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**RACE AS/AND THE TRACE OF THE GHOST: JURISPRUDENTIAL ESCAPISM,
HORIZONTAL ANXIETY AND THE RIGHT TO BE RACIST IN *BOE TRUST
LIMITED***

JM Modiri*

The judge's political and moral values therefore play a routine, normal, and ineradicable role in adjudication. Accordingly, examination of the judge's underlying political and moral convictions and preconceptions is an appropriate line of legal commentary and criticism.¹

Race is absent precisely because it is so troubling. We prefer not to speak about it. We prefer not to think about it. We hardly have a language to express ourselves properly ... It remains a spectre that haunts us ...²

1 Introduction

In this note, a theoretical analysis and critique of the recent Supreme Court of Appeal (SCA) judgment of Erasmus AJA in *BoE Trust Limited*³ is presented. In it I offer two parallel but necessarily intersecting criticisms of the court's decision - one being a critique of its 'legal politics' (its underlying jurisprudential approach) and the other being a critique of its 'race politics' (its background racial ideology). I shall also examine the convergence between them, enquiring if there is, at least in this case, a "correlation between judicial style and interpretive method, on the one hand, and political ideology on the other";⁴ that is, if certain techniques of legal adjudication, in this case formalism, provide a better fit for the articulation and concealment of certain political and moral positions - in this case, a racially conservative one.

The object and focus of the critique in this note is not so much the outcome of the judgment as it is the reasoning followed. Three specific features of the hidden politics of the judgment will be exposed and highlighted as problematic: (1) the

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¹ Klare 1998 *SAJHR* 163. See also Klare and Davis 2010 *SAJHR* 403.

² Durrheim, Mtose and Brown *Race Trouble* 56.

³ *BoE Trust Limited* 2013 3 SA 236 (SCA).

⁴ Klare 1998 *SAJHR* 170.

rhetorical moves and 'legal interpretive techniques' by which the judge escaped the basic legal texts governing the situation in which a racially discriminatory provision is included in a will, as well as the substantive reasoning and normative choices that those texts necessarily invite; (2) how the escape from those legal texts evinces an anxiety towards the horizontal application of the Bill of Rights, which explicitly proscribes overt (racial) discrimination by private non-state actors and (3) how by following a formalist legal approach, one in which the basic assumptions of liberal legalism and capitalism are viewed as natural, normal and immutable, the judgment lacks a decisive rejection of racism. In short, I will suggest that the judgment not only lacks a substantive, transformative and democratic-minded method of legal reasoning, but also that it takes place uncritically from a colour-blind and post-racial standpoint and in the end, tolerates and protects whites' perceived right to be racist.

The arguments in this note will proceed as follows. In the next part (part II), the facts of the case as well as the history of the case in the High Court will be briefly set out as a background to a discussion of the judgment. Thereafter (in part III), I will begin first by offering a jurisprudential critique of the judgment, specifically focusing on the formalist and liberal legalist assumptions that undergird the judgment as well as its evasion of the politics of interpretation and the horizontal application of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*). Secondly, I will develop a racial critique of the judgment, taking issue firstly with the extent to which a colour-blind and post-racial standpoint frames the judge's approach to the racial controversy at the heart of this case and secondly, with the depoliticising, privatising and unwittingly racist effects generated by such a standpoint. In conclusion (part IV), some thoughts on the implications of this case for post-apartheid jurisprudence and for the place of race - and *critical* approaches to race - in legal and social discourse in South Africa are offered.

2 Facts, history and judgment

2.1 Facts

This case dealt with an appeal against the judgment of Mitchell AJ in the Western Cape High Court in which he dismissed an application to have the word "White" - which was used to identify the group entitled to benefit - severed from a trust provision in a will. The last will and testament of Ms Daphne De Villiers contained a provision establishing the creation of the "Jean Pierre De Villiers Trust" in which the residue of her estate would be held. Among other things, the provision empowered the trustees to apply the part of the trust's income:⁵

... for the provision of small bursaries to assist *White* South African students who have completed an MSc degree in Organic Chemistry at a South African University and are planning to complete their studies with a doctorate degree at a University in Europe or in Britain.

The universities tasked with determining the selection of these students, and the size and duration of the bursaries included the (historically white) universities of Cape Town, Stellenbosch, Free State and Pretoria. In the will, the testatrix however adds the proviso that "[i]n the event that it should become impossible for [her] trustee[s] to carry out the terms of the trust, [she directs] that the income generated by the trust be used annually to provide donations equal in size" to a number of listed charitable organisations.⁶ This proviso was specifically added only after the testatrix was warned by family members that the trust objective limiting beneficiaries of the bursaries to white students would possibly not be given effect on account of its discriminatory nature.

When the legal representatives of the trustees contacted the universities to confirm whether they would accept the bursary bequest on the conditions stipulated by the testatrix, the universities rejected it on the grounds of its racially exclusive nature.

⁵ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 3. Original emphasis.

⁶ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 3.

Each indicated that should the "whites-only" condition be removed, they would gladly participate.

Given this response, the trustees applied to the High Court for a rule *nisi* inviting interested parties to show why the word "White" should not be deleted from the will. The rule *nisi* was granted and after receiving no opposition, a final order was sought in the High Court. The trustees applied for the deletion of the racially exclusionary condition on the grounds that it was contrary to public policy, the constitutional right to equality,⁷ the provisions of section 7 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (the *Equality Act*),⁸ the principles contemplated in sections 3 and 4(a)(i) of the *National Education Policy Act*⁹ and the principles set out in the case of *Minister of Education v Syfrets Trust*,¹⁰ where considerations of equality were said to trump freedom of testation. The view of the trustees was that it would be more "prudent and preferable" if the word "white" were deleted, such that it would be acceptable to the universities and the bursaries could still be provided. However, Mitchell AJ dismissed the application, basing his decision mostly on the common law principle of freedom of testation and its relation to the constitutional right to property, which includes the right to dispose of one's property as one wishes.

2.2 Supreme Court of Appeal judgment

The main legal issue in the SCA was whether or not to uphold the appeal against Mitchell AJ's judgment and to allow a deletion of the word "white" from Ms de Villiers' last will and testament. Since the appellants had based their appeal on the similar SCA case of *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal (Emma Smith)*¹¹ the legal issues before Erasmus AJA had to be considered in

⁷ Section 9 of the *Constitution of the Republic of South Africa*, 1996.

