrop to the charge is that on 20 April 2016, the appellant consented to a maintenance

[1] The section reads: "31 Offences relating to maintenance orders (1) Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine."
[2] Act No. 99 of 1998, as amended

order (Form J214E) in favour of S[…] for *"the minor child"* L[…] L[…] R[…], for payment of the aforementioned fixed monthly amount into a banking account in the name of S[…].[3] Prior to the existence of the maintenance order the appellant was married to S[…]'s daughter C[…]. Through that marriage L[….], was born. The appellant's marriage ended in 2008 when his wife died in a motor vehicle accident. As a matter of choice [4] L[…], who was aged 9 at the time, had since been residing with her grandmother S[…]. S[…] is a pensioner and was appointed co-guardian to L[…] in terms of a High Court order in circumstances and for reasons not germane to this appeal. Their living arrangement culminated in Sh[…] obtaining the maintenance order.

[4] L[…] was born on 19 December 1998. It was not disputed that at the time of the appellant's prosecution she had turned 20 years' of age,[5] was still attending school and residing with S[…]. Also not in issue was that L[…] was not self-supporting and that she had a 3 year old child whose father did not provide financial support due to his whereabouts being unknown. The child lives with S[…] and L[…].

[5] The appellant was legally unrepresented and pleaded not guilty to the charge. His plea explanation and defence is apparent from the following extracts of the record:
In explanation of plea he stated:

" … 2 jaar terug het ek na hulle toe gegaan … en ek het verduidelik dat die hofbevel nie meer wettig is nie en dat ek wel aan gaan om die onderhoud te betaal per maand. Ek het so gedoen vir 18 maande … tot op 'n punt gekom wat ek dit nie meer verder gedoen het nie."

In clarification by the Magistrate:

"So met ander woorde u se die rede hoekom u ophou betaal het is omdat u se u dogter is meerderjarig op hierdie stadium?

He responded:

"Dis korrek".

And when cross-examining S[…] he put it to her:
(irrelevant wording omitted)

"Ek het vroeër aan die Hof verduidelik hoekom ek opgehou betaal het. Is as gevolg van die … hofbevel wat tot einde is toe L[..] 18 geword het … Ek het nog steeds 18

[3] Exhibit "A", affidavit Steven Schreiber, record page 19
[4] Record 66:15-19
[5] Record 52:19-20

maande daarna betaal, met die het ek gesê dat ek nog steeds gaan aanhou betaal … as daar geen probleme is nie. Ses maande terug was daar probleme …" [6]

[6] By his own admission the appellant continued making the required monthly maintenance payments for 18 months after L[…] had attained majority status, though he expressed dissatisfaction about the payments being made into a banking account that was not hers.[7] The turning point ("*punt*") at which he ceased making payment occurred when L[…] required his financial assistance, for an additional R400 per month, to enable her child to attend play school for a few days extra per week.[8] According to S[…], a heated altercation ensued between the appellant and the adult pair with the appellant protesting that no court would force him to pay maintenance. It is not particularly clear when this altercation occurred, though indications are that it must have been sometime during or perhaps shortly before July 2018. Needless to say the appellant did not deny his outburst, nor did he state whether his protestation meant that he lacked financial means.

[7] Following the appellant's failure to have paid maintenance for L[…] in accordance with the maintenance order, S[…] lodged a complaint with the maintenance officer on 13 August 2018. By then the appellant was in arrears for a month [9] and by the time of the trial the arrears accumulated substantially.

THE ISSUES AND APPLICABLE LEGAL PRINCIPLES

[8] Somewhat candidly (or doggedly) the appellant testified that he ceased maintenance payments on the advice of an unqualified layperson.[10] Because the maintenance order incorporated the words "*the minor child"*, and did not make further reference to pay maintenance until L[…] was self-supporting ("*selfonderhoudend*"), he was advised that once L[…] turned 18, S[…]'s right of co-guardianship terminated and the maintenance order lapsed, in effect relieving him of the obligation to continue making payments into S[…]'s bank account.[11] The appellant did not contend that once guardianship terminated, the obligation to pay maintenance was henceforth enforceable only by L[…].

