OF OBEDIENCE AND OFFENCE

S v Mostert 2006 1 SACR 560 (N)

1 Introduction

The judgment of Theron J in the recent case of *S v Mostert* has raised some interesting questions about the nature and content of the defence of obedience to orders (which will be referred to interchangeably with the alternative appellation "superior orders" in the discussion which follows), and the ambit of the common-law crime of *crimen injuria*.

2 Judgment

This case was an appeal against convictions of common assault and *crimen injuria* in the Newcastle magistrates' court. In respect of the common assault conviction, the appellant received a sentence of a fine of R1 000 or 90 days imprisonment which was wholly suspended, and in respect of the *crimen injuria* conviction, he was sentenced to pay a fine of R200 or 30 days imprisonment.

The appellant (Mostert) and the complainant (Ntswotsha) were both municipal traffic officers employed by the Municipal Protection Services, Newcastle. On the day of the incident, the complainant was on patrol, in full uniform. During this period of duty, an incident occurred between himself and a member of the public, who subsequently lodged a complaint with the complainant's employer regarding his behaviour, which encompassed both improper conduct (566g-i) as well as being intoxicated whilst on duty (563g-h). In response, Rothman, his superior officer, instructed the appellant to locate him and take him back to the office (564f-g). The charges of common assault and *crimen injuria* arose from the carrying out of this order. It was alleged that the appellant used unjustifiable force when, upon being confronted by the complainant's unwillingness to accompany him to the office, the appellant purported to nevertheless carry out the orders of his superior officer, by forcing him into a stationary motor vehicle. This conduct formed the basis of the charge of assault. With regard to the charge of *crimen injuria*, the complainant alleged that in his efforts to take him back to the office, the appellant verbally abused him by calling him a "pikkenienie" (570b-c, other terms of abuse were alleged but the evidence in this regard was held to be contradictory and unreliable by the court *a quo* (570c-i)).

The appeal court was essentially required to deal with two matters: first, whether the defence of superior orders would be applicable in respect of the common assault charge, and secondly, whether the words used by the appellant constituted an *injuria*, that is, a violation of the personality interests protected by the common-law crime of *crimen injuria*.

3 The defence of superior orders

Having satisfactorily assuaged its reservations about whether the defence of superior orders had been properly raised in the court *a quo*, the court (per Theron J) proceeded to deal with this matter in some detail. Acknowledging the established nature of the defence (563h-564a), the court stated that the defence could also apply to traffic officers (564b-d), before setting out the requirements of the defence, and discussing each of these in turn.

The court had no difficulty in holding that the first requirement, that the order had emanated from a person lawfully placed in authority over the appellant, had been satisfied (564e-g). In relation to the second requirement, that the appellant must have been under a duty to obey the given order, the court first described the factual scenario relating to Rothman's order to bring the complainant in to the office, which was repeated when the appellant contacted Rothman in the face of the complainant's intransigence in this regard (564g-565d). The court then proceeded to examine the test for the defence of superior orders, in the light of the leading case of *R v Smith* ((1900) 17 SC 561), and the case of *S v Banda* (1990 3 SA 466 (B)). Canadian and American law were also adverted to, before the court found that the appellant was under a duty to obey Rothman's order (567a). However, the court held that the third requirement, that the appellant must have done no more harm than was necessary to carry out the order, had not been complied with. In this regard, the court stressed the limits of the appellant's powers over the complainant, in that he had no power to arrest him (567g) or to use force against him (568b). Nor indeed did Rothman, their superior, and thus Rothman "could not lawfully order the appellant to do what he (Rothman) could not lawfully do" (568f). Whilst Rothman's order to bring the complainant in was lawful, his order to use force was not.

This might have concluded the matter as regards the defence of superior orders, but the court continued to make the following remarks, which are the basis for the discussion that follows (568g-h):

> "Even if Rothman had authorised the appellant to use the necessary force to execute the order (which on the evidence we find he did not) that would have been an unlawful order and the appellant, being an experienced traffic officer of some 17 years, ought to have known that such order was unlawful. This Court need not consider the question of criminal liability for the execution of illegal orders. Firstly, this is not the defence that has been raised in this matter, and secondly, it is unlikely that this defence will be successful outside of a military context."

Despite the appellant's unsuccessful reliance on the superior orders defence, the court held that he should nevertheless be acquitted on the common assault charge, as he lacked the necessary intention to be held liable for assault. Given the fact that the appellant had been acting under what he regarded to be lawful instructions from Rothman, the court held that the requisite knowledge of unlawfulness had not been established beyond reasonable doubt (570a-b). This successful defence could be described as "putative superior orders" (or "putative obedience to orders" as Burchell prefers – see his *Principles of Criminal Law* 3ed (2005) 517).

