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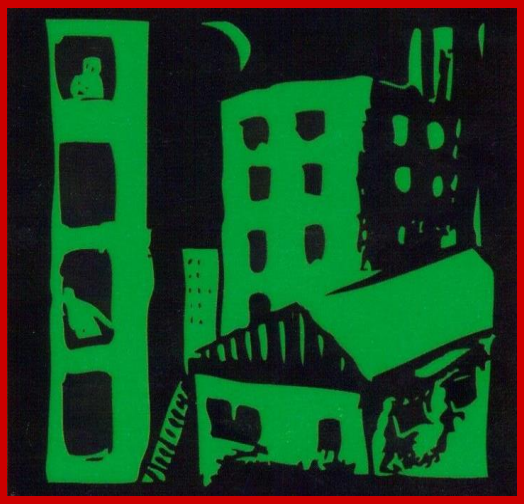

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Are courts going out of their way to accommodate RACISTS? A critique of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*

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ABSTRACT

The article critically examines the way in which the Constitutional Court dealt with the issue of racism in South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others 2017 (1) SA 549 (CC). Invoking general legal principles blended with critical race theory, we show that the apex court erred in finding that an employee who had racially abused his superior by referring to him as a kaffir needed to be compensated for a dismissal that arose from such racial abuse. We show that even with a finding that the dismissal was procedurally unfair, existing legal principles, racial justice and social transformation imperatives negated the court making a finding that compensation was due to the employee. The racism involved was so vile and brazen that a compensation award was not only inappropriate in the circumstances but had the consequence of sending a wrong message to the general public, black people in particular, that the law and the courts are still tolerant of racists and racism. Ordinary black people are likely to read the judgment as the law rewarding racists for being racist. The article calls upon the courts to take racism and the racial oppression of black people seriously by acting firmly against those found guilty of racial abuse.

Keywords: Racism; colour-blindness; workplace racial oppression; racial justice; judicial choice; social transformation; exceptions to procedural fairness.

"*If the battleground against racism has shifted to the trial courts, the chief artillery [if that battle is to be won] has to be the trial judge himself. He is the one in absolute command; he is the sole repository of that tremendous force for good or evil which we call 'judicial discretion*'."[1]

1 INTRODUCTION

South Africa has a long, painful and well documented history of legalised racism that refuses to end.[2] Hardly a month goes by without a racial incident making headline news. The Constitutional Court itself has noted the stubborn nature of racism in *City of Tshwane Metropolitan Municipality v Afriforum & another* where Mogoeng CJ remarked that racism in South Africa "is a system so stubborn that its divisive and harmful effects continue to plague us and retard our progress as a nation more than two decades into our hard-earned constitutional democracy"[3].

Although racial oppression and racial prejudice exist everywhere in the world in one form or another[4], the mainstay of racism in South Africa is the fact that our racism

[1] Crockett G "Racism in the courts" (1971) 20(2) *Journal of Public Law* 385 at 388.

[2] See for example Dlamini CRM "The influence of race on the administration of justice in South Africa" (1988) 4 *South African Journal on Human Rights* 37 at 37.

[3] See *City of Tshwane Metropolitan Municipality v Afriforum & another* 2016 (6) SA 279 (CC) at para 4.

[4] See Naicker L "The role of eugenics and religion in the construction of race in South Africa" (2012) 38(2) *Studia Historiae Ecclesiasticae* 209 at 209.

was both institutionalised and legalised.[5] By institutionalised and legalised we mean that racial oppression of, and racial prejudice against, black people in South Africa were never only a function of official government policy, but were also legally entrenched and visible in the statute books[6], the court processes and proceedings[7], as well as in the composition of the judiciary. Abel makes the point that black people "were charged under laws they had no role in enacting [and were] prosecuted and heard by men they had no say in appointing"[8]. So legally entrenched was our racism, that Pitt correctly observed that "[t]he most striking feature of law in South Africa [was] that it was largely directed against black [people]"[9].

That the law favoured, protected, benefitted and exclusively served the interests of whites is now a fact of historical import. In serving only the interests of whites, the law enabled and facilitated racial oppression. Black people were deliberately excluded from claiming any benefit from, or protection under, the law. As a result of this, black people, justifiably so, distrusted the law, became suspicious of the law and most importantly, lost all confidence in the administration of justice.[10] The end result of this was that the law and the legal system suffered a crisis of legitimacy amongst many black people.[11]

The crisis of legitimacy faced by the legal system ended, or so many thought, with the advent of the new constitutional order that promised, as it does, equality before the law,[12] human dignity,[13] freedom and non-racialism.[14] So widely held was this belief and so firm was the hope in the new constitution, that Froneman J, as he then was, remarked

[5] See Rubin N "Law, race and colour in South Africa" (1974) 4(3) *Journal of Opinion* 6 at 6; Gravett WH "The myth of objectivity: implicit racial bias and the law (part 1)" (2017) 20 *Potchefstroom Electronic Law Journal* 1 at 1.

[6] See for example statutes like the Native Land Act 27 of 1913 which dispossessed black people of land; the Group Areas Act 41 of 1950 which forced residential segregation; the Immorality Act 5 of 1927 which imposed racial barriers on marriage and sex; the Bantu Education Act 47 of 1953 which racially differentiated schooling; and the Industrial Conciliation Act 28 of 1956 which excluded black workers from being employees.

[7] See for example *R v Pitje* 1960 (4) SA 709 (A), where an attorney had to address the court from a "blacks only table".

[8] Abel R *Politics by other means: law in the struggle against apartheid, 1980 – 1994*: New York: Routledge Taylor & Francis Group (2015) at 382.

[9] Pitts J "Note: Public interest law in South Africa" (1986) 22 *Stanford Journal of International Law* 153 at 154.

[10] Dlamini (1988) at 39.

[11] For a detailed discussion on the legitimacy of our legal system see Olivier M "Is the South African magistracy legitimate?" (2001) 118 *South African Law Journal* at 166; Olivier M & Baloro J "Towards a legitimate South African judiciary: transformation, independence and the promotion of democracy" (2001) 26 *Journal for Juridical Science* at 31.

[12] Section 9 of the Constitution.

[13] Section 10 of the Constitution.

[14] Sections 1(a) and 1(b) of the Constitution.

in *Qozeleni v Minister of Law and Order* that "the previous constitutional system of this country was the fundamental mischief to be remedied by the new Constitution"[15] .

With the adoption of the Constitution of the Republic of South Africa, 1996 (Constitution) many believed, naively as it turned out, that South Africa had finally cleansed itself of its institutionalised and legalised racism which had permeated every facet of life including the workplace. This was the case because the adoption of the Constitution was thought to have marked a decisive break from a past in which racism was accepted, institutionalised and legitimised in various ways.[16] Some judges even declared that the "Constitution has changed the 'context' of all legal thought and decision-making in South Africa"[17].