⁸ Section 7 of the *Promotion of Equality and Prohibition of Unfair Discrimination Act* 4 of 2000.

⁹ *National Education Policy Act* 27 of 1996.

¹⁰ *Minister of Education v Syfrets Trust* 2006 4 SA 205 (C).

¹¹ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* 2010 6 SA 518 (SCA).

the light of the principles established in *Emma Smith*. It was thus of importance also to establish if *Emma Smith* could be distinguished from the case at hand.¹²

Emma Smith had not been decided by the time the application was brought and when the High Court judgment by Mitchell AJ was issued. It dealt with the provisions of a will creating a charitable trust known as the "Emma Smith Educational Fund", the benefits of which were reserved solely for "[poor] European girls born of British South African or Dutch South African parents" who required financial assistance in order to pursue a tertiary education. In *Emma Smith*, Bertelsman AJA, upheld the findings of the court *a quo* which had ordered the deletion of the racially restrictive provision. The basis of his decision was that section 13 of the *Trust Property Control Act*¹³ authorises a court to vary or delete the provisions of a trust instrument where such provisions "(a) hamper the achievement of the objects of the founder; or (b) prejudice the interests of beneficiaries; or (c) are in conflict with the public interest".

Bertelsman AJA argued that a racially exclusive trust provision is in conflict with public policy - which is now rooted in the *Constitution* and constitutional values such as the achievement of equality, the advancement of human rights and freedoms and non-racialism. Further, as the Bill of Rights applies to all law, including the law relating to charitable trusts, the objects and provision of the trust have to conform to the prohibition of unfair discrimination under section 9 of the *Constitution* and the *Equality Act* - which in its Schedule explicitly identifies "unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds" as amounting to unfair discrimination. Accordingly, Bertelsman AJA found that the ruling in the court *a quo* which deleted the words "European", "British" and "Dutch South African" was fully empowered by statute and was in line with the Constitution, and thus dismissed the appeal against it.

¹² *BoE Trust Limited* 2013 3 SA 236 (SCA) para 16.

¹³ Section 13 of the *Trust Property Control Act* 57 of 1988.

It was in view of this reasoning in *Emma Smith* that the appellants in the present case believed that their appeal against Mitchell AJ's judgment "must succeed".¹⁴ Erasmus AJA, however, felt differently. For him, it should be "immediately clear that the facts dealt with in *Emma Smith* are distinguishable from the facts of the instant case".¹⁵ Three reasons are provided in support of this view. First, the trust in the *Emma Smith* case provided for the "single purpose that the funds put in trust shall be dedicated in perpetuity for the promotion and encouragement of education". Secondly, the testator in *Emma Smith* did not state any alternatives should the terms become impossible to carry out. And thirdly, the trust provisions had already been carried out for decades prior to being challenged in the "new" constitutional dispensation.¹⁶ As he writes further:¹⁷

In the instant case no bursaries were ever paid; they could not be, because of the universities' stance. The giving of the bursaries as Mrs De Villiers had intended had become impossible as a result of the universities' stance. Must the alternative provided in the will be given effect to? Does Mrs De Villiers' right to dispose of her assets as she saw fit, whether we agree with her exercise of that right or not, require a court to see at least whether there is a way in which to interpret her will so as that it does not offend public policy?

Erasmus AJA specifically points out that the two rights that are pertinent in this case are the rights to property and the right to dignity. In his view, the right to property, as enshrined in section 25(1) of the *Constitution*, which provides that no one may be arbitrarily deprived of property, also protects a person's right to dispose of their assets as they wish upon their death.¹⁸ Dignity further comes into play because the failure to recognise freedom of testation would, in the judge's words, "also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away".¹⁹

¹⁴ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 16.

¹⁵ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 24.

¹⁶ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 24.

¹⁷ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 25.

¹⁸ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 26.

¹⁹ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 27.

Erasmus AJA does note that the principle of freedom of testation and the rights that underlie it are not absolute. However he goes on to state that the balance to be struck between freedom of testation and its limitations requires firstly that we ascertain the wishes (or intention) of the *testatrix* - and we must do so even before determining if some rule of law prevents us from giving effect to those wishes. This approach, we are told, is what the rights to property and dignity demand.²⁰ Further, in order to understand the testatrix's wishes it is also necessary to determine what is meant by impossibility. The judge reasons that because the testatrix was informed that it may be impossible to give effect to the trust provision due to its unlawful, racially-discriminatory effect, the alternative she stipulated in the proviso and her use of the words "... should it become impossible" indicate that she did so with such an impossibility in mind - in other words, the impossibility that would be occasioned by the possible unlawfulness of the bequest. He thus rejects the argument that impossibility means "objective impossibility", such as for example where no South African university offered an MSc in organic chemistry.²¹ To quote him:²²

As I have said, the primary function of a court, in interpreting a will, is to ascertain the intention of the testator. To my mind, it is clear that the testatrix intended that, quite simply, should it prove impossible, for whatever reason, to give effect to the provisions of the educational bequest, that the money should go to the charitable organisations. The testatrix clearly set out a general scheme in which she provided for foreseen eventualities.

Thus the judge concludes that the refusal of the universities to participate in the bursary scheme constitutes impossibility. As a result, he orders that effect must be given to the testatrix's wishes and that the bequest be made to the charitable organisations she listed, and accordingly dismissed the appeal.

²⁰ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 29.

²¹ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 30.

²² *BoE Trust Limited* 2013 3 SA 236 (SCA) para 31.