The defence of superior orders or 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* (*supra* 561), where a soldier successfully relied on this defence after having carried out the order to execute a farm-hand who was dilatory 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 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 view has 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; *S v Mule* 1990 1 SACR 517 (SWA) 528d-i; and Skeen "Criminal Law" in Joubert (ed) *LAWSA* Vol 6 2ed (2004) par 66). 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 superior 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 edition (Burchell, Milton and Burchell 354ff) and third edition (Burchell *South African Criminal Law and Procedure Vol I General Principles* 3ed (1997) 108ff) 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 …" (our own 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, since because 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. As might be expected, given their stated support for this approach, both Burchell (*Principles of Criminal Law* 3ed (2005) 286-7) and Snyman (*Criminal Law* 4ed (2002) 133) cite the *Banda* case approvingly, although the corollary of the *Banda* court not being bound by South African authority is that the judgment of the Bophuthatswana court in *Banda* does not create binding precedent for South African courts.

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). (Le Roux's suggested solution, fashioning a defence founded on culpability, on normative foundations, suffers from the fact that he seeks to rely on Burchell and Hunt's test (referring to the second edition – Burchell, Milton and Burchell 358 – cited above) as a basis for his culpability defence when this test actually relates to the issue of unlawfulness, as discussed above).)

Whilst a more detailed discussion of the nature and content of the superior orders defence are 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.

Returning to the *Mostert* case, it is evident that Theron J does not harbour any doubts about the existence of the defence, in the form of a justification ground, which she proceeds to analyse in terms of the requirements first set out by Burchell and Hunt (297-300). For the purposes of the discussion which follows, we shall assume that this view is correct, although as noted above, this is a contested issue. Two further matters flowing from this passage may be noted, relating to the passage cited above (568g-h). First, the comment of the court that it "need not consider the question of criminal liability for the execution of illegal orders" as "this is not the defence that has been raised in this matter" is curious. This statement runs contrary to all the discussion that precedes it, where it is clear that the appellant is raising, and the court is considering, the defence of obedience to orders. It may be that the court is simply attempting to state that the defence does not apply on the facts, given that the immediately preceding statement is to the effect that even if there had been authorisation to use force from the superior, this would amount to an unlawful order, and the appellant ought to have known this. On the face of it such reasoning is problematic. The requirement in question – that the appellant must have done no more harm than necessary to carry out the order – essentially involves the question whether the appellant's acts could be regarded as reasonable. With regard to the question of unlawfulness, reasonableness is reflective of the *boni mores* of the community. This notion should not, however, be confused with the reasonable person test for negligence. As Neethling and Potgieter have stated:

> "die redelikheid van die dader se optrede by onregmatigheid [word] beoordeel deur 'n belange-afweging aan die hand van die *boni mores*, terwyl by nalatigheid die redelike man se optrede vasgestel word met verwysing na die redelike voorsienbaarheid en voorkombaarheid van skade; kwalifiseer onregmatigheid die daad en nalatigheid die juridiese verwytbaarheid van die dader vir sy ongeoorloofde daad; en word onregmatigheid beoordeel op grond van werklikhede, nalatigheid op grond van waarskynlikhede …" ("Amptelike Bevel en Noodtoestand: Regmatigheid van die Uitoefening van 'n Onregmatige Bevel – *S v Banda* 1990 3 SA 466 (BGD)" 1991 *THRHR* 651 654).

Thus the defence does not fall to be excluded because the appellant "ought to have known that the order was unlawful", as the court has apparently done *in casu*, but rather because his actions do not comply with the test for reasonableness, assessed on the basis of the legal convictions of the community.

A further query relates to the court's assertion that "it is unlikely that this defence will be successful outside of a military context". This contradicts the statements made earlier by the court to the effect that the fact that the defence arose in the military context "does not make its application exclusive to soldiers only" (564a-b) and that the defence could indeed be extended to traffic officers (564b-d). Further, the defence has been upheld in non-military contexts in cases such as *R v Albert* (*supra*) and *R v Sadowsky* (*supra*).

4 *Crimen injuria*

Crimen injuria has been defined as "unlawfully, intentionally and seriously impairing the *dignitas* of another" (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 492). This common-law crime has roots in Roman law, and in the protection of personality rights such that an *injuria* was seen to be done if there had been some intentional and unlawful impairment of the physical security (*corpus*), reputation (*fama*) or *dignitas* of a citizen (*omnemque iniuria aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere – D* 47 10 2). Traditionally, the wrong consisted in "any act … which showed contempt of the personality of the victim or was such as to lower him in the estimation of others and was so intended" (Milton 496, citing Buckland). However, *crimen injuria* only appeared in South African law in 1908, having been resuscitated in the case of *R v Umfaan* (1908 TS 62). Since then it has been a feature of our criminal law.