Anecdotal evidence however suggests that despite the Constitution and the promises it makes, not much has changed in our race relations. Racial oppression remains alive and well in South Africa, whilst racial equality and racial justice remain a distant dream. The promises of the Constitution have not filtered through to break the back of racism. Instead, in some cases the Constitution appears to have emboldened racists to continue to use the law and the legal system to score undeserved victories against the very same black people they racially abuse and discriminate against. A case in point is *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration (SARS (*2017*))*.[18] This case is likely to be read by many black people, and justifiably so, as yet another instance of the law and the legal system working in favour of whites against the racially abused and victimised blacks.[19]

The *SARS* judgment concerned the fairness of the dismissal of an employee, a Mr Kruger, who had been found guilty of having racially abused his superior by indirectly calling him a kaffir in the workplace. The Constitutional Court, which is tasked not only with the duty to interpret the Constitution, but also with an obligation to bring about social transformation, ordered that the employee be compensated for the resultant dismissal. This article takes issue with the way in which the Constitutional Court decided this case. The reasoning of the Court and the outcome that it reached are wholly unsatisfactory as the apex court missed an opportunity to send a strong message to all racists that the Constitution, and indeed our legal system, can no longer be used as refuge for racists.

The thrust of our argument is that properly considered, the *SARS* judgment represents yet another case where the law appears to have ignored black pain, rubbished black exclusion and marginalisation, and instead, showed itself to be an ally of racists. Put differently, the *SARS* judgment appears to us as another example where the law revealed that the deeply held belief that the law is neutral, apolitical, colour

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[15] *Qozeleni v Minister of Law and Order & another* 1994 (3) SA 625 (E) at 635B.

[16] *Rustenburg Platinum Mine v SAEWA obo Bester* [2016] ZALCJHB 75 at para 21.

[17] See *Holomisa v Argus Newspaper Ltd* 1996 (2) SA 588 (W) at 618D.

[18] 2017 (1) SA 549 (CC).

[19] This term, whenever it is used here, is not used in a pejorative way, but only as a collective term to refer to black people.

blind or objective is in fact a myth to be dispelled. On the contrary, properly considered the *SARS* judgment shows that law is both violent and instrumental in the maintenance of white privilege and white domination despite the transformative objectives of the Constitution.[20] The law remains as friendly and comfortable with racists today as it was before the adoption of the Constitution. This case shows in clear terms that despite the official demise of apartheid in 1994, our law remains "instrumental in the marginalisation and exclusion of blacks and in perpetuating deep inequalities between whites and blacks"[21] .

In making our argument, we proceed from the premise that acknowledges that law is anything but neutral, apolitical or even objective. Law, or the interpretation and application thereof, is a product of judicial choice, which judicial choice may either be liberal or conservative, transformative or formalistic. For this reason, we locate the reasoning and the outcome the Constitutional Court reached on the judicial choice it chose to follow, which judicial choice has the effect of perpetuating entrenched racism rather than dismantling it. Whilst inspired by and drawing from critical race theory, we show, purely on the existing legal doctrines, that the judgment of the Constitutional Court is susceptible to criticism.

The judgment can be criticised on at least five grounds. First, as we shall show, the Constitutional Court adopted a denialist, colour-blind approach to the issue of racism which denialist approach was presented as neutral, impartial and objective adjudication. This denialist and colour-blind approach, we shall argue, is compatible with the very nature of racial oppression and racism the Chief Justice decried as horrendous. Secondly, the Constitutional Court invoked a strained construction and application of procedural fairness. Thirdly, the Constitutional Court appears to have forgotten that its duty was to search for substantive justice which required it to examine not only the alleged procedural wrong done to the complainant, but also the extent to which that procedural wrong prevented justice from being done. Fourthly, transformative constitutionalism requires courts to always assess the social impact and message their judgments make in the lives and minds of ordinary South Africans. This judgment is bound to have a negative impact in the minds of black people who continue to be at the receiving end of racism. Lastly, while the judgment deals with important debates about the influence of the Constitution in fostering social change, the outcome the judgment reaches is a far cry from any transformative ideal; in fact, the judgment is a statement of a failure by our highest court to decisively reject racism.[22] We expand on these criticisms after a brief narration of the facts of the case as well as the judgment of the Constitutional Court.

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[20] Modiri J "The crises in legal education" (2014) 46(3) *Acta Academica* 1 at 6.

[21] Modiri J "The colour of law, power and knowledge: introducing critical race theory In (post-)apartheid South Africa" (2012) 28 *South African Journal on Human Rights* 405 at 406.

[22] Modiri J "Race as/and the trace of the ghost: jurisprudential escapism, horizontal anxiety and the right to be racist in *BOE Trust Limited*" (2013) 16(5) *Potchefstroom Electronic Review* 582 at 583.

2 BRIEF FACTS OF THE CASE

The case concerned a South African Revenue Services (SARS) employee, a Mr Kruger (Kruger), who, after an altercation, referred to his superior in the workplace as a kaffir. Verbatim Kruger is said to have charged "Ek kan nie verstaan hoe kaffirs dink nie,"[23] and that "A kaffir must not tell me what to do"[24]. This racial charge caused SARS, the employer, to institute a disciplinary process against Kruger where he was charged with misconduct.

At the disciplinary hearing Kruger pleaded guilty to the charges preferred against him and a shockingly lenient sanction was imposed by the chairperson of the disciplinary hearing. Kruger was served a final written warning valid for six months, placed on suspension without pay for ten days, and ordered to undergo counselling.[25] This sanction, as shockingly lenient as it was, appears to have been negotiated and agreed to by all present in the disciplinary hearing, including the SARS representative.

When the disciplinary report was handed to the SARS Commissioner for implementation, the SARS Commissioner refused to give effect to the sanction as prescribed by the chairperson of the disciplinary hearing and, instead, elected to unilaterally change the sanction from a final written warning to a dismissal.[26] This unilateral change of sanction incensed Kruger who complained that his right to be heard before an adverse decision was made against him had been violated ,and that the SARS Commissioner, in terms of the collective agreement in place, did not have the powers to unilaterally change the sanction. Kruger then referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Unsurprisingly, and based on a collective agreement in place between SARS and the trade unions as well as case law, the CCMA found that the SARS Commissioner did not have the powers to unilaterally change the sanction imposed by the chairperson of the disciplinary hearing.[27] Based on these factors the CCMA accordingly found Kruger's dismissal to have been unfair. It then reinstated the chairperson's sanction which had the effect of reinstating Kruger in his employment at SARS.[28]

Feeling aggrieved by the CCMA's arbitration award reinstating Kruger, SARS approached the Labour Court for a review of the arbitration award, and then the Labour Appeal Court after its review was dismissed by the Labour Court. The Labour Appeal Court also dismissed the appeal prompting SARS to approach the Constitutional Court. Although we may refer to the judgments of the Labour and Labour Appeal courts, that will be in passing and for the sake of clarity, as it is the Constitutional Court's judgment that is the focus of the discussion.

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[23] Direct translation: "I can't understand how kaffirs think."

[24] See *SARS* (2017) at para 15.

[25] See *SARS* (2017) at para 16.

[26] See *SARS* (2017) at para 18.

[27] See *SARS* (2017) at paras 20 -21.

[28] See *SARS* (2017) at para 21.

3 *SARS v CCMA*: THE CONSTITUTIONAL COURT'S JUDGMENT

On appeal, the Constitutional Court first had to deal with issues unrelated to the fairness of Kruger's dismissal. This was the case because SARS first attempted to settle the matter with Kruger by offering him compensation for the dismissal if he agreed to walk away.[29] SARS also appeared to have made a representation to Kruger that no further appeal will be instituted after the Labour Appeal Court's judgment. Kruger turned down what amounted to a golden handshake offer[30] and demanded reinstatement on the terms prescribed by the chairperson of the disciplinary enquiry. Faced with this insistence from Kruger, SARS then reneged on its undertaking that it would not appeal to the Constitutional Court after the Labour Appeal Court's judgment, and instead approached the Constitutional Court.