3 Comment: two streams of critique on the politics of law and race

A critique does not consist in saying that things aren't good the way they are. It consists in seeing on what type assumptions, of familiar notions, of established, unexamined ways of thinking, accepted practices are based.²³

3.1 Legally speaking

Erasmus AJA's decision is legally flawed because it fails to engage with the basic legal texts governing this issue. This failure is enabled by the judge's attempt to distinguish the present case at hand from the *Emma Smith* case, his deployment of the rights to property and dignity, his understanding of the meaning of impossibility and the over-emphasis on the intention of the testator. In so doing, the judgment completely misconstrues the relevant principles of the law of succession. It is of course trite that South African law places a high premium on the common law principle of freedom of testation.²⁴ But it is equally trite that the freedom of testation has a number of common law limitations. A testamentary provision will not be given effect to if it is (1) unlawful; or (2) contrary to public policy (*contra bonos mores*); or (3) impracticably vague or (4) impossible.²⁵ Freedom of testation can also be limited by statute and in this specific case, by the provisions of the *Trust Property Control Act*, which authorises a court to delete or vary a trust provision or even to terminate the trust altogether.²⁶

The judge *chose* to focus on the ground of impossibility rather than unlawfulness. His view was that it was not necessary to consider the aspect of unlawfulness given that the testatrix had specifically foreseen impossibility and made alternative arrangements in the light of it. But this view can be accepted only if one accepts that a testatrix can, in her will, dictate to the court the terms of its interpretation or that she can foresee and resolve all future interpretive problems generated by the

²³ Foucault "So is it Important to Think?" 456.

²⁴ De Waal and Schoeman-Malan *Law of Succession* 4.

²⁵ De Waal and Schoeman-Malan *Law of Succession* 4; Jamneck "Freedom of Testation" 115-118.

²⁶ De Waal and Schoeman-Malan *Law of Succession* 4; Jamneck "Freedom of Testation" 117.

will. Admittedly, the addition of an alternative beneficiary made the judge's attempt at escaping the principles set out in *Emma Smith* and *Syfrets* and the provisions of the *Trust Property Control Act*, the *Equality Act* and the *Constitution* much easier. But as the proper basis for deciding this case should have been unlawfulness rather than impossibility, such an alternative is basically irrelevant because the conditions that trigger its coming into effect (i.e. the impossibility of the primary bequest of a bursary trust fund for white students) were not in place. It was still possible to distribute the bursaries and thereby enforce the bequest, albeit in a manner that is constitutionally cogent.

The primary intention of the testatrix was to establish a trust that would provide bursaries for "white South African students" from the selected universities who planned to complete doctoral studies in a European or British university. That this was the primary intention is evidenced by the fact that the testatrix named and established the trust in memory of her husband who was a "leading" applied chemist with doctorates in chemistry from the Universities of Oxford and Pretoria.²⁷ Thus the court must focus on and exhaust this primary intention before even considering the ground of impossibility. When the universities refused to participate in the bursaries they did so because they believed the racially-restrictive trust provision was unlawful. Their refusal cannot be said to render the provision impossible; it remains only unlawful. In other words, the reason or legal impediment for why the provision cannot be given effect to is not because there are not any white students in a university, or because no university in South Africa offers the MSc degree. Rather, it was because the provision is racially discriminatory against Blacks and therefore unlawful and contrary to public policy. It is in this sense that the case is not at all distinguishable from the *Emma Smith* case.

As was also confirmed in *Emma Smith*, public policy is now rooted in the *Constitution*.²⁸ Section 9(4) of the *Constitution* provides that no person may unfairly discriminate directly or indirectly against anyone on the grounds *inter alia* of race.

²⁷ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 6.

²⁸ See also *Barkhuizen v Napier* 2007 5 SA 323 (CC).

Because race is a ground explicitly listed in section 9(3), section 9(5) provides that discrimination on the basis of race is to be presumed to be unfair, unless it is shown to be fair.²⁹ Further, if one accepts that the *Constitution* is "historically self-conscious", as Klare suggests, I contend that the unfairness of the racially exclusive trust provision is considerably aggravated by the fact that it was designed with the aim of protecting and advancing persons who were and still are vastly advantaged by past and present forms of unfair discrimination, racial exclusion and white privilege.³⁰ Furthermore, section 6 read with section 7 of the *Equality Act*, which gives effect to section 9(4) of the *Constitution*, prohibits the State or any person from unfairly discriminating against any person on the ground *inter alia* of race. In terms of section 7(c) of the Act, unfair racial discrimination would include "the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group" and in terms of section 7(e) of the same Act it would also include "the denial of access to opportunities." Clearly a bursary scheme providing postgraduate doctoral funding may appear to be legitimate in addressing the brain-drain, as the high court judge intimated, but its restriction to white students reveals that its aim is to deny black MSc graduates the opportunity of access to the bursary. On these grounds alone the judge could have relied on section 13 of the *Trust Property Control Act* to vary the terms of the trust provision by deleting the words "white". This so because, in the light of the earlier distinction between impossible and unlawful, the testatrix's inclusion of an alternative beneficiary in the case of "impossibility" cannot be said to be her foreseeing that the clause would be in conflict with public interest.

However, I think there is a stronger and more compelling argument available if one accepts the view that this decision is not simply one legal view or interpretation of a will but is also a normative argument about the influence of the *Constitution* on the common law of succession, and the "private" law more generally. Erasmus AJA justifies his decision for the most part by simply remaining within the bounds of the common law. He refers to the *Constitution* only to point out that freedom of

²⁹ *Harksen v Lane* 1998 1 SA 300 (CC).

³⁰ Klare 1998 *SAJHR* 146.

testation is part and parcel of the right to property. Unlike *Emma Smith* and *Syfreets*, he never confronts the question of how the *Constitution* alters the fundamental legal concepts of the law of succession, especially freedom of testation. Drucilla Cornell and Nick Friedman have made a powerful argument that "the Constitution mandates that the common law be deeply infused with constitutional values".³¹ They argue further that this mandate to develop the common law involves doing so not just on the basis of the Bill of Rights but also in view of the promotion of the values of the Constitution as a whole.³² I refer to them here because their argument functions as an implicit critique of Erasmus AJA's evasion of the clear constitutional questions raised by and in this case - specifically on the now "constitutional" nature of all legal interpretation and the horizontal application of the Bill of Rights.

The textual basis for Cornell and Friedman's argument is section 39(2) of the *Constitution*, which states that when interpreting legislation and developing the common law, courts must promote the spirit, purport and object of the Bill of Rights. They argue that section 39(2) imposes a "non-conditional obligation on courts to develop the common law in line with the Constitution in each and every case".³³ They arrive at this conclusion through a holistic and cumulative reading of section 39(2) together with section 173 (which grants courts the inherent power to develop the common law) and section 8(1) of the *Constitution* (which expressly states that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state"). Through this reading, they explain that the judiciary (that is, not just the judges of the Constitutional Court but also of the SCA and the High Court) must always promote the Bill of Rights in their adjudication of legal matters in order to further the *Constitution's* vision for a transformed legal order.³⁴

The express inclusion of the judiciary in section 8(1) of the 1996 *Constitution* was done with the intention to avoid diminishing the effects that the Bill of Rights was to

³¹ Cornell and Friedman 2011 *Malawi LJ* 3.

