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A critical investigation into the reality of decolonising labour law: A South African perspective

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Co-Supervisor: N Whitearnel

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DECLARATION REGARDING ORIGINALITY

I, Fanelesibonge Mabaso, declare that:

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ABSTRACT

This study analysed labour law as more than just what the law is, at face value. The study examined labour law as being influenced by socio-political narratives. To better understand these socio-political narratives and their influences on labour law, the study posed much needed questions concerning race, gender and class in relation to labour law. The study noted that all of these socio-political narratives have been ignored social issues, which are collectively at the forefront to understanding decolonisation.

The crux of the dissertation was the reality of decolonising labour law in South Africa. The study used the principle of decolonisation as means of addressing the issues faced by workers in the workplace. The study viewed decolonisation as a suitable tool of analysis in that it allowed the study to use the concept of intersectionality. Linking race, class and gender as the primary points of the oppression of employees in South Africa.

The study addressed the different terminologies that were at the centre of the thesis, such as Whiteness, Blackness and African. The importance of this is that these terms are often used interchangeably but within the context of the study, they each play a different role in understanding the racial makeup of the South African workplace.

The study presented a discussion of labour law advancing access to justice for the working class through the rejection of the civil litigation principle of costs orders following the result. This discussion highlighted the need to not simply burden workers with costs orders that would deter the poor, often black, workers from fighting injustices in the workplace.

The study dealt with the omission of domestic workers from the definition of ‘employee’ in COIDA and provided a discussion on the intersectionality of this apartheid-rooted exclusion. The study also addressed the issue of the commodification of workers through a complete disregard of labour brokerage and suggestion that employees be given a right of first preference in share schemes.

The study also discussed the appropriate remedy to racism in the workplace. Finally, the study addressed the link between race, class and the right to strike.

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This thesis is dedicated to all African people and black people at large, in particular the working class and poor people of our society. It is extremely unfortunate that even in a post-1994 society, our people continue to face race and gender-based exploitation. It is unfortunate that our people are violated as they often are in instances like the Marikana Massacre and their families a decade later obtaining little to no justice. It is equally unfortunate that our legal systems are allowing themselves to be abused by the growing right wing with their deliberate misconstruction of racism to the detriment of actual victims of racism. It must be understood that racism is violence in itself. Capitalism too is violence through its greed, exploitation and subjecting our people to abject poverty.

This thesis calls upon all people to write and expose the injustices various groups of our society face. This thesis is not meant to vilify a certain portion of our society, nor is it meant to be apologetic about the exploitation of African people, it is intended to expose the harsh reality of poor, African workers, women African workers being worse off.

LIST OF PUBLICATIONS

1. Mabaso, F ‘A Much Needed Reaffirmation of a Settled Principle of Law: Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others’ (2021) 42 ILJ 2371 (CC) (2022) 43 ILJ 1522’ (2022) 2 ILJ 1522;

2. Mabaso, F. (2023). A STEP FORWARD IN THE FIGHT AGAINST ABLEISM: Damons v City of Cape Town [2022] ZACC 13. *Obiter*, 44(2); and

3. Mabaso, F. (2023). RACIAL CONSIDERATIONS ARE A PREREQUISITE AND NOT AN AFTERTHOUGHT: A DISCUSSION OF Kroukamp v The Minister of Justice and Constitutional Development [2021] ZAGPPHC 526 and Magistrates Commission v Lawrence 2022 1 All SA 321 (SCA). *Obiter*, 44(3).

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LIST OF ACRONYMS

AA	Affirmative Action
ACJ	Acting Chief Justice
AD	Appellate Division
AJ	Acting Judge
ANC	African National Congress
AMCU	Association of Mineworkers and Construction Union
BC	Black Consciousness
BCEA	Basic Conditions of Employment Act
BCM	Black Conscious Movement
BEE	Black Economic Empowerment
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CDT	Critical Disability Theory
CJ	Chief Justice
CJLJ	Canadian Journal of Law and Jurisprudence
CLS	Critical Legal Studies
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
CRT	Critical Race Theory
DCJ	Deputy Chief Justice
DENV. U. L. REV	Denver University Law Review
EC	Equality Court
ECHR	European Charter of Human Rights
EEA	Employment Equity Act
EFF	Economic Freedom Fighters
FAWU	Food and Allied Workers Union
FRELIMO	Liberation Front of Mozambique
GBV	Gender-based Violence