With SARS retracting its undertaking not to appeal and approaching the Constitutional Court, Kruger naturally sought to rely on the undertaking and argued that SARS had perempted[31] its right to appeal to the Constitutional Court and as such the Constitutional Court should not grant leave to appeal.[32] The Constitutional Court then had to first determine if Kruger's defence of peremption militated against it granting leave to appeal. On the point of peremption the Constitutional Court found that peremption had indeed taken place but that there were overriding constitutional considerations that justified hearing the appeal and militated against the enforcement of peremption. The Court on the strength of *Minister of Defence v South African National Defence Force Union* reasoned that

> "where the enforcement of [peremption] would not advance the interests of justice, then [the] overriding constitutional standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal[33]".

Accordingly, realising that the "central feature of this case [was] the mother of all historical and stubbornly persistent problems in our country: undisguised racism"[34] the Constitutional Court dismissed Kruger's contention of peremption and decided to grant leave to appeal. We take no issue with that stance.

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[29] See *SARS* (2017) at para 51.

[30] A Golden Handshake in this context is best understood as some incentive, usually monetary, given to an employee to leave his employment quietly. See generally Schmall LA "Telling the truth about golden handshakes: exit incentives and fiduciary duties (2001) 5(1) *Employee Rights and Employment Policy Journal* 169 at 170.

[31] See *Dabner v South African Railways and Harbours* 1920 AD 583 at 594: "The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal."

[32] See *SARS* (2017) at para 24.

[33] See *SARS* (2017) at para 28.

[34] See *SARS* (2017) at para 29.

After granting leave to appeal the Constitutional Court had to then decide the appeal on its merits. On the merits of the appeal the Constitutional Court correctly noted that SARS was in effect attacking the reinstatement part of the arbitration award and as such the only question it was called upon to decide was whether it was appropriate or reasonable to reinstate Kruger.[35] On this question, after considering the test for review that the Labour Court and Labour Appeal Court ought to have applied when confronted with the CCMA's arbitration award, the Constitutional Court concluded that reinstatement was not a reasonable decision a reasonable decision maker would have made considering that Kruger was guilty of racism in the workplace. In arriving at this finding Mogoeng CJ for the unanimous Constitutional Court held that in using the term kaffir when referring to his superior, Kruger was implying that

> "[as far as he was concerned none] of his African colleagues was in his world-view worthy of effectively exercising authority over him. His was a demonstration of the worst kind of contempt, racism, and insubordination. A proper reflection on these racial statements alone would have been enough to lead the Arbitrator to the inescapable conclusion that reinstatement was the most inappropriate remedy"[36].

The Constitutional Court's judgment would have been defendable had the Constitutional Court stopped here, but the Court decided to go a step further and criticised, unfairly so, the approach adopted by the CCMA. In this instance Mogoeng CJ went a step further and held that "[a]fter concluding that Mr Kruger's dismissal was unfair, the Arbitrator immediately ordered his reinstatement without taking into account the provisions of section 193(2) [of the Labour Relations Act (LRA)]"[37]. This was an unfair criticism of the CCMA because the Chief Justice had in the earlier parts of the judgment acknowledged that the "referral to the CCMA was on a somewhat tightly defined basis"[38] relating to "the legal impermissibility of the Commissioner's substitution of the sanction, during the lifespan of the collective agreement that binds SARS"[39].

On this acknowledgment it should be clear that the CCMA never considered if Kruger's reinstatement was appropriate as that was not the dispute it was called upon to decide. The reason why the CCMA did not consider the provisions of section 193(2) had to do with the way in which the dispute was framed rather than with any omission or misdirection on its part. The reinstatement of Kruger was not ordered by the CCMA but was the natural consequence of setting aside SARS's decision to unilaterally substitute the chairperson's sanction which the Constitutional Court did not say was incorrect. From the way the dispute was framed it is hard to imagine how the CCMA would have considered section 193(2). It is on this basis that we say Mogoeng's criticism of the CCMA was unfair.

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35 See *SARS* (2017) at para 34.

36 See *SARS* (2017) at para 42.

37 See SARS (2017) at para 44.

38 See *SARS* (2017) at para 18.

39 See *SARS* (2017) at para 18.

Despite the fact that the case was always narrowly framed to look at whether SARS had powers to substitute the disciplinary chairperson's sanction in light of the collective agreement in place, and whether it could do the substitution without affording the affected employee a hearing, the Constitutional Court when seized with the matter somewhat broadened the enquiry to consider if it was appropriate to reinstate Kruger. It was on this broadened enquiry that it became necessary to consider and even apply the provisions of section 193(2) read with section 194(1) of the LRA. In doing so the Constitutional Court concluded that no matter how vile a racist Kruger had shown himself to be, he was still entitled to compensation as that was the just and equitable remedy for his unprocedural dismissal by SARS. Kruger was accordingly awarded six months' salary.[40] In coming to this conclusion, the Constitutional Court, we argue, stretched the law, downplayed race and its influence, and overlooked several key and relevant factors which open the judgment to criticism.

4 ANALYSIS AND DISCUSSION OF JUDGMENT

4.1 Denial of racism only serves to perpetuate its existence

SARS (2017) was, to state the obvious, a case about racism, white privilege and racial domination. Yet, in the judgment these issues, individually or collectively, are either ignored or were mentioned in passing. The Constitutional Court was content to passively see the case as nothing more than a labour dispute where the complainant was deprived of procedural fairness by an unruly organ of State.[41] Despite this passive characterisation, racism still loomed so large in the case that Mogoeng CJ saw it necessary to warn himself and the other judges against getting passionately involved with the case. In this regard he said:

> "Judicial Officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. To be caught up in that web, as a Judicial Officer, amounts to a dismal failure in the execution of one's constitutional duties and the worst betrayal of the obligation to do the right thing, in line with the affirmation or oath of office."[42]

Although this may appear as a harmless and neutral obiter remark calling upon judges to be objective, emotionless and apolitical in the execution of their judicial tasks, it is not. The law and the cases that reflect that law are not neutral, emotionless or harmless. This statement was a warning against seeing the case for what it was truly about – white privilege seeking to assert itself. The statement was a classical call to adopt a

[40] See *SARS* (2017) at para 58.

[41] The Constitutional Court warned against passive adjudication in *Pitje v Shibambo* 2016 (4) BCLR 460 (CC) at para 19. See also Nkosi T "Interpretation, credit reinstatement and judicial disagreement: *Nkata v First Rand Bank Ltd*" (2017) 29 *South African Mercantile Law Journal* 403 at 414.

[42] See *SARS* (2017) at para 13.

colour-blind[43] approach to race and the racial domination of whites. Colour-blindness is after all rooted in the belief that race must be ignored or denied because "[i]f people or institutions do not even notice race, then they cannot act in a racially biased manner"[44]. This is so because racism is seen as an irrational aberration that is incompatible with the law.[45]

In essence, Mogoeng CJ was saying that, in deciding the case, judicial officers should, in the first instance, refuse to see colour or the racism that was central to the case and, in the second instance, not identify with the victims of racism. All that, for purposes of adjudication, is irrelevant and unnecessary, and considering or identifying with it, constitutes a betrayal of the oath of office. Simply put, race and its role in the dispute must be denied. This denial of race is certainly reflected in the conclusion reached by the judgment.