[9] Understandably, and not surprisingly, the appellant presented no legal argument at the hearing of the appeal save for stating his case on appeal was founded in *Bursey v Bursey*,[12] and in *Gold v Gold*.[13] Relying on *Bursey*, the appellant's

[6] Record 120:20-24; 121:2-6
[7] Record 53:1-6
[8] Record 100:20-25; 130:22-24; 131:4-17
[9] Exhibit "A" page 19 paragraphs 2 and 4
[10] Mr Paul Hijl who was present during the appeal proceedings
[11] Record 120:20-24; 121:16-22; and 138:10-139:8; and 145:24-146:13
[12] 1999 (3) SA 33 (SCA)
[13] 1975 (4) SA 237 (D&CLD) at 239F

contention is that the express wording of the maintenance order qualified its duration by fixing a time when payment for maintenance should cease, and in holding that the maintenance order had currency the Magistrate misapplied *Bursey* and erred in convicting him. In finding that the maintenance order did not lapse the Magistrate's judgment indicates that he relied on *Moraitis Investments v Montic Dairy* [14] which he found sufficiently persuasive to deduce that the maintenance order had the same standing and qualities as any other order of Court; it could not be disregarded and to ignore it would be inconsistent with the Constitutional decree that a court order is binding on all persons to whom it applies. Although what was stated in *Moraitis* was in the context of a settlement agreement, I doubt if the Magistrate incorrectly applied it to the maintenance order in issue. His approach, in any event, finds resonance in *Bursey* where it is stated that a maintenance order is not *ipso jure* varied by changed circumstances but remains fully effective until terminated or varied by the Court.[15]

[10] Reverting to the matter under consideration, I do not agree that the appellant's interpretation of *Bursey* applies to the present case. *Bursey* is factually distinct in a somewhat narrow respect.

[11] A starting point is the injunction under our common law, correctly decreed in *Bursey*, that the duty of support owed by a parent to a child does not terminate when the child reaches a particular age but continues after majority. *Bursey* concerned a divorce order that incorporated an agreement between the parties which provided: (irrelevant wording omitted)

"The defendant shall pay to the plaintiff, as and for maintenance for the said minor children, the sum of R750 per month per child … The said maintenance shall be paid until the said children become self-supporting."

[12] In *Bursey,* the appellant contented that on a proper interpretation of the order payment of maintenance to his divorced spouse (i.e. the plaintiff) ceased once the children attained majority status. In rejecting this contention the Supreme Court of Appeal (SCA) found that the phrase *"the said minor children"* identified them by reference and could not have been intended to qualify the duration of the order where the express terms as to its duration (signified by the wording *"until the said children become self-supporting"*) were spelt out. Applying the common law, ancillary to which the order existed, the SCA concluded that the order meant precisely what it said namely, that the appellant was obliged to pay maintenance until the children became self-supporting even if that occurred after they attained majority.[16]

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[14] 2017 (5) SA 508 (SCA)
[15] At 304
[16] At 38C

[13] Although the maintenance order relating to L[…] makes no reference to payment of maintenance until she becomes self-supporting (a feature that distinguishes the present case from *Bursey*), parity of reasoning dictates that the wording "*the minor child"* identifies L[…] by reference and does not have the effect of qualifying the duration of the maintenance order. Considering that it was never disputed by the appellant that L[…] was not self-supporting when she turned 18, or that he had means, the maintenance order in her favour assumes an ancillary existence to the common law that regulates the duty of a parent to provide a child with support after majority.

[14] For the above reasons, I cannot uphold the appellant's contention that once L[…] attained majority, and co-guardianship had ceased, the maintenance order terminated and he was no longer obliged to make payment to S[…] in accordance therewith.

[15] In heads of argument, the appellant raised the issue that S[…] lacks any form of standing or valid interest in acting for L[…]. In contending as such he does not contest that within the framework of *Bursey* the law recognises a situation in which a person can have standing in respect of another who is a major. He contends however that the courts should not extend *locus standi* further than necessarily conferred by the terms of a particular order. In my view, the effect of the maintenance order *per se* is that once L[…] attained majority, the maintenance payable would continue to be paid to her by S[…], who would recover under the maintenance order from payments by the appellant. S[…] is entitled to do this in terms of that order (until such time as she and / or L[…] and / or the appellant approaches the maintenance officer for its variation to effect payment into different bank account[17]). Thus it is the operation of the order that confers S[…] with *locus standi* or a validly identifiable interest to have initiated the complaint with the maintenance officer. The principle is that the attainment of majority does not *per se* in all circumstances automatically prevent a parent (or co-guardian, as in this instance) from denying one of them the right to enforce a claim for maintenance. The *Bursey* case serves as authority for this proposition [18] and renders the appellant's contention abstract and academic.