³² Cornell and Friedman 2011 *Malawi LJ* 4.

³³ Cornell and Friedman 2011 *Malawi LJ* 15, own emphasis.

³⁴ Cornell and Friedman 2011 *Malawi LJ* 17.

have on the rules of the private law. Such inclusion was meant to unambiguously indicate that the *Constitution* intends to inform and transform the relations between individuals, so that, in Cornell and Friedman's words, apartheid would not live on in the "private sphere".³⁵ Recall Madala J's famous phrase in *Du Plessis v De Klerk*.³⁶ Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations. In its effort to create a new order, our *Constitution* must have been intended to address these oppressive undemocratic practices at all levels. In my view our *Constitution* starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society.

To return to *BoE Trust Limited*, we can now see that it is not simply that the *Trust Property Control Act* provided the judge with ample space to vary the terms of the trust provisions in order to cure its conflict with public policy (and specifically its contravention of the *Constitution* and the *Equality Act*). On Cornell and Friedman's argument, the judge was under "a non-conditional obligation" to interpret the common law of succession in a way that would have given expression to the equality clause (and specifically the injunction against unfair discrimination based on race) and to the ideal of "non-racialism" embedded in the *Constitution*. Clearly, an interpretive emphasis on freedom (of testation), property and dignity that functions to ultimately justify and shield from scrutiny racially discriminatory actions by individuals such as the creation of bursary schemes that exclude and disadvantage blacks is not reconcilable with the *Constitution's* "objective, normative value system".³⁷ Because the trust established in this case would have involved acceptance by public institutions (universities) and thus could not, by definition, be purely private, the judge had an affirmative constitutional obligation and a political

³⁵ Cornell and Friedman 2011 *Malawi LJ* 17.

³⁶ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 163

³⁷ Cornell and Friedman 2011 *Malawi LJ* 18.

responsibility, due to the well-established and frequently proclaimed public policy against racial discrimination, to invalidate and alter the provisions of the trust.³⁸

In my view, the problems with this judgment which I have just pointed out can be traced to the judge's reliance on a traditional legal or formalist approach - an approach which has been challenged for its denial of the politics of interpretation brought about by the legal and political transformation of South Africa, and also for its consistent failure to meet the challenge of transformative constitutionalism.³⁹ That Erasmus AJA was in this case relying on a traditional or formalist approach to law can be discerned in his insistence on establishing the plain or ordinary legal meaning of the words contained in the will to ascertain the wishes of the testator, and his rhetorical construction of a strict divide between the law (i.e. giving effect to the testatrix's intention and thus protecting her testamentary freedom and her rights to dignity and property) and politics/morality (the racially exclusive manner in which she exercised her rights and freedom). As the judge tells us, the principle of freedom of testation and the right to bequeath one's property must be given effect to irrespective of whether "...we agree with her exercise of that right or not...".⁴⁰ This denial of politics and morality (and what is more politically and morally controversial than race and racism?) evinces another formalist ploy, namely the pretence of legal stability, neutrality and objectivity.

From his emphasis on the "intention of the testatrix", it would appear that the judge seems to believe, incorrectly to my mind, that words are fixed and stable and can self-generate the correct legal solution without calling upon a normative viewpoint, that in other words, the testatrix's intention can be discovered by means of logical deduction to the exclusion of normative reasoning. In so doing, the judge fails to acknowledge that the flipside of the coin of constraint by legal materials is the interpretive freedom to give them meaning.⁴¹ For as Cornell and Friedman and many others demonstrate, the "application" of law is also always already an

³⁸ Voyer 1999 *Wm & Mary Bill Rts* J943.

³⁹ Van Marle 2003 *TSAR* 549.

⁴⁰ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 25.

⁴¹ Botha 2004 *SAJHR* 249-283.

"interpretation" of law, and interpretation is always normative.⁴² This belief in the clarity and certainty of legal meaning as well as the choice of a judicial style devoid of politics and normative consideration is what exposes the judgment as being constituted and framed by a jurisprudential approach that Du Plessis, in the context of statutory interpretation, names "interpretive formalism".⁴³ Du Plessis describes interpretive formalism as a "purely textual" approach, that is, an approach that is pre-occupied with the fixed attributes of a legal text that renders it controllable by limiting its meaning.⁴⁴ This approach could also be seen as narrow and "literalist", and as displaying a "strong faith in the precision, determinacy and self-revealingness of words and texts".⁴⁵ Erasmus AJA's judgment in *BoE* is formalistic in this sense because whether one is speaking of the intention of the legislature or of a testatrix, there is a desire to abide by the "very linguistic form" or plain meaning of the text, even when the extant legal rules permit and mandate deviation from, and alteration of, that meaning.⁴⁶ This then explains why the judge appears to believe that it is only through discerning the "intention" of the testatrix that a "purely legal" (and presumably also correct) outcome can be achieved.

In my view, it is the judge's reliance on this formalist approach that facilitated his denial of the dilemma of interpretation (that is, the fact that law is indeterminate, and that it is by that indeterminacy that it invites value-based forms of legal interpretation) and abetted his escape from the constitutional and political implications of this case. The "jurisprudential escapism" evidenced in Erasmus AJA's judgment is aptly described by Klare as follows:⁴⁷

The goal is to maintain the law/politics boundary by describing rational decision-procedures (deduction, balancing, purposive reasoning *etc*) with which to arrive at determinate legal outcomes from neutral, consensus-based general principles expressed or immanent within a legal order.

⁴² Cornell and Friedman 2011 *Malawi LJ* 6-7.

⁴³ Du Plessis *Re-interpretation of Statutes* 100-101.

⁴⁴ Du Plessis *Re-interpretation of Statutes* 100-101.

⁴⁵ Klare 1998 *SAJHR* 168.

⁴⁶ Du Plessis *Re-interpretation of Statutes* 100-101.

⁴⁷ Klare 1998 *SAJHR* 158.