Projecting the case as solely a labour dispute, mired as it were in colour-blindness and race denialism, had some practical consequences. First, though purporting to be neutral and concerned about the scourge of racism, the judgment fails to directly and unapologetically confront racism; instead, because of its race denialism approach, the conclusion it reaches stands only to reinforce the structural patterns of racism and black subordination. To fight racism, its existence as well as its broader effects and manifestations must first be acknowledged. Secondly, reducing the need to acknowledge and even identify with the victims of racism to misplaced emotions that have no place on the bench has the effect of downplaying the true extent of Kruger's transgressions.

Properly viewed Kruger was not only guilty of a workplace misdemeanour. His conduct was far worse than that and extended beyond the workplace and the employment relationship to which the Court sought to confine the dispute. Kruger was guilty of a hate crime, which hate crime was directed at a group of people beyond those he directly abused.[46] Had the Court not adopted its race denialist approach, it would have given due regard to this and even refer its judgment to the criminal justice authorities to consider taking further action against Kruger as it did in *Black Sash Trust v Minister of Social Development*[47].

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[43] On colour-blindness, its meaning, operation and effects, see Peer D "The colourblind ideal in a race-conscious reality: the case for a new legal ideal for race relations" (2011) 6 *Northwestern Journal of Law & Social Policy* 473 at 475.

[44] Apfelbaum E, Norton M & Sommers S "Racial color blindness: emergence, practice, and implications" (2012) 21 *Current Directions in Psychological Science* 205 at 205 .

[45] See Modiri J "Race, realism and critique: the politics of race and Afriforum v Malema in the Inequality Court" (2013) 130 *South African Law Journal* 275 at 283.

[46] See generally Naidoo K "The origins of hate crime laws" (2016) 22 *Fundamina* 53 at 53-66.

[47] *Black Sash Trust v Minister of Social Development* 2018 (12) BCLR 1472 (CC). In this case the Constitutional Court, acting out of its own volition, referred the conduct of the Minister of Social Development to the criminal justice authorities to investigate if perjury charges could be brought against her.

4.2 Court elevated procedural fairness to an unacceptable standard

The Constitutional Court's compensation award to Kruger was clearly premised on the Court's finding that Kruger's dismissal by an organ of State in the form of SARS was procedurally unfair. This is seen from Mogoeng CJ's reasoning that there is a "need to ensure that employers are not inadvertently encouraged by the non-payment of compensation to adopt a shotgun approach of dismissing employees without affording them the opportunity to be heard"[48]. Whilst we accept the importance of affording employees, especially those employed by organs of State, as Kruger was, opportunities to be heard before adverse decisions are taken against them,[49] we also note that procedural fairness, which is a subset of natural justice, has never been an unqualified or inflexible principle in our law. This was said by the Constitutional Court itself in *President of the Republic of South Africa v South African Rugby Football Union*[50] (*SARFU* (2000)) where it held:

> "The requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. [There is] no authority for such a proposition, nor [is there] authority for the proposition that, whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case."[51]

This principle was again repeated by the Constitutional Court in *Masetlha v President of the Republic*[52] (*Masetlha* (2008)) where Moseneke DCJ, for the majority of the Court, referring to *Administrator, Transvaal v Zenzile*[53] held:

> "It was recognised in *Zenzile* that the power to dismiss must ordinarily be constrained by the requirement of procedural fairness, which incorporates the right to be heard ahead of an adverse decision. In my view however, the special legal relationship that obtains between the [parties] … is clearly distinguishable from the considerations relied upon in *Zenzile*. One important distinguishing feature is that the power to dismiss is an executive function that derives from the Constitution and national legislation."[54]

What *SARFU* (2000) and *Masetlha* (2008) tell us is that procedural fairness and the expectation to be heard may be limited by a number of factors, including the circumstances of a particular case, the nature of the relationship between the parties, as well as the nature of the power used in making that adverse decision. This of course is

[48] See *SARS* (2017) at para 52.

[49] See generally *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 748G.

[50] 2000 (1) SA 1 (CC).

[51] See *SARFU* (2000) at para 219.

[52] 2008 (1) SA 566 (CC).

[53] 1991 (1) SA 21 (A).

[54] See *Masetlha* (2008) at para 75.

in accordance with what the Labour Appeal Court has been saying about procedural fairness, namely, that procedural fairness is by its very nature flexible, depending "in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests, and expectations affected by it, the circumstances in which the impugned decision is made, and the consequences resulting from it"[55] .

In *SARS* (2017) the Constitutional Court appears to have taken it as a given that procedural fairness was applicable, and because Kruger had not been heard before a heavier sanction was imposed, the Court reasoned that it necessarily followed that he was due to receive compensation for the procedurally unfair dismissal he had suffered. None of the Justices considered weighing or balancing any factors including asking SARS to provide good reasons why it had not afforded Kruger a hearing before imposing the heavier sanction it imposed. In doing so the Constitutional Court unwittingly elevated procedural fairness to a higher standard of absoluteness and inflexibility than was previously the case. The Court appears to have mechanically enforced Kruger's right to procedural fairness without balancing that right in a practical sense with, amongst others, the misconduct he had committed and his subsequent conduct of trying to retract his guilty plea. The Constitutional Court should have followed the dictum laid down in *National Union of Mineworkers & another v Commission for Conciliation, Mediation and Arbitration & others* where the Labour Court in a case where employees had been dismissed without a hearing held:

> "… Even if it may be considered that the issue raised by the applicants could feasibly constitute some or other form of procedural irregularity, this does not by automatic consequence mean that the dismissal of the second applicant was procedurally unfair …".[56]

Further, in arriving at this conclusion that Kruger, despite his deplorable conduct, was nevertheless due to be compensated, the Constitutional Court certainly appears to have neglected to pay due regard to the well-known fact that, because procedural fairness as a flexible standard in our labour law is so entrenched, where there has been a deviation on the part of the employer, that employer should and is often called upon to explain the reasons for the deviation.[57] It is only in the absence of a convincing explanation that such an employer would be made to pay up for their foolhardiness.[58]

If the decision to compensate Kruger was based on SARS having failed to explain why it had not heard from Kruger before dismissing him, such a decision would have been correct. But the decision was clearly not based on any failure on the part of SARS to explain its deviation since the Constitutional Court never approached the matter in

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[55] *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33*ILJ* 2033 (LAC) at para 44.

[56] *National Union of Mineworkers & another v Commission for Conciliation, Mediation and Arbitration & others* (2013) 34 *ILJ* 945 (LC) at para 55.

[57] See generally Cameron E "The right to a hearing before dismissal – part 1" (1986) 7 *Industrial Law Journal* 183 at184.

[58] See Cameron (1986) at 184–187.

that way. This, we say, is regrettable, for SARS could have given proper and plausible reasons why it did not deem it necessary to hear from Kruger when it decided to change the sanction.

To insist, as the Constitutional Court did, that compensation be awarded to Kruger on the basis that his dismissal was procedurally unfair without balancing all the factors and interests at play, the Court did not vindicate his procedural rights but unfairly elevated procedural fairness to an inflexible rule. The most and immediate likely effect of this elevation is that workplace efficiencies will now be "unduly impeded by onerous procedural requirements"[59] , something the Labour Court has always said we must guard against.