[16] In the light of the above findings the next issue that requires determination is whether the appellant acted with criminal intent. The appellant contends that he engendered a *bona fide* belief that the maintenance order lapsed *ipso jure*. In raising this contention he relies on the case of *Gold v Gold*.[19] For reasons that follow his reliance thereon is misplaced. The *Gold* case is distinguishable from the present matter. It concerned an application for a declaration of civil contempt in which a Court is called upon to decide whether a respondent's non-compliance

[17] Section 19, Maintenance Act No. 99 of 1998, as amended
[18] At 37D
[19] 1975 (4) SA 237 (D&CLD) at 239F

with an order of Court is wilful and *mala fide*. Once a respondent, as in *Gold's* case, adduces evidence that establishes that he held a *bona fide* belief that a maintenance order had ceased to operate, then such evidence constitutes a defence.

[17] In the present case the appellant was prosecuted on a charge of contravening section 31(1) of the Maintenance Act. To establish a contravention of the section, *S v Magagula* [20] laid down that the State has the burden of proving the following elements:

(1) A maintenance order directed to the accused;

(2) A failure by the accused to make a particular payment required by the order;

(3) (a) that at the time of his default, the accused had the means to comply with the order; or

(b) failing 3(a), and if the accused has raised the defence of lack of means, that the accused's lack of means was caused by his own unwillingness to work, or by his misconduct; and

(4) A "guilty mind" on the part of the accused (including knowledge of unlawfulness),

[18] The appellant's prosecution was for a criminal offence under the Maintenance Act. In contrast to civil contempt, the State must prove that he acted with a guilty mind, it being one of the requirements for securing a conviction for contravening section 31(1) *per Magagula supra.* The type of "guilty mind" required for the relevant contravention, includes *dolus* or *culpa*. This is informed by the general aims, objects, purposes and obligations imposed by the Maintenance Act, indicating that the Legislature requires a person against whom a maintenance order is made to exercise a degree of care and circumspection. Hence, where an accused fails to comply with a maintenance order due to ignorance or error, he will only escape liability if such ignorance or error is found to be reasonable (*Magagula supra at paragraph [47])*.

[19] The aforegoing explanation was necessary to clarify that the form of intent in civil contempt proceedings is markedly different from a prosecution under section 31(1) of the Maintenance Act. The nature of the present proceedings, the type of offence in question and particularly the form of intent renders this matter distinguishable from *Gold*.

[20] On the evidence, elements (1), (2) and (3)(a) *per Magagula* are not in issue, and so it remains to consider whether the appellant had a guilty mind. The appellant's assertion of the maintenance order having lapsed *ipso jure* came from advice given to him by a layperson without legal qualification and whose

[20] ***S v Magagula*** 2001 (2) SACR 123 (T), paragraphs [75] and [105]

experience is unknown. It is not the appellant's case that he was misled into accepting such advice or that the person concerned misrepresented the capacity in which the advice was given. On it being put to the appellant that such advice was unsound *vis-à-vis* the advice proffered by three legally qualified persons, the appellant had no hesitation stating that he preferred the advice as a matter of choice, and not through ignorance ("onkunde").[21] Undoubtedly, he knew he was acting unlawfully.

[21] A reading of the appellant's testimony reflects that in accepting the advice of a layperson he consciously exercised a choice ("keuse")[22] to suit his own purpose. He did not do so out of ignorance or error.[23] Contrary to what is stated in his heads of argument nowhere did the appellant state that he held the *bona fide* or reasonable belief that such advice was sound. Indicative from the evidence is that despite competent legal advice from three qualified and experienced persons, the appellant rejected their advice on the pretext that it was forthcoming from persons who were conspiring against him. His preference to accede to the advice of a layperson tells of a failure to have exercised a degree of care and circumspection in weighing up the competing advices. This is evident from his blunted rejoinder to a question posed about the person's qualifications and experience: *"Moet 'n mens 'n graad hê on 'n 'mechanic' te wees?".* [24] The Magistrate correctly found that the appellant did not act out of ignorance or error. In passing, I should mention that of the three legally qualified persons one was an attorney into whose trust account the appellant, at some stage before the trial, paid monies to be appropriated for Lacey's maintenance in accordance with the order.