GN	Government Gazette
HC	High Court
ILJ	Industrial Law Journal
ILO	International Labour Organisation
J	Judge
JP	Judge President
KZD	KwaZulu-Natal High Court, Durban
LAC	Labour Appeal Court
LC	Labour Court
LLM	Master of Laws
LLD	Doctor of Laws
LRA	Labour Relations Act
NMWA	National Minimum Wage Act
NMW	National Minimum Wage
NEHAWU	National Health and Allied Workers Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metal Workers of South Africa
NUPSAW	National Union of Public Service and Allied Workers
PAC	Pan African Congress
PELJ	Potchefstroom Electronic Law Journal
Para	Paragraph
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
POPCRU	Police and Prisons Civil Rights Union
SA	South Africa
SAA	South African Airways
SABC	South African Broadcasting Corporation
SCA	Supreme Court of Appeal
SACP	South African Communist Party
SADSAWU	South African Domestic Service and Allied Workers Union

SAJHR	South African Journal on Human Rights
SAJLR	South African Journal of Labour Relations
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SAMWU	South African Municipal Workers Union
SANDF	South African National Defense Force
SAPS	South African Police Service
SARIPA	South African Restructuring and Insolvency Practitioners Association
SATAWU	South African Transport & Allied Workers Union
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDHR	Universal Declaration on Human Rights
UCT	University of Cape Town
UKZN	University of KwaZulu-Natal
UN	United Nations
UNISA	University of South Africa
UP	University of Pretoria
VOC	Vereenigde Oostindische Compagnie
ZAR	Zuid-Afrikaansche Republiek

CHAPTER 1
GENERAL INTRODUCTION

I BACKGROUND

Movements such as #feesmustfall and #rhodesmustfall opened up a much needed discussion around the topic of decolonisation. Botha and Fourie argue that the call for decolonising labour law requires a radical rethinking of this subject.[1] Unlike other areas of law, labour law is underpinned by political, social and cultural processes.[2]

Decolonisation concerns moving away from a European based understanding of the law, connected to legal structures which traditionally stem from colonialism.[3] It entails drawing from the different sources of the law to endorse the transformative capability of the law in achieving more economic and social justice.[4] Decolonisation goes beyond what the law is, it concerns itself with how these laws are used in society.[5] Within the labour law perspective this would necessitate an investigation into the constitutional rights of workers as they are important considerations to take into account in the bid for decolonising labour law.[6] However, there is much debate within the academic community of what exactly decolonisation is.[7] It is important to understand that the post-colonial, post-apartheid South Africa, in its search for a decolonial voice experienced a wave of movements that sought to be rid of the stench of the colonial master that sought to make profits at whatever cost. As a result, a wide range of studies are shifting towards the tide of decolonisation. The study submits that this is more so within the labour law perspective. In essence, it is not only labour law that needs to undergo the radical rethinking as suggested above, however, this study is limited to labour law. The debate around decolonisation

[1] MM Botha and E Fourie 'Decolonising the labour law curriculum in the new world of work' 2019 (82) THRHR 177 at 177.
[2] G Davidov and B Langille Labour law after labour: The idea of labour law ed (2011) at 16.
[3] C Himonga 'The constitutional court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law' (2017) *Acta Juridica* 101.
[4] C Himonga and Diallo, F 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) *PER* 1 at 5.
[5] Ibid.
[6] Botha and Fourie op cit note 1 at 1; also see TR Jeewa and J Bhima 'Discriminatory language: A remnant of colonial oppression' (2021) 11 *Constitutional Court Review* 323–339 on a discussion that judgments and laws that do not consider the lived experiences of the people cannot lead to substantive equality.
[7] A Rycroft and R Le Roux 'Decolonising the labour law curriculum' 2017 *ILJ* 1473.