The last point we make here is that procedural fairness, whether in the labour sphere or at common law where it is expressed through the maxim *audi alteram partem*, has always admitted exceptions to its operation. In *R v Ngwevela* for example the Court both highlighted the importance of procedural fairness and the fact that it admits exceptions in the following terms:

> "… [T]here may be special circumstances which would justify a public official, acting in good faith, to take action, even if he did not give an opportunity to the person affected to make any relevant statement or to correct or to controvert any relevant statement brought forward to his prejudice."[60]

In *Laubscher v Native Commissioner, Piet Retief* Schreiner JA warned about the dangers of failing to appreciate that procedural fairness, as important as it is, is nonetheless a context specific rule. In this regard the Judge of Appeal held that procedural fairness was undoubtedly an important rule to observe, but so, held the Court, "its value would be lessened rather than increased if it were applied outside of its proper limits[61]". The dangers that arise with the elevation of procedural fairness in the *SARS* (2017) judgment are easy to see, and are not only limited to hindering efficiencies in the workplace, but may also render the rule hollow.

4.3 A less than perfect disciplinary process is not the same as no process at all

It is worth emphasising at the outset that Kruger was guilty of racism in the workplace and that he had a pre- dismissal hearing where he pleaded guilty. This was clear from the time the matter began at the CCMA all the way until it reached the Constitutional Court. Because this was common cause and because it is commonly accepted that calling a black person a kaffir in the workplace is so atrocious that it calls for a dismissal of the perpetrator[62], perhaps the Constitutional Court should have considered, as do the English courts, if giving another hearing to Kruger in those circumstances would have made any difference at all in relation to the dismissal sanction he was challenging.[63]

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[59] *Schwartz v Sasol Polymers & others* (2017) 38 *ILJ* 915 (LAC) at para 13.

[60] *R v Ngwevela* 1954 (1) SA 123 (A) at 131F.

[61] *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 549C.

[62] See *SARS* (2017) at paras 48 and 49.

[63] See *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 (HL) at 1294.

It is not beyond the realm of possibility that ,on these facts, giving Kruger a hearing prior to the substitution of the sanction would not have made any difference at all taking into account the gravity and seriousness of the offence for which he was dismissed and the constitutional obligations resting on SARS.[64] If this were to be the case, and we strongly suspect it could have been, then it is difficult to imagine why Kruger would have been entitled to compensation only on account that he was not heard before the warning and suspension sanctions were substituted with a dismissal. A consideration of the totality of all that transpired from the time Kruger was charged with misconduct to the time he was dismissed, like the Court in *National Union of Mineworkers & others v Power Construction (Pty) Ltd* we find it "difficult to see how a formal … hearing could have made any difference"[65] in relation to Kruger's dismissal. Kruger was guilty of very serious misconduct in the workplace and some process, less than perfect we accept, had been followed before he was dismissed.

It should never be forgotten that the reason labour law provides for hearings, pre-dismissal hearings in particular, is so that any misconduct complaint against an employee can be investigated and the employee concerned be afforded an opportunity to answer to the complaint. In *National Union of Mine Workers v Durban Roodepoort Deep Ltd* the then Industrial Court held:

> "The primary object of [a pre- dismissal] enquiry, whatever form it takes, is to endeavour to investigate any complaint against an employee, as honestly and as objectively as is possible, so that he or she is not dismissed for want of a just cause and without having been afforded a fair and a reasonable opportunity of speaking in rebuttal or in mitigation of the complaint …."[66]

A point the Constitutional Court omitted to emphasise in *SARS* (2017) was that SARS had arranged a form of enquiry for Kruger where he was heard. Because of this, it is not clear to us what would have been achieved if the SARS Commissioner heard from him again. It cannot be seriously said that hearing from Kruger again would have achieved a different standard of fairness that the disciplinary hearing did not afford him. To insist on fairness in the labour sphere requires a recognition that fairness "applies to both the employer and the employee"[67]. In *SARS* (2017) the Constitutional Court appears to have veered only to the side of the employee.

In leaning only on the side of the employee, the Constitutional Court allowed itself not only to benefit and protect one party in the employment relationship[68], but also to

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[64] Section 7 of the Constitution obliges SARS as an organ of State to respect, protect, promote and fulfil the rights in the Bill of Rights. For this reason, not acting against Kruger would have been a violation of SARS's obligation to respect, protect, promote and fulfil the workers' rights to equality and dignity. See *SARS* (2017) at para 39.

[65] (2017) 38 *ILJ* 227 (LC) at para 72.

[66] (1987) 8 *ILJ* 156 (IC) at 164.

[67] *Branford v Metrorail Services (Durban)* (2003) 24 ILJ 2269 (LAC) at 2278H.

[68] Smit "How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct" 2011 *De Jure* 49 at 54.

be hamstrung by procedural fairness contrary to the warning made by Judge Lloyd QC that "[i]t is now settled law that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties"[69].

As important as procedural fairness is, it should also be remembered that the task and duty of adjudication is to arrive at a just outcome and procedural fairness should not be allowed to derail that ideal. The outcome of the *SARS* (2017) judgment is that taxpayers' money was spent compensating a racist just because the Constitutional Court was overly sensitive to procedural niceties. We fail to see how such a judgment can be just. It is on this basis that we submit that the Constitutional Court ought to have pondered the question whether Kruger's position in relation to the sanction would have been any different had he been afforded a hearing before the sanction imposed by the disciplinary chairperson was altered. Had this been considered, it is likely that the Constitutional Court would have come to the conclusion that compensation was not necessary because Kruger had been heard in a substantive sense and hearing from him again would not have made any difference to the validity of the dismissal he sought to challenge. Holding otherwise, as was unfortunately the case here, was nothing short of allowing form to prevail over substance and technicalities to trump justice.

4.4 Court failed to consider impact of its judgment

Judging under a system of law where the constitution is supreme is in many ways different from judging under a system of law that follows parliamentary supremacy. This is so because a supreme constitution generally places more responsibilities on judges than its parliamentary counterpart. This the Justices of the Constitutional Court appear to have forgotten in *SARS* (2017). Why else would they accentuate Kruger's interests to a hearing above all else? Kruger, on Mogoeng CJ's own characterisation, was an unrepentant racist in that he was "an employee who, though guilty of racism, did not acknowledge his racist conduct, [and] apologise to all concerned …"[70].

Despite this, the Constitutional Court still saw fit to award him compensation. This, we argue, is at odds with the transformative agenda our Constitutional Court is said to embrace and does little to foster good relations between black and white people. This is the case because it will always be difficult to explain to the racially oppressed black people how it came about that a white man who was guilty of the very thing that was at the heart of their oppression, racism and white supremacy, approaches the transformed courts administering the Constitution that is said to be transformative and have the Court find in his favour. Is that not an act of rewarding racists for practising their racism, will be the question. How equal or protected are black people before the law? What is transformative about the law and the Constitution that allows a racist to be paid money for being a racist?

Judges have an active role to play in bringing about the vision the Constitution has for our country. To play their role meaningfully judges must recognise that the supreme

[69] *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597 (TCC) at para 27.

[70] See *SARS* (2017) at para 45.