[22] In the circumstances the following order issues:

(i) The appeal against conviction is dismissed;

(ii) The sentence imposed by the Magistrate is confirmed;

(iii) The appellant shall within 60 days from the date of this order make payment of the arrears amount of R6 750 (Six thousand seven hundred and fifty Rand) in accordance with the maintenance order dated 20 April 2016 together with accrued interest at the prescribed legal rate applicable as at 31 January 2019 calculated to date of payment;

(iv) The order in paragraph (iii) shall have the effect of a civil judgment of this Court and shall be executed in the manner prescribed by the Maintenance Act No. 99 of 1998, as amended.

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[21] Record 139:1-7
[22] Record 139:1-2
[23] ***S v Magagula*** *supra* at paragraph [47]
[24] Record 139:5-9

From The Legal Journals

Broughton, D W M

"The South African Prosecutor in the Face of Adverse Pre-Trial Publicity"

***PER* / *PELJ* 2020(23)**

Abstract

Pre-trial publicity regarding a pending criminal case, which publicity may be in the form of media coverage of the case or a prior decision given in parallel judicial proceedings arising from substantially the same facts as the criminal matter, may be adverse to an accused. Such media publicity or findings contained in the parallel judicial decision may implicate the accused in the commission of the crime on which he or she is to stand trial. The publicity may, for example, suggest that the accused is "guilty" of the crime charged, or that the accused is of bad character having had the propensity to commit the crime. Conversely, pre-trial publicity may portray the accused as innocent of any criminal wrongdoing. In other words, pre-trial publicity may prejudge the issues that are to be adjudicated on at trial. A central question that may arise in these instances is whether there is a real and substantial risk that such publicity would materially affect or prejudice the impartial adjudication of the criminal case; that is to say, whether the publicity is likely to have a biasing effect on the trial court in the adjudication process or the outcome of the trial, thereby imperilling the constitutional right to a fair trial.

Another key consideration, in respect of which there is scant literature and case-law, is the question of the impact which adverse pre-trial publicity may have on the prosecutor in instituting and conducting a prosecution. Being unduly influenced by such publicity, a prosecutor may impinge upon the accused's right to a fair trial. There is also a dearth of authority on how the prosecutor is to function in the face of pre-trial publicity which may be prejudicial to the accused. This article seeks to explore these aspects vis-à-vis the prosecutor. It is posited that in an adversarial criminal justice system the same level of impartiality required of the presiding judicial officer is not required of the prosecutor, and that prosecutorial bias towards the guilt of an accused is inevitable where the prosecutor decides to institute a prosecution after studying the police case docket. Thus, exposure of the prosecutor to virulent pre-trial publicity would not be inimical to the fair disposition of the accused's trial provided that the

prosecutor conducts the trial fairly and without undue prejudice to the accused and is dedicated to assisting the court in arriving at the truth. Moreover, additional knowledge and understanding of a case which a prosecutor gains from an extraneous source does not amount to bias or prejudice.

The article can be accessed here:
https://journals.assaf.org.za/index.php/per/article/view/7423/9971

Marais, M E

"Hate speech in context: Commentary on the judgments of the Equality Court and the Supreme Court of Appeal in the *Masuku* dispute"

***Journal for Juridical Science* 2019:44(2):101-118**

The article can be downloaded here:
http://journals.ufs.ac.za/index.php/jjs/article/view/4248/3767

Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

The defence of obedience to orders

In order to enforce the necessary restrictions required by the coronavirus pandemic, some 73000 troops will shortly be deployed on the streets of South Africa. In the period since lockdown, there have been reports of heavy-handed treatment, excessive use of force, and even deaths of people at the hands of security personnel. The inevitable interaction between the security forces and those who are required to obey restrictions in this period raises once again the somewhat vexed question of the nature of the defence of obedience to orders (or "superior orders"). This question will be briefly addressed in the discussion which follows (for an extended discussion of this matter, see 2007 *Obiter* 663).

The defence of obedience to orders has been a source of controversy in South African law, not least because the Supreme Court of Appeal has not been called upon to pronounce authoritatively on either its nature or content. As a result, the leading case is generally regarded to be that of *R v Smith* ((1900) 17 SC 561), where a soldier successfully relied on this defence after having carried out the order to execute a farm-hand who delayed in obeying the instruction to hand over a bridle. The test applied by the court (per Solomon JP) in assessing this defence is:

"[I]f a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer" (568).