The term *dignitas* has been described as "somewhat vague" (*R v Xabanisa* 1946 EDL 167 169), and this is reflected in the varying efforts to describe the essence of this concept. Whilst the definition proffered by Gardiner and Lansdown (Lansdown, Hoal and Lansdown *South African Criminal Law and Procedure Vol II: Specific Offences* 6ed (1957) 1579) which describes *dignitas* as including the "personal rights of safety, security or privacy or … dignity or reputation" of a person, has found some support in the case law (see, *inter alia*, *R v Sackstein* 1939 TPD 40 42; *R v Payne* 1934 CPD 301 302; and *R v Stander* 1939 TPD 22 27), it has been criticised for confusing "dignity" with "safety, security … or reputation" (Milton 492 fn 2). Milton prefers to describe *dignitas* in terms of a person's right to self-respect, mental tranquillity and privacy (493), following De Villiers's classic definition of the concept of *dignitas* as:

> "[T]hat valued and serene condition in his social or individual life which is violated when a person is, either publically or privately, subjected by another to offensive and degrading 'treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt'" (*The Roman and Roman-Dutch Law of Injuries* (1899) 24).

In the light of the vagaries associated with the concept of *dignitas*, it is not surprising that recent definitions of *crimen injuria* have eschewed reference to the concept at all, preferring to define the crime as the "unlawful, intentional and serious violation of the *dignity* or privacy of another" (our own emphasis) (Snyman (2002) 453; see also Burchell 746, for a substantially similar definition, although Burchell does not include the element of seriousness in his definition, thereby indicating that this requirement is moot (747)). Notably, Theron J in *Mostert* (571b-c) adopts the same approach, defining *crimen injuria* as "the unlawful and intentional violation of the dignity or privacy of another, in circumstances where such violation is not of a trifling nature" (the same definition may be found in *LAWSA* par 275).

There is certainly an argument to be made for the recent definitional trend, not least for the clarity that it brings in articulating the underlying values

protected by the crime. However it is not clear that the terms "dignity and privacy" necessarily encompass all the diverse personality interests which fall under the umbrella of *dignitas* (see discussion in this regard in De Wet (1985) 249ff). The terms *dignitas* and dignity are not equivalent and should not be used interchangeably (*R v Holliday* 1927 CPD 395 400; *LAWSA* par 276; but see Burchell 746). Nevertheless, there is consensus that both a person's dignity and her privacy are protected by *crimen injuria* (Snyman (2002) 454). Further, the centrality of the right to dignity (s 10 of the Constitution, 1996) in the rules of criminal liability (see discussion in Hoctor "Dignity, Criminal Law and the Bill of Rights" 2004 *SALJ* 304) provides the frame of reference for the heightened significance of the common-law crime *crimen injuria*, founded on Roman legal precepts, as a means of enforcing constitutional values in the present-day South Africa.

As regards the conduct which formed the basis of the charge, the courts have accepted that utterances of an insulting, humiliating, vulgar nature, or those with racial overtones, all fall under the category of impairment of dignity (see *S v Bugwandeen* 1987 1 SA 787 (N); *S v Steenberg* 1999 1 SACR 594 (N)) and are thus potentially capable of prosecution as *crimen injuria*. In the present case, the court held that the utterance made by the appellant fell within the aforementioned category of *injuria*.

The further inquiry – the extent to which the impairment of the complainant's dignity is required to be a "serious" invasion of the complainant's dignity (Milton 500) – has been somewhat controversial, however. The traditional view is that the criminal law should only concern itself with "those *injuriae* which involve an anti-social element of general importance" (Steyn "*Crimen Injuria*" 1958 *SALJ* 278 280, see also Milton 500; Snyman 458; and *R v Walton* 1958 3 SA 693 (SR) 695), and thus the crime is not committed unless the impairment is "serious". This approach is reflected in *S v Sharp* (2002 1 SACR 360 (Ck HC)), where the complainant's dignity was held not to have been impaired simply because, as a police officer, she would have been exposed to rude and abusive language on a regular basis, and albeit that the epithet "bitch" was directed at the complainant, the court held that it was a term used in everyday parlance and "scarcely raises an eyebrow in conversation" (par [13]). (The court was also not satisfied that the accused had the requisite intention to impair the dignity of the complainant when the utterance was made (par [14]; and see also *S v Jana* 1981 1 SA 671 (T), where calling the complainant a "pig" was held not to be sufficiently serious an impairment of *dignitas* to constitute *crimen injuria*).