Constitution, in addition to placing more responsibilities on them than was previously the case under the old order, also calls for a different legal culture and method of adjudication. Part of that different legal culture and method of adjudication must be that judges engage in an ongoing process of rethinking existing legal structures and forging adequate solutions to contemporary societal problems. This is in conjunction with the overarching duty on all judicial officers to do justice between the parties when adjudicating. It was Denning LJ in *Jones v National Coal Board* who correctly said that "a judge [when adjudicating] is not a mere umpire to answer the question 'How's that?'. His object above all is to find out the truth, and to do justice according to law."[71]

It cannot be argued that the Constitutional Court in awarding compensation to Kruger for a dismissal that was not only substantively justified but was also appropriate in the circumstances did any justice between him, SARS and the broader society bound by the precedent this judgment now sets. Properly considered, the Constitutional Court in this case adopted a docile approach, ready to award compensation to Kruger just because SARS had committed a procedural blunder. In doing so, the Constitutional Court failed to consider the transformative imperatives it was bound to consider, and most importantly, the Justices failed to heed what was said about the role of a judge in *R v Hepworth*:

> "A Judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."[72]

To do justice in a case like this required the Constitutional Court to recognise that not every procedural defect leads to a vitiation of the process or the outcome. Sometimes and if we are serious about using the Constitution to transform society, procedural flaws in the circumstances of a case like this become immaterial if the objective is to send a clear message to society that racism has no place in our society.

It is clear to us that the Constitutional Court did not ponder the message such a judgment sends out to society. Many black people are to experience the impact of the judgment as the law having offered money to Kruger thereby rewarding him for being unashamedly racist in a country that is meant to be intolerant of racism. Part of doing justice between the parties and in accordance with the law involves ascertaining the impact of judgments and the messages such judgments send to society as a whole. The Constitutional Court as an apex court has a heightened responsibility to ensure that its judgments always send out clear and correct messages to society. Had this not been a requirement, then the total transformation of our society will never be achieved.

Furthermore, although the sole responsibility a judge has in a system of law that observes parliamentary supremacy is, as Harms J says, to enforce and not to question

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[71] *Jones v National Coal Board* [1957] 2 All ER 155 (CA) at 159B.

[72] *R v Hepworth* 1928 AD 265 at 277.

the law,[73] this is rejected where the Constitution reigns supreme, and for good reason. In the process of enforcing and not questioning the law, our history tells us, a lot more harm than good was done. The courts were not racially representative of all the races of the population,[74] the judgments handed down were pro-executive, human rights, especially those of black people, were trampled on, and the rule of law was compromised.[75] All this was done to give expression to the will of the majority in Parliament.[76] Because the judges could not question the law they also did not consider the impact of their judgments on society. The prevailing attitude was that it was not the function of courts and judges to be concerned with hardships caused by their judgments since their role was simply to apply the law. The supreme Constitution changes all this not only by demanding that judges be faithful to it and nothing else, but also by, in the words of Harms J, giving judges the latitude "to backchat when the lawgiver speaks – even coherently "[77].

The *SARS* (2017) case is disappointing because the Constitutional Court did not use any of the mechanisms it had at its disposal to send a clear message to Kruger and all would be racists out there that racism will not be tolerated. Instead, the Court elected to pay the usual lip service to the scourge of racism. From its arsenal to achieve social transformation and to send clear messages to society the Constitutional Court could have fashioned an appropriate remedy that would have enabled it to do justice between the parties and also be firm in its rejection of racism.[78] In previous cases the Constitutional Court had defined an appropriate remedy as one that fits the injury, that is fair to those affected, effectively vindicates rights, and is just and equitable in the light of the facts.[79] None of these principles where applied in the SARS (2017) judgment.

The power to fashion that appropriate remedy is found in section 172(1)(b) of the Constitution. In *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* (*Khumalo* (2014)) Skweyiya J held that section 172(1)(b) gave the Constitutional Court greater powers "to regulate any possible unjust consequences" that may ensue as a result of its orders.[80] Whilst the Constitutional Court must declare conduct it finds

[73] See Harms LTC "Judging under a Bill of Rights: Ebsworth Memorial Lecture, 24 January 2007" (2009) 12(3) *Potchefstroom Electronic Law Journal* 1 at 4.

[74] Hlophe J "The role of judges in a transformed South Africa – problems, challenges and prospects" (1995) 112 *South African Law Journal* 22 at 23.

[75] Mpya M & Ntlama N "The evolution of the constitutional law principle of the 'Rule of Law' in the South African Constitutional Court" (2016) 31(1) *Southern African Public Law* 114 at 115.

[76] *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (E) at 598B.

[77] Harms LTC (2009) at 5; see also Nkosi T "Rule of Law, the mandament van spolie and the missed opportunity: some thoughts arising from *Ngqukumba v Minister of Safety and Security*" (2016) 31(1) *Southern African Public Law* 157 at 165.

[78] See *Molaudzi v S* 2015 (2) SACR 341 (CC) at para 33.

[79] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 29.

[80] 2014 (5) SA 579 (CC) at para 53 .

unconstitutional invalid, reasoned Skweyiya J, it need not always set such conduct aside.[81]

The point we are making here is that in *SARS* (2017) the Constitutional Court could have concluded that Kruger's procedural rights were violated, but it did not, as a matter of course, need to also conclude that compensation was due. The Court could have said that the misconduct for which Kruger had been dismissed was so vile that a compensation award was not appropriate as it would send a wrong message to society. This position would have been in accordance with the Constitutional Court's previous ruling in *Equity Aviation Services (Pty) Ltd v CCMA* where it held that remedies to be granted in terms of section 193 of the LRA are , which means that a court is not obliged to award compensation pursuant to a finding that a dismissal was procedurally unfair.[82]

The last point we make here is that the Constitutional Court will do well to always remember the following:

> "In [all organised] societies, people often rely on the courts of law to give direction in their disputes. How the court discharges this task will have a bearing on how the public views the whole justice system. In colonial times and later apartheid era, courts of law did not have legitimacy in the eyes of the black majority."[83]

The law and the courts of law of the bygone era were a source of black alienation because, amongst others, of the messages they were sending through their judgments. It is for this reason that we say courts, especially the Constitutional Court, must always pause to consider what messages it sends to society through its judgments, and whether those judgments embody the transformation called for by the Constitution. The credibility and legitimacy of the entire judicial system depends on that.

4.5 Tough talk without consequences does little to eradicate racism

The *SARS* (2017) judgment is an example of what has become daily practice in our courts: tough talk but no action. Our courts are yet to recognise that to reject racism decisive action rather than tough talk is necessary. But, to be fair, the stance adopted by our courts is probably informed by the way in which racial oppression was "defeated". No decisive action underpinned that process.

What is true is that the end of South Africa's legalised racism came at a sacrifice. The victims of apartheid were asked to forego rightful criminal charges they so yearned to press against their oppressors, as well as all civil and delictual claims they had against the old regime.[84] The beneficiaries of the old regime, on the other hand, were

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[81] *Khumalo* (2014) at para 53.

[82] *Equity Aviation Services (Pty) Ltd. v Commission for Conciliation, Mediation and Arbitration & others* 2009 (1) SA 390 (CC) at para 48.

[83] See Mnyongani F "Duties of a lawyer in a multicultural society: a customary law perspective" (2012) 23(2) *Stellenbosch Law Review* 352 at 359.

[84] Van der Walt J "Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: a case of competing retroactivities" (2010) 26(1) *South African Journal on Human Rights* 102 at 127.

directed to drop their racist ideologies and get along with the black folk they once oppressed. No reparations were paid and no one took responsibility. Justice was suspended in pursuit of reconciliation, which reconciliation was forced and imposed by the political leaders.[85] This is the background against which our constitutional order was born.