and what it entails is far from being settled.[8] The reason behind this is that our institutions themselves remain unchanged, including courts, as they are overridden with cultural chauvinism which is in favour of and unapologetically Eurocentric with a bias towards African people.[9] This is the case despite the arguments which are highlighted below and which argue that the post-1994 South Africa has been decolonised by the mere illusion of transformation. This makes it important for an investigation of what decolonisation is in labour law and to determine if it has any links to the concept of Africanisation. Briefly, Africanisation is the inclusion of African value systems into the legal systems, as this was previously denied in favour of pure Eurocentrism.[10]

Decolonisation has shifted from seeking independence from external domination to seeking the transformation of institutions that were the centre of producing racial prejudices that were enforced in colonial times.[11] The study submits that labour law is one such institution that enforced racial prejudices, which necessitates its transformation and rethinking in a radical manner. Therefore, labour law should be re-imagined in light of this discussion.[12]

Critical race theory (CRT) is crucial to labour law in terms of facilitating the recognition of discrimination. CRT is the study of the relationship between race and power.[13] The importance of CRT specifically in this study is that it contests existing theories of society in that without an understanding of race and racism, there can be no true understanding of power relations. This is because CRT challenges the role of the law as a form of a race-related power in the black diaspora.[14] The employer has and always had complete control and discretionary power

[8] Botha and Fourie op cit note 1.
[9] Ibid.
[10] W Louw 'Africanisation: A rich environment for active learning on a global platform' (2010) 32(1) *Progressio* 42–54 at 42.
[11] M Mamdani 'Between the public intellectual and the scholar: Decolonization and some post-independence initiatives in African higher education' 2016 *Inter-Asia Cultural Studies* 79.
[12] Botha and Fourie op cit note 1 at 1.
[13] J Stefancic and R Delgado Critical race theory: An introduction (2010).
[14] TR Jeewa and J Bhima, op cit note 6; for a discussion on CRT; also see R Delgado & J Stefancic 'Critical race theory: Past, present, and future' (1998) 51(1) *Current Legal Problems* 467-491; R Delgado and J Stefancic Critical race theory: An introduction (2012) 2nd ed 9; R Delgado & J Stefancic 'Critical race theory and criminal justice' (2007) 31(2–3) *Humanity and Society* 133; C Hallinan and S Coram 'Critical race theory and the orthodoxy of race neutrality: Examining the denigration of Australian indigenous athlete Adam Goodes' (2017) *Australian Aboriginal Studies* 99–111; CI Harris 'Whiteness as property' in K Crenshaw, N Gotanda, G Peller and K Thomas (eds) Critical race theory: The key writings that formed the movement (1995) 276; JSM Modiri 'The grey line in-between the rainbow: (Re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse' (2011) 26 *South African Public Libraries* 177 at 183.

over the labour of all African people.[15] This is because the modern employment contract has its origins in the Roman law *locatio servi*, where the slave master had ownership over the enslaved person and the fruits of that enslaved person's labour.[16] Through the imposition of colonial laws on African people by the British and the Dutch settlers, South Africa was forced to subscribe to the concepts of *locatio conductio operarum* through which a free man let his service to another for remuneration.[17] Further down the line, there was the imposition of the Master and Servant Ordinance in 1841 and the various acts – the Master and Servant Act of 1856[18] – all of which the master controlled the servant and her/his labour with an iron fist.[19] The researcher submits that this made it important for this study to investigate race in relation to labour law.

To elaborate, practically, what necessitates the introduction of CRT into labour law is highlighted in the following examples. First, the response to the cry for the decolonisation of labour law is that since this area of law is codified under the Constitution of the Republic of South Africa 1996, by a government elected by the people, the conclusion is that labour law is a decolonised area of law. This line of reasoning continues to argue that since the master and servant legislation has been abolished and trade unions have been legalised, labour law has taken strides to move away from colonial practices.[20] Academics such as Rycroft and Le Roux[21] highlight this line of thought which argues that within the South African context, since the 1990s, black people have been the decision makers, therefore the impact of law unto black people is self-imposed.