However, not only does the judge attempt to escape the dilemma of interpretation by treating freedom of testation as unproblematic and self-evident, but he also ignores another novel and transformative element of "post"-apartheid constitutionalism, namely the horizontal application of the Bill of Rights, which subjects private conduct and private relations to the normative influence and legal force of the *Constitution*.⁴⁸

For this argument, let us also turn to Van der Walt's postmodern post-apartheid theory of law, and particularly his understanding of horizontality. In Van der Walt's view, the horizontal application of the Bill of Rights dissolves the distinction between the private and the public, and between private law (law of succession) and public law (constitutional rights and values).⁴⁹ Because there is no sphere of human activity or social practice that is not in some way or other governed by a legal rule, and there is no legal rule that is immune from the *Constitution*, Van Der Walt contends that all (statutory and common law) private law rules that govern such activity or practice are open to amendment, rethinking and influence from the *Constitution*.⁵⁰ This means that the fairly "absolutist" conception of freedom of testation that the judge relies on will have to be squared off against a wide array of constitutional rights, values and ideals such as, among others, non-racialism, *ubuntu*, substantive equality, transformation, social justice and constitutional supremacy.

For Van der Walt, horizontality also works to constantly resist "privatising interpretations" of rights, interpretations that instrumentalise fundamental rights (in this case, rights such as those to dignity and property) to promote private interests.⁵¹ This is important here because of Van der Walt's argument that another function of constitutional horizontality is to restrain private legal subjects from using their economic power (of which private property rights are an obvious example) to violate human rights and to deviate from constitutional duties and norms. Tellingly,

⁴⁸ For our purposes, see s 8(2) of the *Constitution* read together with s 9(4). Klare 1998 *SAJHR* 155 describes horizontal application as one of the "postliberal" features of the *Constitution*.

⁴⁹ Van der Walt *Law and Sacrifice* 110.

⁵⁰ Van der Walt 1997 *SA Public Law* 11; Van der Walt 2001 *SAJHR* 341.

⁵¹ Van der Walt *Law and Sacrifice* 111.

Van Der Walt specifically cites Unger,⁵² who has invoked democracy in an argument against the granting of "property claims beyond death as embodied in the law of succession".⁵³ Unger specifically notes the role of inheritance in entrenching intergenerational class hierarchies and privileges, which in South Africa are thoroughly racialised.

Van der Walt thus interprets the horizontal application of the Bill of Rights in terms of a resistance against "neo-colonialism" and its attendant "privatisation of the political".⁵⁴ In a similar vein, Van Marle has warned that the relentlessly privatist logic of post-apartheid law (a logic which in her estimation also pervades South African life more generally) "hinders transformation, reparation and socio-economic restructuring, makes new interactions and ways of living impossible, and prevents the coming into being of a public sphere characterised by dialogue, resistance, eternal questioning and the imagining of new identities".⁵⁵

The concern about the judgment's jurisprudential escapism, and its avoidance of engaging with the horizontality of the *Constitution* has yet one last dimension: its implications for post-apartheid jurisprudence and transformation. If horizontality can be thought of in terms of what Van Marle, following Deleuze and Guattari, calls a "post-apartheid becoming", the becoming of subjects/individuals, their becoming minor by the giving up of majoritarian standards, privileges and certitudes, then to what extent does this judgment stand in the way of that becoming?⁵⁶ If, also, we can think of this horizontality in terms of Cornell's definition of transformation, which denotes change radical enough not only to alter the identity of a system but also of its subjects - to enable their openness to new worlds and futures, then to what extent is this judgment a conservative and regressive one?⁵⁷ In his attempt to retrieve and safeguard an "intention" irretrievably corrupted (or haunted?) by racial discrimination, and in his refusal to pronounce on its constitutional validity, the judge

⁵² Unger *Legal Analysis* 14; Unger *Democracy Realized* 144

⁵³ Van der Walt *Law and Sacrifice* 82.

⁵⁴ Van der Walt *Law and Sacrifice* 55-77; 65.

⁵⁵ Van Marle 2005 *SA Public Law* 251.

⁵⁶ Van Marle 2010 *CCR* 350.

⁵⁷ Cornell *Transformations* 1.

negates both this becoming and this transformation - failing to resist the privatisation of the political and thus unwittingly allowing "apartheid" to live on unmitigated in the private sphere.⁵⁸

3.2 The race question

Whiteness is unseen, and this invisibility is how whiteness gets reproduced as the unmarked mark of the human.⁵⁹

If, as I have argued, this judgment is better cast as a normative argument about the influence of the *Constitution* and human rights on the private law, then it can also be read as a political and ideological statement about the "proper" relationship between race and law. In making this claim, I am adapting a method of critique that Matsuda calls "asking the other question".⁶⁰ In other words, having identified interpretive formalism and horizontal anxiety to be at work in the judgment, the other question to be posed should be: where is the racial ideology in this? Where is the racial politics or racism in this? This way we are better able to understand the interconnectedness of law and race, and the convergences between a specific approach to law and a specific view of race.

In order to apprehend the racial ideology that underlies this judgment, we should begin by noting Mbembe's argument that the "the defeat of legalised white supremacy" (i.e. apartheid) in South Africa has not ended the struggle for racial equality not only due to the persistence of racial inequalities but also because of the continuation of white racist prejudice in the private sphere.⁶¹ For Mbembe, this migration of racism and racial power into the realm of the private is central to the re-invention and operation of white supremacy and racial privilege in an age of formal legal equality.⁶² It follows then that in order to challenge whites' position in the social hierarchy, and in order to transform law's relation to racism from one of

⁵⁸ Cornell and Friedman 2011 *Malawi LJ* 17.

⁵⁹ Ahmed 2004 www.borderlands.net.au.

⁶⁰ Matsuda 1991 *Stan L Rev* 1189.

⁶¹ Mbembe 2008 *Public Culture* 6.

⁶² Mbembe 2008 *Public Culture* 8.

promotion and production to one of eradication and objection, the private sphere would need to be demythologised, and racism openly challenged in all spheres.