It is evident from this test that there appears to be a conflation of the inquiries into unlawfulness and fault. As De Wet and Swanepoel point out, this *dictum* thus not only links an objective (assessing unlawfulness) test and a subjective (assessing state of mind or intention) test (which two tests function entirely separately), but it does so in such a way as to justify the justification ground by referring to the absence of fault (specifically, lack of knowledge of unlawfulness) (*Strafreg* (1949) 59, the same argument is maintained in the fourth edition of this work (1985) 100-101). This assessment of the *Smith* dictum found support amongst academic writers, as well as in the case law (Snyman *Criminal Law* 2ed (1989) 130; Burchell and Hunt *South African Criminal Law and Procedure Vol I General Principles* (1970) 299, the same argument is raised in the second edition of this work by Burchell, Milton and Burchell *South African Criminal Law and Procedure Vol I General Principles* (1983) 357; and *S v Mule* 1990 1 SACR 517 (SWA) 528d-i). Despite Solomon JP's approach being rejected in *R v Van Vuuren* (1944 OPD 35 38) in favour of an entirely objective approach, there are a number of contrary decisions in the case law (a similar approach to the decision in *Smith* was followed in *R v Bekker* 1901 18 *SALJ* 421; and the *Smith* decision was explicitly followed in cases such as *R v Celliers* 1903 ORC 1 5; *R v Werner* 1947 2 SA 828 (A) 833 (with some qualification); and *R v Mayers* 1958 3 SA 793 (SR) 795H).

Given the equivocality of the *Smith dictum*, it is unsurprising that there is little suggestion in the sources that the obedience to orders defence excluded the unlawfulness of the accused's conduct, as opposed to excluding intention. Writers such as Gardiner and Lansdown (Lansdown, Hoal and Lansdown *South African Criminal Law and Procedure Vol I General Principles and Procedure* 6ed (1957) 63) dealt with this issue in the context of an exception to the rule that ignorance of the law is no excuse. (It is perhaps notable that in the context of children relying on the defence of obedience to orders, in cases such as *R v Albert* (1895) 12 SC 272 and *R v Sadowsky* 1924 TPD 504, the courts seem to confuse the issues of justification and *mens rea* in describing the defence (Burchell and Hunt 297).)

How then did this defence come to be classified as a justification ground? It appears that Burchell and Hunt have been influential in this regard. Prior to the publication of their work in 1970 there is little indication in either the case law or amongst the writers that the defence could be classified as such. However, their classification of "obedience to orders" as one of the "defences excluding unlawfulness" (296ff, which classification has been maintained in the second (Burchell, Milton and Burchell 354ff), third (Burchell *South African Criminal Law and Procedure Vol I General Principles* 3ed (1997) 108ff) and fourth edition (Burchell *South African Criminal Law and Procedure Vol I General Principles* (2011) 174ff) of this work) was undoubtedly influential. Burchell and Hunt (300) acknowledge the inexorable logic of De Wet and Swanepoel's approach (see discussion in (4ed) 101; and that of the court in *R v Van Vuuren* 38) that, adopting the objective criterion which governs the issue of unlawfulness, where the order is unlawful there cannot be any duty to obey it, and thus the act cannot be justified by the order. Nonetheless, Burchell and Hunt reason that adopting such an approach would result in the defence having hardly any application at all, "since by this standard almost all orders to commit crime are unlawful" (300). Of course, this rather begs the question whether superior orders *should* be regarded as a justification ground. However, Burchell and Hunt clearly believe that this should be the case. It appears that the rationale for their approach is that absent a defence which excludes liability for obeying unlawful orders, "soldiers would be hesitant to obey doubtful orders" and that this in turn "would be subversive of military discipline" (300). Crucially, they note that the accused would not be able to rely on a defence of mistake of law. Hence, they propose that the test for the defence is whether "a reasonable man in the position of the accused would have regarded himself as being under a duty to obey the order and would, therefore, have obeyed it" (300).