Despite arguments highlighted by Rycroft and others, it is clear that one of the sources of having labour law colonised is the historic friction between white labour and black unskilled labour. Shakti Jainarain correctly argues that race is a social and political issue that causes strikes. However, she incorrectly argues that the violence of strikes was caused by white labour

[15] J Nolde 'South African women under apartheid: employment rights with particular focus on domestic service and forms of resistance to promote change' (1991) *Third World Legal Studies* 203 at 209; see also AK Wing and P de Carvalho 'Black South African women: Toward equal rights' (1995) 8 *Harvard Human Rights Journal* 57.
[16] C Thompson and P Benjamin *South African Labour Law* (2006) at E1-2.
[17] TG Kasusa *The definition of an "employee" under labour legislation: An elusive concept* (LLM Theses, UNISA, 2015); *Colonial Mutual Life Assurance v MacDonald* 1931 AD 412; Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A).
[18] Act 15 of 1856 (Cape) as amended by Acts 18 of 1873, 28 of 1874, 7 of 1875 and 30 of 1889.
[19] R le Roux 'The evolution of the contract of employment in South Africa' (2010) 39(2) *ILJ* 139–165.
[20] Rycroft and Le Roux op cit note 7.
[21] Ibid.

versus unskilled black labour.[22] She argues further that this occurred when the unskilled black labour obtained work at the expense of the white skilled labour in an attempt by the employer to save costs, which resulted in some of South Africa's most violent strikes, by the white workers.

Modiri argues that Eurocentrism involves making European culture the centre and erasing other cultures' contribution to world history.[23] The researcher of this study concurs with Modiri[24] who submits that as a legally based philosophical discipline, CRT has not been formally adopted in mainstream South African legal scholarship and this is surprising for a state with a tragic history of race based segregation and institutionalised race-based discrimination and oppression. The researcher also submits that the above examples necessitate the need to re-imagine labour law within the perspective of decolonisation which itself calls for the practical use of CRT in the labour law perspective

Gender also played a role in the colonisation of labour. However, this study was limited to analysing the lived experiences of black women, in particular in the labour law perspective. Moodley[25] argues that gender inequality is one of the numerous challenges that our country's labour law system faces. The apartheid government not only imposed racial but also gender separation. While white women suffered, black women suffered severely. It is submitted that it is then necessary to analyse the decolonisation of labour through the lens of the oppression of women.[26] The study submits that since colonisation was a project of portraying the world in a capitalist, white, heterosexual, Christian, male perspective, decolonisation will involve doing the opposite and examining if people who do not fit the above description have been accommodated in labour law. The problem question is: Has South Africa done enough to decolonise labour law?

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[22] S Jainarain *A critical analysis of violent strikes in South Africa* (LLM theses, University of KwaZulu Natal, 2020) at 7.

[23] J Modiri 'In the fall: Decolonisation and the rejuvenation of the academic project in South Africa' *Daily Maverik* 16 October 2016 https://www.dailymaverick.co.za/opinionista/2016-10-16-in-the-fall-decolonisation-and-the-rejuvenation-of-the-academic-project-in-south-africa/ [Accessed 08 June 2021].

[24] J Modiri 'The colour of law, power and knowledge: Introducing critical race theory (CRT) in (post) apartheid South Africa' 2012 *SA Journal on Human Rights* 405 at 406.

[25] T Moodley *Progression of South African women in the workplace: A study to the right to development and the relevant legal framework that underpins the eradication of gender disparity in the workplace* (LLM Thesis, University of KwaZulu Natal, 2018) at 1.

[26] *Mahlangu and Another v Minister of Labour and Others* (2021) 42 *ILJ* 269 (CC); furthermore such oppression can be investigated through migrant labour system still in effect today which made African women be dependent on their sons and husbands whilst experiencing extreme poverty, see CL Poinsette 'Black women under apartheid: An introduction' (1985) 8 *Harvard Women's Law Journal* 93; Andrews 'From gender apartheid to non-sexism: The pursuit of women's rights in South Africa' (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 693.

In essence, have our institutions, both courts and the legislature, done enough to protect the interest of those who were and perhaps still are marginalised?