Yet in the judgment itself, race or racism are never mentioned. The possibility that we might be dealing with a case of private racial discrimination (specifically white racism) is not considered at all. In fact, at one point, Erasmus AJA refers - with seeming approval - to an argument made by Mitchell AJ in the High Court that the racist clause in the will could be rendered "fair" if one were to take account of the fact that it contained a condition stipulating that the beneficiaries of the bursaries should, upon completion of their doctoral studies, return to South Africa, thus alleviating the problem of white skills emigration commonly called the "brain drain".⁶³ In the judgment, the deeply racial character of this case was "neutralised" by its technical legalist and formalist approach and the significance of race or racism as central issues is left completely unmentioned. It is this "blindness" to race and this refusal to grant race any significant attention that reveals Erasmus AJA's judgment to be based on the racial ideologies of colour-blindness and post-racialism. Critical race legal analysis is useful here in amplifying the volume of the judgment's silence on race in order to uncover its hidden racial view.⁶⁴

Bonilla-Silva has argued, in the context of the United States but in a manner applicable to South Africa, that colour-blindness should be seen as part of an ideology that emerges in an era after the abolition of formal systems of racial segregation and discrimination to defend the contemporary racial order - an ideology he calls "colour-blind racism".⁶⁵ He argues that colour-blind racism operates by means of four discursive or rhetorical frames that are mobilised to justify racism and racial inequality and in this way is central to the "reproduction and enforcement of the *status quo*".⁶⁶ In his view, these frames are also ideological: they mask and conceal the operation of racial power and domination, filter and explain racial phenomena in predictable and non-racial ways, and distort the social reality of race.

⁶³ *BoE Trust Limited* 2013 3 SA 236 (SCA) para 14.

⁶⁴ See Crenshaw *Critical Race Theory*; Delgado and Stefancic *Critical Race Theory: Introduction*.

⁶⁵ Bonilla-Silva *Racism Without Racists* 25.

⁶⁶ Bonilla-Silva *Racism Without Racists* 26.

Following Bonilla-Silva, I argue that this judgment reflects three of the four frames of "colour-blind racism" that he identifies, namely abstract liberalism, naturalisation and the minimisation of racism. These are briefly discussed in turn:

- (a) *Abstract liberalism.* Abstract liberalism, in the judgment, involves using ideas associated with political and economic liberalism (rule of law, private property rights, individual autonomy (implied in the right to dignity)) in an abstract manner when approaching race-related problems. By not connecting these liberal principles to the concrete context of racial inequality, the persistence of white privilege and black youths' lack of access to tertiary education, the judgment's treatment of freedom of testation functions to obscure how practices of racial exclusion are not simply a matter of individual choice but are also of a historical, political and structural nature. Liberal legalism, in its abstract form, provides the judgment with an appearance of neutrality and reasonableness, even as it works to defend an obviously racist testamentary provision.⁶⁷
- (b) *Naturalisation.* Naturalisation is a frame that explains overtly racial phenomena by suggesting they are natural and immutable. In this case, an openly racially exclusionary clause in a will is treated from the beginning to the end of the judgment as a normal, routine testamentary clause and its legal problematics are reduced to just another question of discerning testamentary intention. Thus racism is naturalised, treated as mostly a set of personal choices and decisions that are rational, universal and expected rather than as a product of social and cultural contingencies.⁶⁸
- (c) *Minimisation.* Minimisation of racism is a frame that is premised on the assertion that racial discrimination is no longer a central factor affecting the lives of Blacks, and that race and racism are no longer legitimate candidates for legal attention and public concern. The complete avoidance of the racially

⁶⁷ Bonilla-Silva *Racism Without Racists* 28.

⁶⁸ Bonilla-Silva *Racism Without Racists* 28.

discriminatory nature of the testamentary provision appears to issue from the sentiment that race is merely an afterthought or back-story in the case, despite its obvious centrality in the legal history of the dispute. When racism is minimised in this way, it becomes easy for the judge to insinuate that the only (or the most significant) legal problem with the testamentary bequest at issue in this case is the "impossibility" of its execution occasioned by the objection of the universities.⁶⁹

The replication of these three frames of colour-blind racism in the judgment can be explained with reference to the judge's reliance on what Olson refers to as a "pre-political idea of race", an idea of race that treats it as something constructed prior to, or outside the political realm, as a prediscursive reality.⁷⁰ This pre-politicisation of race negates the fact that race and racism function primarily to maintain the social, economic and cultural power of one race, the dominant race (whites) at the expense of and through the oppression and exclusion of another, the marginalised race (Blacks). Olson notes three specific consequences of the pre-politicisation of race.⁷¹ First, race is relegated to the realm of the private. Through this relegation, an obviously racist clause in a will is treated solely as a personal choice ("intention") and objections to it are rendered as merely competing or even intrusive opinions. Secondly, it redefines racial domination from white supremacy to abstract discrimination thereby detracting from the specific and concrete modalities by which anti-black racism and white supremacist thought and practice operate in society. And thirdly, it also relocates whites from a privileged identity and dominant social group to a politically neutral category, to just a race or culture among other racial and cultural groups. The result here is that unjustly earned white privileges together with property relations structured by the past and present of apartheid are normalised and protected under the pretext of constitutional rights to dignity, property and

⁶⁹ Bonilla-Silva *Racism Without Racists* 29.

⁷⁰ Olson *White Democracy* xii; 30.

⁷¹ Olson *White Democracy* 73.

freedom.⁷² Ultimately, reliance on a pre-political concept of race results in the normalisation of whiteness and its position of structural power.⁷³

Taken together, the central effect of the deployment of these three frames of colour-blind racism undergirded by a pre-political idea of race is to aid in law's relentless depoliticisation of contentious racial issues. Wendy Brown defines depoliticisation as involving the removal of a "political phenomenon from comprehension of its historical emergence and from recognition of the powers that produce and contour it".⁷⁴ In this case, depoliticisation is achieved by eschewing the question of white racial power and the history of apartheid, dispossession and racial inequality in the representation of the legal dispute at hand. In the judge's elision of power and history, private and personal vocabularies come to stand in for and replace public and political ones (the language of individual choice, private ownership and respect for the last wishes of the dead and their peace of mind in knowing that those wishes will be respected after they pass away replaces an enquiry into the public implications of universities carrying out racist testamentary clauses, the law's explicit endorsement of the continuation and transfer of white privileges, and the unquestioned naturalness of liberal and capitalist principles).⁷⁵ As I noted earlier, with reference to Van der Walt and Van Marle, depoliticisation in this judgment takes the form of privatisation - and here we can hear echoes of Williams' concern that the rhetoric of privatisation in response to racial issues functions as a "rationalising agent" for public unaccountability and irresponsibility, but I would add also for justifying racially discriminatory acts and downplaying racism.⁷⁶

Bonilla-Silva's provocative term "colour-blind racism" is telling for its exposure of colour-blindness as itself a racial ideology in contrast to its traditional pretension of racial perspectivelessness.⁷⁷ Through this term, colour-blindness can be seen as not simply an inability or refusal to see race but as itself another, albeit different, way of

⁷² See Harris 1993 *Harv L Rev* 1707-1791

⁷³ Olson *White Democracy* 72-73.