Burchell and Hunt argue that adoption of this approach would allow the accused a defence excluding the unlawfulness of his conduct where the reasonable person in the accused's position felt himself bound, as a soldier, to carry out the order despite its illegality (300). The language that the authors use in advocating such a defence is revealing: "obedience to an unlawful order would *excuse* the accused …" (my emphasis).

Further, it is asserted by the authors that on balance South African courts "seem prepared to accept exemption from liability", provided that the order obeyed and relied on was not "manifestly unlawful" (300). Thus, despite indicating the difficulties with the test used in *Smith* (as noted above), it is evident that the authors are happy to frame the test, at least in part, using similar terms. Moreover, such a conclusion cannot be confidently arrived at in the light of precedent, as noted above. In this regard, the sole Appellate Division judgment (*R v Werner supra*) can be distinguished, as since there was no lawfully established superior-subordinate relationship on which to rely, the question of whether the accused were indeed under a duty to obey the order was not required to be dealt with in detail. Watermeyer CJ

did express qualified approval of the *Smith* approach in this regard (833), in the light of the writings of some contemporary authors, but did not seek to authoritatively lay down the South African position.

The approach of Burchell and Hunt, sustained in the second edition of this work (Burchell, Milton and Burchell 358), is supported by Snyman in the first edition of *Criminal Law* ((1984) 106, although the test is framed in terms of the "reasonable soldier"), as well as in succeeding editions of the same work (2ed (1989) 130; and 3ed (1995) 124). This approach was also favoured in the Bophuthatswana case of *S v Banda* (1990 3 SA 466 (B)), which dealt with criminal charges arising from an attempted *coup d'etat* against the Bophuthatswana government. Whilst Friedman J stressed that he was not bound by decisions of the South African courts, these were nevertheless regarded as "weighty persuasive authority" by the court (485H-I). Friedman J embarked on an extensive comparative examination of the position in a number of systems, in the course of adopting a test for the defence of superior orders consistent with that adopted by Burchell and Hunt, and Snyman. (In doing so, Friedman J states (479F) that it is "generally accepted" that obedience to orders constitutes a justification ground, which is a somewhat optimistic generalisation in the light of the rather less than unanimous sources referred to above.) In terms of Friedman J's formulation, a soldier is under a duty to obey all lawful orders, inflicting no more harm than necessary in doing so, but is justified in refusing to obey orders which are:

"[M]anifestly beyond the scope of the authority of the officer issuing them, and are so manifestly and palpably ('klaarblyklik') illegal that a reasonable man in the circumstances of the soldier would know them to be manifestly and palpably illegal …" (496C-E).

A justified refusal to obey an order also means that if the order is carried out, the conduct will not be lawful. In the most recent decision to deal at some length with the defence of obedience to orders, *S v Mostert* 2006 (1) SACR 560 (N), which cited both the *Smith* and *Banda* decisions in applying the test for this defence, the court regarded this defence as an established justification ground (563h-564a), which could also apply to traffic officers (564b-d). On the facts the defence was unsuccessful in excluding the unlawfulness of appellant's conduct, but nevertheless founded an acquittal on a charge of assault on the basis of a lack of knowledge of unlawfulness.

The *Banda* approach has been applied in *S v Mohale* (1999 2 SACR 1 (W) 3i-4a), where the defence was denied, *inter alia*, because *in casu* the orders were "manifestly and palpably unlawful" (see Le Roux "Obedience to Superior Orders During the Struggle Against Apartheid" 1999 *Obiter* 405 for a critical assessment of this case). The brevity of the judgment on the point (the crucial consideration in the court's view was the lack of an established superior-subordinate relationship – 3h-i) and the attenuated nature of the test applied (the third requirement in the test set out

in *Banda* 480A-C, that the accused must have done no more harm than necessary in carrying out the order, is left out of the *Mohale* test) tends to detract from the value of the judgment as precedent. Shortly before the *Banda* decision, the approach in *Smith* was called into question in two Namibian cases, *S v Andreas* (1989 2 PH H38 (SWA)) and *S v Mule* (*supra* 528a-i). In the former decision, the court (per Levy J) held that the decisions of *Smith* and *Werner* had to be reassessed in the light of the case of *S v De Blom* (1977 3 SA 513 (A)), where it was held that mistake of law could operate as a defence. This line of argument is developed by Jordaan, who argues that the "manifestly unlawful" test was adopted in *Smith* "to mitigate the harshness of the *ignorantia juris* rule", and that given that mistake of law can exculpate in South African law, the continued utility of the *Smith* test is questionable ("*S v Banda* 1990 3 SA 466 (B): Obedience to Orders – Justification or Excuse?" 1991 *SACJ* 230 232). The *Mule* decision approved De Wet and Swanepoel's criticism of the *Smith* case set out above, and thus dealt with the superior orders defence as one excluding fault rather than unlawfulness (528a-i).