II LITERATURE REVIEW

Not much literature exists on the issue of decolonisation of labour law in South Africa. Since the subject is important for a maturing democracy in South Africa, it is crucial for this study to develop this area of labour in line with the Constitution. The history of South Africa entailed that for the law to be viable, it needed to have some form of Eurocentric narrative. A number of authors have written about the decolonisation of the law but none of them have actually dealt with it holistically. For example, Botha and Fourie, as highlighted in the background above, correctly argue for the introduction of CRT and decolonisation in labour law but they do not give practical examples of what this would look like in practice. Another example is Therusha, as highlighted in the background above, not engaging in a discussion of the racially-related reasons for strikes in South Africa and simply reducing it to unskilled black labour.

In an attempt to narrow the gap in the existing literature on decolonisation, the study analysed the following source materials in order to understand whether South Africa has made any progress in trying to decolonise labour law.

In *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe),*[27] Lufil Packaging (Lufil) manufactured printed and plain paper bags and associated paper or paper-derivatives based products.[28] On 27 January 2015, the National Union of Metal Workers of South Africa (Numsa) wrote to Lufil asking it to provide stop orders for the deduction of union fees for its alleged members who where employees of Lufil. The deduction of union fees by the employer from the salary of the employee is an organisational right provided for by S 13 of the LRA. Lufil responded saying its core business does not form part of the Union's scope and referred Numsa to its own constitution in Annexure B. Clause 1(2) of Numsa's constitution provides that the scope of the union is the metal industry. Annexure B details the industries to which Numsa's membership is open to and it does not include the paper and packing industry in which Lufil operates. Lufil alleged that the trade union, in recruiting members from Lufil's

[27] (2020) 41 (*ILJ*) 1846 (CC).
[28] *Lufil Packaging* (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd) *v Commission for Conciliation, Mediation and Arbitration* (2019) 40 ILJ 2306 (LAC) para 2 to 3.

operation, Numsa acted *ultra vires* to its own constitution. Lufil didn't recognize Numsa and declined to act on implementing union stop order deductions in its work.

The Constitutional Court was given a novel and difficult task of determining if a trade union could or could not represent workers who fell outside of the scope of its constitution. The Constitutional Court found that the idea that a trade union and the workers could ignore a provision in that trade union's own constitution was logically inconsistent as the members and the trade union were bound by the agreement they had entered into. This links with the question of employers interfering in the internal mechanisms of institutions that are supposed to protect the interests of the working class.

The study submits that this position by the court is an unwanted limitation and opens up a debate regarding the representation of the working class where workers are denied access to justice simply because they do not fall within the scope of a trade union, thus limiting their right to associate with that trade. This raises the question of whether the law then gives too much power to the employers at the expense of the right to association and limitation of access to justice of the working class?[29] In this regard, the researcher of this study argues that there is a complete disregard of the interests of the working class which was justified and supported by the court in this case, in support of Woolman[30] who argued that it is extremely important for a trade union to have control over its membership policies and internal affairs. Instances in which the trade union admitted individuals who did not fall within its purpose had the effect of altering the identity of trade union.

This study submits that what necessitates an investigation into this is that the debate on this issue is far from being settled. In *Multiquip (Pty) Ltd and Another v National Union of Metalworkers of South Africa*[31], the court confirmed the previous position of *McDonalds*

[29] *AFGRI Operations limited v MacGregor* (2013) 34 *ILJ* 2847 (LC); On freedom of association see M Budeli-Nemakonde 'Workers' right to freedom of association and trade unionism in South Africa : An historical perspective' (2009) *Southern African Society of Legal Historians, Fundamina: A Journal of Legal History* 15(2) 57-74; *Hamata and Another v Chairperson, Peninsula Technikon Internal disciplinary Committee and Other* 2002 (5) SA 449 (SCA) further provides workers with the right to legal representation by trade unions they chose to be associated with; also see *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2005) 2 All SA 479 (SCA).

[30] S Woolman 'Freedom of Association' in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa Service* 6 (ed) (2014) at 44-2-3.

[31] (D 477-20) [2021] ZALC 7 (17 August 2021).

Transportation Upington (Pty) Limited v Association of Mineworkers and Construction Union[32] that the contents of the trade unions' constitution are irrelevant when the trade union is providing representation in the protection of the worker's right to be represented, thus going against the decision of the Constitutional Court in *Lufil Packaging*.