⁷⁴ Brown *Regulating Aversion* 15.

⁷⁵ Brown *Regulating Aversion* 16-17.

⁷⁶ Williams *Alchemy of Race and Rights* 47.

⁷⁷ Bonilla-Silva *Racism Without Racists*. See also Crenshaw 1989 *Nat'l Black LJ* 1-14.

seeing race and for explaining, indeed explaining away, racism. Colour-blindness is also non-performative in Sara Ahmed's sense: it does not do what it says and cannot bring about the effects that it names.⁷⁸ As Neil Gotanda reminds us, the very logic of colour-blindness is circular and self-contradictory for in order to be consciously blind to something (especially something as ubiquitous as raciality) one must see it first, and then suppress acknowledgement of what has been seen. To be racially colour-blind is to "ignore what one has already noticed"; it is to perceive race and then to ignore it.⁷⁹ But, as Gotanda also points out, colour-blindness is also normatively contradictory because it perpetuates that which it disavows as even existing. In its systemic denial of racial subordination, it allows such subordination to continue.⁸⁰

This understanding of colour-blindness as racial, and ideological, anticipates a further understanding - one that exposes the inherent, yet latent, whiteness and thus racism of colour-blindness.⁸¹ On this view, colour-blindness moves from being seen as an innocent or misguided idealism or a well-meaning but premature approach to race to being figured as itself a new development within, or even logical modern progression of, white racism; as not only helping to obscure and sustain racism but a form of racism in its own right. Thus when colour-blindness is seen to so frequently leave racism unchallenged, the relation between anti-Black racism and colourblindness (as an extension of liberal racial ideology) should be rethought - and explained not as accidental but as co-constitutive.⁸² How else does one explain the judge's refusal to sever the racially exclusive, whites-only clause to include eligible students from all racial groups, especially in the light of the fact that the trustees and the universities not only did not object to the alteration but were in fact the ones who called for it in the first place?

On my reading, the judgment can be seen as a defence of private racism and a refusal to see or even challenge white privilege. In this context, the rights to property and dignity that are said to be the basis of freedom of succession

⁷⁸ Ahmed 2006 www.borderlands.net.au.

⁷⁹ Gotanda 1991 *Stan L Rev* 18.

⁸⁰ Gotanda 1991 *Stan L Rev* 16.

⁸¹ Bonilla-Silva *Racism Without Racists* 177.

⁸² See Mills *Racial Contract*; Mills 2008 *PMLA* 1380-1397.

metamorphose into a right to be racist, a right to have one's racist intentions treated with legal respect. I am, in other words reading this judgment as an instance of what Williams warned of as the moment where laws would "[become] described and enforced in the spirit of our prejudices".⁸³ This is because the conclusions reached in this judgment make sense only when coupled with the conservative appropriation of the discourse of liberal constitutional rights and with the adoption of a tolerant posture towards racism. The judge's obsession with maintaining a certain legal fidelity to the intention of the testatrix (despite its discriminatory and hence unconstitutional nature) unwittingly enlists law to a purpose which, at best, judicially legitimises an official stance of denial and evasion with regards to racism and at worst, effectively sides with a "racist point of view"⁸⁴ or more simply, what Essed calls "a white point of view".⁸⁵

4 Conclusion

When Klare made the still prescient observation that the South African legal culture is characterised by interpretive and jurisprudential conservatism,⁸⁶ he clarified that by "conservative" he was referring to "cautious" traditions of legal analysis and not to political ideology.⁸⁷ He further explains that by caution he means to denote "a reluctance to press legal materials toward the limits of their pliability" and "an exaggerated concern to give the appearance of conforming to traditional canons of interpretive fidelity".⁸⁸ The judgment of Erasmus AJA exemplifies precisely this conservative or cautious approach. His decision is anchored by an individualistic and absolute notion of freedom of testation which exhibits a reluctance to press the extant legal materials in order to produce a constitutionally cogent and substantive legal solution. It also evinces an exaggerated concern with being true to the "golden rule" (which is actually just another *theory*) of the interpretation of wills, which is to give effect to the "intention" of the testatrix. Klare's fear was that when conservative

⁸³ Williams *Alchemy of Race and Rights* 67.

⁸⁴ Memmi *Racism* 4.

⁸⁵ Essed *Understanding Everyday Racism* 7.

⁸⁶ Klare 1998 *SAJHR* 168, 170.

⁸⁷ Klare 1998 *SAJHR* 168.

⁸⁸ Klare 1998 *SAJHR* 171.

or cautious approaches to adjudication, such as the one present in *BoE*, are adopted, the project of constitutional transformation is likely to suffer as a result.⁸⁹

My concerns with Erasmus AJA's decision also pertain to its refusal to adopt a race-conscious method of analysis in approaching this dispute and its choice to follow a typically colour-blind and post-racial perspective, one that reduces the significance of race and also distorts the social realities it produces. However, the absence of racial analysis or race-consciousness in the judgment is itself political and ideological. Failure to incorporate racial analysis in a legal dispute where race is obviously significant is to say that race does not matter (at least, does not matter in law), and is therefore also to be complicit with continuing forms of racial exclusion and marginalisation which are permitted, facilitated and tolerated by law and legal discourse. This double-denial of race, which is the simultaneous denial of law's own investment in racial power and subordination and of the relevance of race to legal inquiry, discourse and adjudication, renders law impotent and incapable of addressing racism. More significantly, such a denial functions to eviscerate race from our field of perception and meaning, so that we are eventually no longer able to "see" and "name" racism as *racism*. This is why I have argued that the judgment's lack of a decisive rejection of racism is better read not simply as the outcome of a colour-blind and race-neutral approach but rather as a legal affirmation of racism and as a defence of the privileges located in the white private sphere.