Subsequent to the *Banda* case, there have been attempts by a few writers to critically assess the nature of the superior orders defence. Eden argues that where an accused pleads that he was following superior orders when he committed a crime, the appropriate defence would be an excuse (excluding fault) rather than a justification ground (excluding unlawfulness) ("Criminal Liability and the Defence of Superior Orders" 1991 *SALJ* 640 643-644). Eden goes so far as to question whether there is any need for a separate defence of superior orders, given that the fact of obedience to orders may be taken into account within the scope of necessity and mistake of law (653). Labuschagne ("Sosiale Stratifikasie en die Strafregtelike Effek Daarvan Op Menslike Outonomie" 1991 *Stell LR* 252 262) agrees that the defence of superior orders overlaps other defences such as compulsion or necessity, and argues that the crux of the matter is not the lawfulness of the order but rather the extent to which the accused's criminal capacity has been affected by the issuing of the order and the surrounding context in which this took place. Le Roux ("Obedience to Illegal Orders: A Closer Look at South Africa's Post-*apartheid* Response" 1996 *Obiter* 247) argues strongly that the line adopted in *Smith* and *Werner* was in response to the absence of a mistake of law defence at the time (251-253), and that this approach is wrong, and that (as held in the *Andreas* and *Mule* cases, as well as by a number of authors) given the deficiencies in the "manifest illegality" test, the focus of the defence should not be unlawfulness, but responsibility (254-256). Le Roux cogently criticises section 199(6) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution, 1996"), which adopts this criterion, stating that "[n]o member of any security service may obey a manifestly illegal order", for failing to take into account the significant changes in the notion of culpability since the test was first mooted in *Smith*, and thus for being "both anachronistic and conceptually unsound" (257).

Whilst a more detailed discussion of the nature and content of the superior orders defence is beyond the scope of this note, it is hoped that the few brief remarks set out above at least indicate that the nature of the defence is contested, and has not been conclusively settled in South African law. Moreover, it is submitted, the difficulties inherent in the *Smith* approach with regard to the mingling of objective and subjective considerations, and more specifically, making the question of unlawfulness dependent upon the state of mind of the accused, have contributed to the general lack of conceptual clarity in this area of the law.

Given the difficulties associated with obedience to orders operating as a justification ground, and the not inconsiderable interpretive problems associated with assessing "manifest illegality" as per the *Smith* test (clearly illustrated in the *Smith* case itself, where the command to a soldier to kill a non-combatant civilian was not regarded as "manifestly illegal"), it is submitted that the defence of obedience to orders should be a defence relating to lack of fault, rather than absence of unlawfulness. This fault-based defence will be complemented by the operation of existing justification grounds of official capacity (which would protect obedience to lawful orders) and necessity (which would apply when the illegal order is obeyed under duress).

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Matters of Interest to Magistrates

Does the non-registration of customary marriage affect its validity?

The Recognition of Customary Marriages Act 120 of 1998 (the Act) brought about fundamental changes to the legal position of a customary marriage in South African law. The Act ensured that a customary marriage is – for all purposes of South African law – recognised as a valid marriage whether it is registered or not, considering the compliance of the requirement for validity thereof.
Before dealing with the main issue at hand, it is important to understand the meaning of key words.
Section 1 of the Act defines 'customary law' as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part

of the culture of those peoples'. 'Customary marriage' is defined as 'a marriage concluded in accordance with customary law'.

The requirements for the validity of a customary marriage

Section 3(1) of the Act states the requirement for validity as follows:

'For a customary marriage entered into after the commencement of this Act to be valid –

(*a*) the prospective spouses –

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(*b*) the marriage must be negotiated and entered into or celebrated in accordance with customary law'.

The registration of customary marriage in terms of s 4 of the Act

'(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

(3) A customary marriage –

(*a*) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or

(*b*) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(4) (*a*) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any *lobolo* agreed to and any other particulars prescribed.