In the same context of understanding access to justice by the working class, generally accepted as the marginalised African population, it becomes important to analyse the string of recent cases concerning cost orders. In *National Union of Mineworkers obo Masha and Others v SAMANCOR Limited (Eastern Chromes Mines)*[33] the employees worked in a mine, performing underground drilling operations when they were warned by their supervisor to stop working until the conditions to proceed with working were safe. The workers ignored both the verbal and written instruction, they were dismissed and found guilty of misconduct. On appeal at the Constitutional Court, the workers argued that their application raised constitutional issues as it implicated the right to access courts, as provided for in section 34 of the Constitution. The Constitutional Court correctly found that the Labour Appeal Court did not have regard for the Constitutional Court's decision in *Zungu v Premier of the Province of KwaZulu-Natal*[34] where it confirmed that the rule of practice that costs follow the result does not apply in labour law cases.

Another important case that involves the right to access justice by the working class, borderline poor African people, is *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others,*[35] which accurately corrected the departure, without reason, by the Labour Court from the settled principle of labour law that costs do not follow the result of the matter. The study submits that what necessitates this engagement is that this case has racial implications. According to Magubane, South Africa is the epitome of racially-based social pyramids and has long had a hierarchy of cheap labour, readily available for exploitation.[36] Magubane argues further that the Republic of South Africa, in its current form has a two-faced labour market. On the one side, secure, well-paying jobs dominated by the white population and on the other side, an unsecure, filthy and low paying employment dominated by

[32] (2016) 37 *ILJ* 2593 (LAC).
[33] (2021) 42 *ILJ* 1881 (CC).
[34] (2018) 39 *ILJ* 523 (CC).
[35] (2021) 42 *ILJ* 2371 (CC).
[36] B Magubane 'The problem and its matrix: Theoretical and methodological issues' in *The political economy of race and class in South Africa* (1979) https:// knowledge4empowerment.files.wordpress.com/2011/08/magubane-1979-1990_ch1_poliecon-raceclass.pdf [Accessed 23 January 2022].

the African.[37] As a race-based and capitalist society, the exploitation referenced above is directed to African labour.[38] As explained in *Member of the Executive Council for Finance: KwaZulu-Natal v Dorkin N.O.*[39], if cost orders are allowed to follow the result, they will discourage workers, unions and employers' organisations from approaching the Labour Court and Labour Appeal Court by overburdening unsuccessful litigants with cost orders.

The racial implications of the above are that while not all workers are African people, it is this already exploited and marginalised group of people that will bear the brunt of cost orders they cannot afford. This is supported by Tshikota who argues that racially motivated capitalism involves the creation of an economy that does not favour African people, in essence, black people being labourers that bear the brunt of the exploitation with the white population enjoying the financial outcome of such exploitation.[40] The logic then is, while labour is not restricted to African people, it is undoubtedly this already marginalised, impoverished and economically disadvantaged population that will bear the brunt of cost orders it cannot afford to pay if cost orders are allowed to follow the result in labour law.[41] Such an engagement is important in attempting to show the link between class and race in South Africa and how a fear for cost orders by the oppressed African working class can have drastic effects. According to Serron, such an engagement on race and class in labour law, is a critical part of understanding the law and legal institutions.[42]