The sacrifices made to achieve our constitutional order based on equality and non-racialism were, however, not enough to obliterate the roots and influence of racism that have always bedevilled South Africa. Time and again, and *SARS* (2017) is an apt example of this, racism does raise its ugly head, calling upon the judiciary to act appropriately. The judiciary's response has been, to say the least, inadequate and wholly ineffective. The best the judiciary has been able to do when adjudicating cases concerned with racism is to chastise and condemn racism in the strongest possible terms. Sadly though, as we see in this *SARS* (2017) judgment, that strong condemnation is not always followed through by the imposition of an equally strong and effective rehabilitative or deterrent sanction by our courts.

Tough talk without appropriate consequences is nothing more than lip service. What is required to uproot and defeat racism is for the tough talk to be accompanied by an effective sanction. That is the only way in which inroads can be made against racism.[86] Effective sanctions are crucial to the proper administration of justice. In this regard, as early as in 1906 Innes CJ held:

> "If Courts of law do not intervene effectively in cases … then one of two results will follow – either one man will avenge himself for an insult to himself by insulting the other, or else he will take the law into his own hands."[87]

We can only add that in cases of racism, which cases come with deep emotions and with feelings of exclusion, the dangers described by Innes CJ are more than real and forever present. A proper balance between condemnation and sanction must be found so that courts and the justice system itself do not lose credibility in the eyes of the people. Going further, in SARS (2017) Mogoeng CJ writes:

> "It bears repetition that the use of the word kaffir is the worst of all racial vitriols a white person can ever direct at an African in this country. To suggest that it is necessary for the employer to explain how that extremely abusive language could possibly break the trust relationship and render the employment relationship intolerable, betrays insensitivity ... Where such injurious disregard for human dignity and racial hatred is spewed by an

[85] See generally Woods JM "Reconciling reconciliation" (1998) 3 *UCLA Journal of International Law and Foreign Affairs* 81 at 81.

[86] See generally Nkosi T "Balancing deprivation of liberty and quantum of damages" (2013) *De Rebus* 62 at 63-64.

[87] *Botha v Pretoria Printing Works Ltd* 1906 TS 710 at 714.

> employee against his colleagues in a workplace, that ordinarily renders the relationship between the employee and the employer intolerable."[88]

It is difficult to reconcile such strong condemnation of Kruger's racist conduct with the order the Constitutional Court eventually made. How is it possible that a racist bigot in Kruger's position who had been found guilty of having committed what the Constitutional Court described as "the worst kind of verbal abuse ever"[89] ends up being compensated for a dismissal that flowed from that verbal abuse? It boggles the mind, and the injustice embodied in such a decision far outweighs any value protected by procedural fairness. The only explanation for this odd outcome is to say that the Constitutional Court paid lip service to the seriousness of the issue at hand.

The *SARS* (2017) judgment is comparable to , and in many ways reinforces what happened in, the appeal case of *Prinsloo v S* (*Prinsloo* (2014)) where the Supreme Court of Appeal (SCA) also spoke tough against racism but failed to give an effective order that could address the violation and potentially deter others from committing the same offence. The Court had this to say about racism and the use of the word kaffir by some white people when referring or talking to black people:

> "… I have no doubt that the appellant behaved in a high-handed and cantankerous manner, and further that he uttered the words attributed to him. The word kaffir is racially abusive and offensive and was used in its injurious sense. This was an unlawful aggression upon the dignity of the complainants. … In our racist past [the word kaffir] was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people in this country. … [S]uch conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms."[90]

Prinsloo, who was an attorney,[91] was visiting one of the residences of the University of the Free State when he verbally abused three black women, a mother and her two daughters, by calling them "[j]ulle fucking kaffirs"[92] whilst engaged in an argument over parking space. As a result of this verbal abuse, Prinsloo was charged and prosecuted for, amongst others, *crimen injuria*. He was accordingly convicted and sentenced. But for all his sins, Prinsloo was sentenced to a fine of a mere R 6000 or twelve months imprisonment, both of which were wholly suspended for a period of five years.

It is a mystery that someone who was criminally convicted for such a vile offence is allowed by the SCA to walk away with a wholly suspended sentence. Only tough talk

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[88] See *SARS* (2017) at para 46.

[89] See *SARS* (2017) at para 4.

[90] (5434/13) [2014] ZASCA at para 20.

[91] *Prinsloo* (2014) at para 4, Prinsloo, whilst engaged in an argument, apparently told the complainants that he would represent himself should there be any legal action against him since he was an attorney.

[92] *Prinsloo* (2014) at para 4.

against what he had done but no consequences at all. The tough talk, no consequences stance adopted by our courts does nothing to eradicate racism. Instead, and this we see in both the *SARS* (2017) and *Prinsloo* (2014) judgments, it makes racists crass and shameless in their conduct. At no point did Kruger and Prinsloo show any remorse or regret for their racism. Had they had any remorse, regret or shame for what they had done, they would not have allowed their cases to go to the two highest courts in the land. It is saddening if the two highest courts in the land promote this crass and shameless conduct by handing down orders and sentences that are ineffective in addressing the scourge of racism.

Talking tough against racism by giving the history of the term kaffir in this country, its racist connotations, and its obnoxious implications on the lives of those against whom it is directed[93] is, in the absence of corrective measures directed against the racist, extremely unhelpful. Those found guilty of racism must not only be called out but must also be helped by putting in place appropriate corrective measures to correct them and deter other would be racists, so that they do not offend again. Compensating Kruger, as the Constitutional Court did, will not correct his offensive racist views, nor will it deter other would- be racists.

We should point out, lest we are misunderstood, that in criticising the tough talk no consequence approach to racism we are not calling for racists to be ostracised, but that the punishment must fit the racist and the gravity of his infraction.[94] This is necessary in order to make meaningful gains in the fight against racism. The current judicial attitudes to racism have not only been too soft on racists, but have also been letting the victims of racism down. There needs to be an increase in consequences to arrest this crass and shameless conduct we are beginning to see amongst those found guilty of racist slurs. The consequences we are advocating for are many and varied, and could include, amongst others, ordering racists to work with the very same people and communities they despise so to learn the true value of non-racialism.[95] The intention is for racists to be rehabilitated.

Going further, the point we are making is that those found guilty of racist conduct must be made to realise the seriousness of their racist conduct; and what better way to achieve this than to make them render services to the very communities they despise.[96] Being made to pay for one's racist sins in this way is better than any fine because it is personal and will certainly go a long way in protecting the community's interests. Every time a racist performs community service in a black community, "he will perforce be

[93] *SARS* (2017) at para 53; *Prinsloo* (2014) at para 4.

[94] *S v Rabie* 1975 (4) SA 855 (A) at 862G.

[95] Compare this with the independent delict (tort) for racial slurs suggested by Delgado R "Words that wound: a tort action for racial insults, epithets and name calling" (1982) 17 *Harvard Civil Rights-Civil Liberties Law Review* 133.

[96] *S v Khumalo* 1984 (4) SA 642 (W) at 645C.

reminded of his offence and the necessity to refrain from similar conduct in the future"[97] .

We are mindful that *SARS* (2017), unlike *Prinsloo* (2014), was not a criminal case, and for this reason the outcome there should have been a declaration that SARS was wrong in changing the sanction without affording Kruger a hearing, coupled with no compensation order, but with a costs order for such shameless conduct in allowing the matter to go all the way to the Constitutional Court when, on the objective facts, he was clearly guilty of racism in the workplace.[98] That would have been a just and equitable order available to the Constitutional Court to make. Sadly, the Constitutional Court missed an opportunity to take such a decisive step and send a strong message to racists that technical arguments, masked as procedural unfairness, will not override or blunt the Court from tackling substantive injustices.