It is not my suggestion that all judges should be well-versed in critical legal theory and with philosophical and sociological writings on race - although their decisions will undoubtedly be enriched by them. More modestly, I am arguing that part of the task and responsibility of judges is to see and treat each new case before them as an opportunity to rethink and re-imagine the law and legal doctrine, to probe commonly held legal assumptions and to deepen *post-apartheid* South African jurisprudence in ways that make it more valuable/responsive to a transforming, plural and heterogeneous society. Instead what can be observed throughout Erasmus AJA's judgment is a preference for a formalist, mechanical, pre-constitutional mode of

⁸⁹ Klare 1998 *SAJHR* 171.

reasoning in contrast to a substantive, politically and morally engaged one. In both its jurisprudential approach and its racial politics there is a seeming resistance to change that permeates the judgment, a refusal to let apartheid go and to contemplate the possibility of living and judging in another South Africa, a "South Africa in memory of apartheid".⁹⁰ It is once again at this crucial intersection of the judgment's formalist approach and its expressly non-transformative tenor that a strong homology between jurisprudential approach and political perspective arises. That is, it is here that we can most clearly see how a traditional (formalist) legal method, underpinned by central tropes of capitalism and legal liberalism (private property and ownership; the public/private divide, individual autonomy, negative rights and race-neutrality) functions effectively as a legal mask for conservative racial politics, for encouraging the invisibility of the material operations of race in law, and thereby for permitting the discursive reinsertion of racism into legal doctrine and ideology.

In conclusion, then, the problems of the lack of a jurisprudentially transformative and substantive mode of adjudication together with the negation of a progressive race-conscious orientation identified here are of course not specific to Erasmus AJA's *BoE* ruling, although they do emerge with a particular acuteness within it. Thus, this note has been animated by more than a desire to debunk the air of necessity and inevitability that gives all judicial decisions their appearance of legitimacy or to pierce the veil of judicial privilege that often shields judges from political criticisms and exposures that also reveal their hidden personal biases and predilections or even to humiliate the SCA and the judge for lack of jurisprudential reflection, depth and transparency. Rather, a broader argument is being pursued here, one aimed at tentatively mapping an alliance between conservative forms of jurisprudence and conservative political approaches to race, and highlighting the danger of such an alliance for *critical* projects of legal, social and political transformation that aim to continue and deepen the struggle for racial justice, equality and freedom. It should be emphasised, following the CRT structural determinism thesis, that the transformation of the racial structure of society and the eradication of racial

⁹⁰ Derrida 1985 *Critical Inquiry* 291.

hierarchies and inequalities depends in large part on the transformation, expansion and political re-orientation of current legal tools and thought-structures.⁹¹ When formalism and legal liberalism are readily adopted to resolve racially-contoured disputes, we will be left only with a continuation of the *status quo*, with a sense of changelessness, and ultimately another point of failure in the project of transformative constitutionalism:

Every ... judicial decision embodies a choice between upholding remnants of the old order and enforcing change brought about by the new; every decision to uphold the existing law implies a sacrifice of constitutional reform, even when it is indubitably correct or unavoidable. Even more importantly, every decision in favour of stability and certainty or vested and acquired rights inevitably comes at the price of suppressing plurality, dissent and change.⁹²

The spectres of race, and its ghostly traces on the lives and laws of South Africa, will never rest until we heed their haunting.

⁹¹ Delgado and Stefancic *Critical Race Theory: Cutting Edge* 213-248; Modiri 2012 *SAJHR* 419-420.

⁹² Van der Walt 2008 *CCR* 85.

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List of abbreviations

CC	Constitutional Court
CCR	Constitutional Court Review
Harv L Rev	Harvard Law Review
Malawi LJ	Malawi Law Journal
National Black LJ	Nat'l Black LJ
PMLA	Publications of the Modern Language Association

TSAR	Tydskrif vir Suid-Afrikanse Reg/Journal of South African Law
SAJHR	South African Journal on Human Rights
SCA	Supreme Court of Appeal
Stan L Rev	Stanford Law Review
Wm & Mary Bill Rts J	William and Mary Bill of Rights Journal

**RACE AS/AND THE TRACE OF THE GHOST: JURISPRUDENTIAL ESCAPISM,
HORIZONTAL ANXIETY AND THE RIGHT TO BE RACIST IN *BOE TRUST
LIMITED***

JM Modiri*

SUMMARY

This contribution draws on critical race theory and critical legal theory in order to read and critique the Supreme Court of Appeal judgment of Erasmus AJA in *BoE Trust Limited* 2013 3 SA 236 (SCA). It will specifically focus on the contested jurisprudential and racial politics reflected in the reasoning followed in the judgement. It specifically takes issue with the way in which the judge avoided dealing directly with the constitutional and political implications of racially-exclusive testamentary provisions. Three specific features of the judgment are highlighted in the note as problematic: first, the rhetorical moves and ‘legal interpretive techniques’ by which the judge escaped the basic legal texts governing the situation in which a racially discriminatory provision is included in a will, as well as the substantive reasoning and normative choices that those texts necessarily invite. Secondly, how the escape from those legal texts evinces, or perhaps even facilitated, a certain evasion of, or anxiety towards the horizontal application of the Bill of Rights which explicitly proscribes overt (racial) discrimination by private non-state actors. And thirdly, how by following a formalist legal approach, one in which the basic assumptions of liberal legalism and capitalism are viewed as natural, normal and immutable, the judgment lacks a decisive rejection of racism. The judgment’s uncritical adulation of the common law of succession (and specifically the principle of freedom of testation) and its negation of a more substantive, constitutionally-infused mode of reasoning and adjudication generally reflects a conservative or traditional view of law. It is suggested that this view of law is problematic in our current post-apartheid context for two central reasons: it stands in tension with the project of transformative constitutionalism and

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prevents the coming into being of a more critical race jurisprudence for post-apartheid South Africa.

KEYWORDS: BoE Trust Limited, Race; Colour-blindness; Formalism; Horizontal application of the Bill of Rights; Transformative constitutionalism; Critical race legal analysis; White privilege; Constitution of the Republic of South Africa; Private law.