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[37] Ibid.
[38] Ibid.
[39] [2008] 29 *ILJ* 1707 (LAC).
[40] G Tshikota 'Racial epostemology at a time of a pandemic: A synopsis of South Africa's persisting inequalities through the lens of #FeesMustFall and #FreeDecolonisedEducation' (2021) *Pretoria Student Law Review* 25 at 27.
[41] If the workers were to fear cost orders, they would resort to strikes and not courts when faced with issues and in an attempt to get an employer to fast track the resolution of their issues, such strikes can easily turn violent and deadly, see E Tenza 'The effects of violent strikes on the economy of a developing country: A case of South Africa' (2020) 4 *Obiter* 519–537; on violent strikes *see Security Services Employers Organisation v SA Transport & Allied Workers Union (SATAWU)* (2012) 35 ILJ 1693 (CC); *SA Chemical Catering & Allied Workers Union v Check One (Pty) Ltd* (2012) 33 ILJ 1922 (LC); *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO* (2007) 28 ILJ 1827 (LC), *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC); A Myburgh 'The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law' 2013 23(1) *CLL* 1- 4; on strikes that cause economic loss to the employer, see *In2Food (Pty) Ltd v Food & Allied Workers Union* (2013) 34 ILJ 2589 (LC); *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (2001) 22 ILJ 2035 (LC); *Algoa Bus Company v SATAWU* 2015 (36) ILJ 2292 (LC); *South African Transport and Allied Workers Union and Another v Garvas and Others* (2012) 33 ILJ 1593 (CC); *Mangaung Local Municipality v SA Municipal Workers Union* (2003) 24 *ILJ* 405 (LC)).
[42] C Serron 'Law and inequality: Race, gender…and, of course, class' (1996) 22 *Annual Reviews of Sociology* 187 at 188; for a further discussion on race, class and legal institutions see AL Brophy 'Race, class, and the regulation of

As briefly highlighted above, there is a need for the investigation of the delayed protection of poor, African women. Domestic workers in our Republic are predominantly women who are part of the disadvantaged group.[43] Prior to our current democracy, domestic workers were expressly omitted from labour legislation.[44] This omission contributed to the fact that domestic work was and perhaps to a certain extent remains undervalued. As such, *Mahlangu and Another v Minister of Labour and Others*[45] is a leading case which deals with the exclusion of domestic workers from the definition of the word 'employee' in the Compensation for Occupational Injuries and Diseases Act[46], (COIDA). The Constitutional Court had to then deal with the constitutional invalidity of section 1(xix)(v) of COIDA.[47] The significance of the case is that the Constitutional Court clearly advanced the argument that such an exclusion advances the already existing stigma of disadvantage attributed to a certain race, class and gender. These women were then at the mercy of the colonial masters who were white men, they had to follow the whims of white men who they worked for.

This case engages in a debate highlighted by Botha and Fourie[48] in that labour law must be analysed through a non-legal methodology, using political, social and cultural processes. The way in which this approach works is that the law is not viewed as an independent force which is imposed onto society, rather, the law is understood as being a tool that is sharpened by the lived experiences of people through the social, political and economic logics context.[49] This is confirmed by the court in *Naptosa v Minister of Education, Western Cape*[50] when it observed that labour law is a very sensitive subject, which is based on an economic and compromise between the employees and the employers. Both of these parties are powerful socio-economic forces, which makes the balance between them a delicate one to be kept at all times.

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the legal profession in the progressive era: The Case of the 1908 canons' (2003) 12 *Cornell Journal of Law and Public Policy* 607–624.

[43] Botha and Fourie op cit note 1 at 186.

[44] See the Labour Relations Act 28 of 1956; Basic Conditions of Employment Act 3 of 1983 and the Wage Act 5 of 1957.

[45] *Mahlangu* supra 26.

[46] Act 130 of 1993.

[47] Compensation for Occupational Injuries and Diseases Act, 130 of 1993, *Mahlangu* supra 26 para 12.

[48] Botha and Fourie op cite note 1 at 178; Davidov and Langille op cit note 2 at 16; also see P Benjamin and J Theron 'Costing, comparing and competing: The World Bank's doing business survey and the benchmarking of labour regulation' (2009) *ActJur* 207–208.

[49] S Blandy (2014) 'Socio-legal approaches to property law research' (2014) 3 (3) *Property Law Review* 166 at 4

[50] 2001 *ILJ* 889 (C) 897.

The Constitutional Court in the *Mahlangu* matter clearly used this approach and was correct in doing so as it then opens up space for discussion of using various areas of law and social issues to address labour law-related issues through the lens of CRT. The study concurs with Victor AJ in discussing the issue of the matter through the lens of the intersectionality of the various rights afforded to these oppressed women. These intersecting rights being social security and equality. In essence, saying domestic workers were omitted from the protection of COIDA, which was provided to other categories of workers, simply because they were African, they were poor and they were also women. According to the Constitutional Court, this was worsened by the prejudice that these women suffered under their husbands in their customs, which this study argues is the limitation of this case in the sense that it places the African man in the same tone as the colonial master. The study submits that another significance of this case is that it brings to the surface the inequalities that black women had to deal with in the labour sector and this case has not yet been analysed in the academic community.