5 CONCLUSION

> "When we are talking about a structure as deeply embedded as race, radical measures are required. 'Everything must change at once', otherwise the system merely swallows up the small improvement one has made, and everything remains the same."[99]

Mogoeng CJ spent a bit of time in *SARS* (2017) pondering if are we not "perhaps too soft on racism and the use of the word kaffir in particular?"[100] This question would have been brought about by the rise of racial incidents we are seeing at all levels of our society. Although a concerted effort is required to fight racism, the judiciary has not come to the party. Judgments like *SARS* are disappointing as courts have not shown themselves courageous enough to tackle racism by doing more than just condemning it. Courts have not used their judicial discretion to reject racism by acting firmly against racists. Racists have successfully used the law and the courts to insulate themselves from the legal liability and just outrage that would otherwise flow from their racist acts. For this reason, the answer is "yes, we have been too soft on racism".

This article has attempted to show that there were principled and legally sound reasons militating against the Constitutional Court awarding compensation to Kruger. The fact that these trite legal principles escaped all the Justices can justifiably be read to mean that courts are going out of their way to accommodate racists. Further, we have also attempted to highlight areas of concern in the way in which cases involving racism have been handled by our judiciary and have called for some radical action on the part of the judiciary the next time racists make use of the law and come before the courts. Racism cannot be defeated incrementally through strong words of condemnation; firm

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[97] *S v Fraser* 2005 (1) SACR 455 (SCA) at para 26.

[98] *Oudekraal Estates (Pty) Ltd v City of Cape Town 2004* (6) SA 222 (SCA) held that not every declaration of invalidity must be followed by a set aside order.

[99] Delgado R & Stefancic J *Critical race theory: an annotated biography* New York: New York University Press (2001) at 57.

[100] *SARS* (2017) at para 9.

action is needed, and the approach should not be to try to soften the impact and effects of racism but to eliminate them. Elimination of racism is the end goal of a truly non-racial South Africa and courts have a pivotal role to play in that regard.

Individual contributions:

The lead author wrote the manuscript, did the revisions, the approval and submission of the manuscript.

Co-author was responsible for the collection of materials and analysis. Conceptualization and research planning was done jointly.

BIBLIOGRAPHY

Books

Abel R *Politics by other means: law in the struggle against apartheid, 1980 – 1994* New York: Routledge Taylor & Francis Group (2015).
https://doi.org/10.4324/9781315021584

Delgado R & Stefancic J *Critical race theory: an annotated biography* New York: New York University Press (2001).
https://doi.org/10.1093/acref/9780195301731.013.51089

Journal Articles

Apfelbaum E, Norton M & Sommers S "Racial color blindness: emergence, practice, and implications" (2012) 21 Current Directions in Psychological Science 205.
https://doi.org/10.1177/0963721411434980

Cameron E "The right to a hearing before dismissal - part 1" (1986) 7 Industrial Law Journal 183.

Crockett G "Racism in the courts" (1971) 20(2) Journal of Public Law 385.

Dlamini CRM "The influence of race on the administration of justice in South Africa" (1988) 4 South African Journal on Human Rights 37.
https://doi.org/10.1080/02587203.1988.11827734

Harms LTC "Judging under a Bill of Rights: Ebsworth Memorial Lecture, 24 January 2007" (2009) 12(3) Potchefstroom Electronic Law Journal 1.
https://doi.org/10.17159/1727-3781/2009/v12i3a2732

Hlophe J "The role of judges in a transformed South Africa - croblems, Challenges and prospects" (1995) 112 South African Law Journal 22.

Mnyongani F "Duties of a lawyer in a multicultural society: a customary law perspective" (2012) 23(2) Stellenbosch Law Review 352.

Mpya M & Ntlama N "The evolution of the constitutional law principle of the 'Rule of Law' in the South African Constitutional Court" (2016) 31(1) Southern African Public Law 114.
https://doi.org/10.25159/2219-6412/2634

Modiri J "The crises in legal education" (2014) 46(3) Acta Academica 1.

Modiri J "The colour of law, power and knowledge: introducing critical race theory In (post-) apartheid South Africa" (2012) 28 South African Journal on Human Rights 405.
https://doi.org/10.1080/19962126.2012.11865054

Modiri J "Race as/and the trace of the ghost: jurisprudential escapism, horizontal anxiety and the right to be racist in BOE Trust Limited" (2013) 16(5) Potchefstroom Electronic Review 582.
https://doi.org/10.4314/pelj.v16i5.14

Nkosi T "Rule of Law, the mandament van spolie and the missed opportunity: some thoughts arising from Ngqukumba v Minister of Safety and Security" (2016) 31(1) Southern African Public Law 157
https://doi.org/10.25159/2219-6412/2653

Nkosi T "Balancing deprivation of liberty and quantum of damages" (2013) De Rebus 62.

Schmall "Telling the truth about golden handshakes: exit incentives and fiduciary duties (2001) 5(1) Employee Rights and Employment Policy Journal 169.

Smit N "How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct" 2011 De Jure 49.

Van der Walt J "Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: a case of competing retroactivities" (2010) 26(1) South African Journal on Human Rights 102.
https://doi.org/10.1080/19962126.2010.11864978

Woods JM "Reconciling reconciliation" (1998) 3 UCLA Journal of International Law and Foreign Affairs 81.

Legislation

Bantu Education Act 47 of 1953.

Constitution of the Republic of South Africa 1996.

Group Areas Act 41 of 1950.

Immorality Act 5 of 1927.

Industrial Conciliation Act 28 of 1956.

Native Land Act 27 of 1913.

Case law

Administrator, Transvaal v Traub 1989 (4) SA 731 (A).

Balfour Beatty Construction Ltd v London Borough of Lambeth [2002] EWHC 597 (TCC).

Botha v Pretoria Printing Works Ltd 1906 TS 710.

Branford v Metrorail Services (Durban) (2003) 24 ILJ 2269 (LAC).

City of Tshwane Metropolitan Municipality v Afriforum & another 2016 (6) SA 279 (CC).

Dabner v South African Railways and Harbours 1920 AD 583.

Equity Aviation Services (Pty) Ltd. v Commission for Conciliation, Mediation and Arbitration & others 2009 (1) SA 390 (CC).

Holomisa v Argus Newspaper Ltd 1996 (2) SA 588 (W).

Jones v National Coal Board 1957 2 All ER 155 (CA).

Khumalo v Member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC).

Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A).

Masetlha v President of the Republic 2008 (1) SA 566 (CC).

Matiso v Commanding Officer, Port Elizabeth Prison 1994 (4) SA 592 (E).

Malloch v Aberdeen Corporation [1971] 2 All ER 1278 (HL).

Member of the Executive Council for Education, North West Provincial Government v Gradwell (2012) 33 ILJ 2033 (LAC).

Molaudzi v S 2015 (2) SACR 341 (CC).

National Union of Mineworkers & others v Power Construction (Pty) (2017) 38 *ILJ* 227 (LC).

National Union of Mine Workers v Durban Roodepoort Deep Ltd (1987) 8 *ILJ* 156 (IC).

Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA).

President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC).

Prinsloo v S (5434/13) [2014] ZASCA.

R v Hepworth 1928 AD 265.

S v Fraser 2005 (1) SACR 455 (SCA).

S v Khumalo 1984 (4) SA 642 (W).

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC).

South African Revenue Service v Commission for Conciliation, Mediation and Arbitration & others 2017 (1) SA 549 (CC).