(*b*) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5) (*a*) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.

(*b*) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(7) A court may, upon application made to that court and upon investigation instituted by that court, order –

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.
(8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.
(9) Failure to register a customary marriage does not affect the validity of that marriage'.
In *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T) it was held, that, as it was not disputed that the deceased had entered into a valid customary union with the first applicant, it was unnecessary to consider whether the customary marriage had been properly registered. In any event s 4(9) of the Act provided that failure to register a customary marriage did not affect the validity of that marriage. The court further held that the customary union between the deceased and the first applicant being common cause, the first respondent bore the onus of persuading the court that that union had been dissolved. A customary union was not against public policy and could not lightly be assumed to have been terminated by divorce. Proof on a balance of probabilities had to be adduced to support the contention of dissolution.
The Act recognises a marriage, which is valid at customary law and existed at the commencement of this Act, and further stipulates that a customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.
It is clear from the wording of the *provisio* that the requirements for the validity of the marriage stipulated in terms of the Act do not apply retrospectively. They only apply to customary marriages entered into on or after 15 November 2000 unless the parties have registered their marriage within a period of 12 months after the commencement of the Act or within such a longer period as the minister may from time to time prescribe by notice in the *Government Gazette* to be effected or that they had applied to change the regime of their marriage as envisaged in terms of the provisions of Matrimonial Property Act 88 of 1984. In terms of s 4(3)(*a*) and (*b*) of the Act (GN1045 *GG*42622/8-8-2019) the minister recently prescribed the time period for registration up to 30 June 2024 for both customary marriage entered into on or after the commencement of the Act.
In conclusion, the non-registration of a customary marriage does not affect the validity of such marriage, thus such marriage is not null and void.

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A Last Thought

The judiciary in a modern-day South Africa: A practitioner's perspective

Retired practitioner, Marcel Strigberger asks an important question: Can judges get nasty and difficult? Based on his experience of some forty odd years in the courts, he identifies the problem that 'some judges, not all of course, develop a severe case of "judgitis", which in short is Greek for "Move over Louis XIV, [I am] on the bench now"'. He laments that 'judgitis' can get to some judges' heads and they can get nasty (see M Strigberger 'Judging the judges: With all due respect, of course' (2019) *ABA Journal* (www.abajournal.com, accessed 1-3-2020)).

The fact of the matter is that judges wield immense power. Some judicial officers adopt a change in attitude after ascending to the Bench by becoming indifferent to the day-to-day struggles that their former colleagues in private practice are facing, and they do tend to treat legal practitioners with disdain. It is a reality encountered by many legal practitioners.

This begs the question as to traits a model member of the judiciary should have in a modern-day South Africa (SA).

'The job of a judge is very isolated, very demanding – very difficult' said Juanita Bing Newton, a judge of the New York Court of Claims (W Davis 'Bullying from the Bench: A wave of high-profile bad behaviour has put scrutiny on judges' (2019) *ABA Journal* (www.abajournal.com, accessed 1-3-2020)).

Therefore, in my view a paradigmatic member of the judiciary is robust and patient, sensitive and thick-skinned, enthusiastic and cautious, a committed legal practitioner and someone who does not spend their time exclusively with the law. An independent thinker who works well with others, someone who can decide the most complex point of law, but also deal efficiently with paper applications/motions and administer a court or another impartial tribunal (including commissions of inquiry).

It is imperative for a judicial officer to command the confidence of the public. Each member of the judiciary requires a working knowledge of everyday life. It does not instil confidence of a judicial officer sitting at the Gauteng Divisions of the High Court to ask who *Mafikizolo* are, or what a crossword puzzle is and/or to be unaware in football, of the most famous rivalry (derby) in SA, more substantively, to be unaware of the conditions in which the majority of the people who are regularly before the court live and work.

A judicial officer also requires a good temperament. The work demands calmness. In most instances those who appear in court are ordinary citizens. When they attend

court, parties and witnesses are often anxious and frequently upset. Further, cases may be badly prepared/presented or otherwise frustrating. Legal practitioners may be inexperienced or simply lacking in insight.
Any member of the judiciary should be able to work constructively with others. This includes working with and certainly learning from other judicial officers but also to work well with other court personnel.
Now, to satisfy the purist, it goes without saying that a judicial officer must have the highest integrity, be honest and upstanding and have a good work ethic.

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