A differing view has been expressed by certain writers (Oosthuizen "'n Nuwe Benadering tot '*Crimen Iniuria*'?" 1987 *TSAR* 385; Van der Berg "The Criminal Act of Violation of *Dignitas*" 1988 *SACJ* 351; "Is Gravity Really an Element of *Crimen Iniuria* and Criminal Defamation in our Law?" 1988 *THRHR* 54); and in *S v Bugwandeen* (*supra* 796A-B (per Thirion J)):

> "The test requiring the *injuria* to be 'serious', in so far as it can be called a test at all, is so nebulous as to lead to arbitrariness in its application. While *injuriae*

> of a trivial nature should not engage the attention of the courts … any real and substantial impairment of a person's *dignitas* should merit punishment …"

In the present case, the court looked at the meaning of the word "pikienienie" and held that although the word (out of context) simply bears the meaning of a "negro child" (572e-f) and that it does not have the "same parity of derogatory status as the word 'Kaffir'" (572h-i), it still has "negative racial connotations associated with it" (573a-b) and therefore constitutes a violation of *dignitas* (573c-d). The court assessed the seriousness of the *injuria* on the basis of the political and social history of the country, to gauge what the community would regard as morally reprehensible conduct. It is notable that the court appears to be in agreement with the approach in the *Bugwandeen* case (*supra*) regarding the seriousness of the *injuria* (the *dictum* from the case cited above is quoted, apparently approvingly, in *Mostert* (571d-f)). Theron J further cites (571f-g) the following passage from *Bugwandeen* (which is approved, as is the general approach adopted in the *Bugwandeen* case, in *S v Steenberg* 1999 1 SACR 594 (N) 596c-f):

> "In deciding whether the *injuria* in the circumstances of a particular case merits a conviction of *crimen injuria*, the Court has to some extent to pass a value judgment in regard to the reprehensibility of the offending conduct, viewed in the light of the principles of morality and conduct generally accepted as the norm in society."

Thus in terms of Thirion J's approach, where *crimen injuria* is cut loose from the moorings of a "serious" violation of the complainant's dignity, this "value judgment" based on the *boni mores* functions as a limitation on the ambit of liability. Practically, the consequences of this approach would appear to be that any derogatory language with racial overtones (unless excluded by application of the *de minimis non curat lex* rule) would give rise to liability for *crimen injuria*. Whilst this approach (and this result) would resonate with the need to make a concerted effort to rid South African society of the scourge of racism (and liability would be adequately limited by the operation of the *de minimis* rule and the need to establish intention to impair dignity), it may have unwelcome consequences if applied to the crime as a whole. Any crime which has a chilling effect on freedom of expression, as *crimen injuria* would be wont to do if interpreted excessively broadly (that is, without some objective restraint), so as to include "idle abuse … or a forthright, if unflattering, description of the complainant" (*S v Sharp supra* par [13]), is potentially problematic. Significantly, the *Bugwandeen* case was approvingly cited in *S v Rasenyalo* (1988 1 PH H18 (O)), where the appellant's *crimen iniuria* conviction was confirmed for uttering rude words to a respectable woman ("dit [is] duidelik dat om aan 'n fatsoenlike vrou te sê 'Fok jou' haar in haar eer en waardigheid kan krenk"). While the use of such term is assuredly crude and indecorous, its ubiquitous use detracts from its taboo status. (The term "fuck" is categorised in the *Concise Oxford Dictionary* (8ed (1991), Allen (ed)) as coarse slang.) Surely the use of this term should not give rise to criminal liability? Yet this is what occurred in *Rasenyalo*, where the court has apparently followed the *Bugwandeen* line of applying a value judgment to assess whether the complainant's dignity was impaired, and further seems to have focused on the subjective reaction of

the complainant in founding liability. A better approach, it is submitted, would be to follow the traditional formulation of the crime, which requires a "serious" impairment of the complainant's *dignitas*, as this approach would both protect against scurrilous racial epithets as well as ensure that offensive conduct which does not seriously impair dignity is not met with the blunt force of the criminal sanction. It is submitted that the *Sharp* case correctly set the parameters in this regard (Burchell 752-3 approves of the result in *Sharp*, but Snyman disagrees (*Strafreg* 5ed (2006) 463 fn 50)).

5 Conclusion

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/superior orders should be a defence relating to lack of fault, rather than absence of unlawfulness. Thus, the ultimate result in relation to the obedience to orders defence in the *Mostert* case, such that the appellant was acquitted due to absence of knowledge of unlawfulness, may be commended, and clearly illustrates, we submit, the manner in which the defence ought to operate. 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).

As regards the court's discussion of *crimen injuria*, it is certainly appropriate that criminal liability ensues from racial epithets, and that the common-law crime of *crimen injuria*, viewed in the light of the constitutional imperative to protect the right to dignity, no doubt has an important role to play in punishing this egregious form of expression. It is submitted, however, that the court's approval of the approach adopted in the cases of *Bugwandeen* and *Steenberg* is out of line with the preferred approach, that the impairment of *dignitas* must be serious, in order to limit the potential multiplicity of charges that would flow from basing liability on hurt feelings.

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