Moreover, when attempting to investigate the protection of women in labour law, it becomes necessary to investigate sexual harassment, which is a crisis that is at an all-time high in South Africa, commonly referred to as gender-based violence (GBV). However, the limitation of this study is that it does not discuss sexual harassment beyond this chapter. Kubjana[51] poses multiple important questions such as, are there statutes in place to deal with sexual harassment? Do we have a proper understanding of what sexual harassment is? He further suggests that perhaps, we do not. Are the laws properly constructed to deal with sexual harassment? Are court decisions clear enough to help us understand sexual harassment? Kubjana[52] further suggests that sexual harassment as a concept is yet to be given and understood using one meaningful definition that can be used as a yardstick in all cases of sexual harassment as our Courts have to date not offered certainty with regard to an effective approach to be used when dealing with cases of sexual harassment.

Our statutes have not been silent on the issue. Section 6 of the Employment Equity Act (EEA)[53] condemns any form of harassment as this harassment is unfair discrimination due to it

[51] LL Kubjana 'Understanding the law on sexual harassment in the workplace (through a case law lens): a classic fool's errand' (2020) *Obiter* 88–105.
[52] Ibid.
[53] Act 55 of 1998.

being based on the gender and sex of the victim.[54] The Code of Good Practice provides that sexual harassment is unwelcome and or unwanted conduct of a sexual nature.[55] The Code in its introduction states clearly that harassment in the workplace is an abuse of power. This study concurs with this statement by the Code which portrays harassment as being a product of power relations, or the abuse thereof. However, the study submits that the definition of sexual harassment provided for by the Code is a narrow and problematic definition as it limits itself to what the complainant perceives as unwelcome. Kubjana[56] questions that if behaviour that is objectively perceived as being sexual harassment is received without complaint by a worker, does that behaviour automatically change itself to be acceptable simply because it does not bother the recipient? The study concurs with Kubjana that the victimised worker's perception should not be used as the determining factor of what constitutes sexual harassment. This is more so when one considers the power imbalance caused by professional positions in the workplace, especially in a country plagued by unemployment and poverty such as ours.

There are various cases which become necessary to analyse when dealing with the issue of sexual harassment which are highlighted in brief below. However, these cases are not dealt with in other chapters as only race, gender in relation to race and the economics of labour are the main focus of this study. In *Campbell Scientific Africa (Pty) Ltd v Simmers*,[57] the Labour Appeal Court confirmed that a male manager's conduct when he made a sexual proposition to a female worker of another company constituted sexual harassment and a justified dismissal. This momentum of deciding sexual harassment as a dismissible offence was most recently dealt with in *McGregor v Public Health and Social Development Sectoral Bargaining Council*[58] the Constitutional Court confirmed that at its core, sexual harassment is concerned with the exercise of power and it also reflects the power relations that exist both in society and within a particular workplace. The court went further to use the idea of the intersectionality that not only does the power imbalance in these cases tip according to the professional positions, but it also topples in terms of gender and age. This is supported by the court in *SA Broadcasting Corporation Ltd v*

[54] A Botes 'Identifying sexual harassment in the workplace? Do not forget to remember the Code of Good Practice' (2015) 36 (3) *ILJ* 1719–1747.
[55] Items 4 and 5.4 of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace as published under GN 46056 dated 18 March 2022; also see GN 1357 dated 4 August 2005
[56] Kubjana op cit note 51.
[57] (CA 14/2014) [2015] ZALCCT 62 (23 October 2015).
[58] (2021) 42 *ILJ* 1643 (CC).

Grogan N.O.[59] when it was stressed that sexual harassment by older men in positions of power has become a plague in the workplace. These vulnerable women are placed in the undesirable position of being compelled to balance their sexual dignity and integrity with their duty to respect their superior.[60] Therefore, the study would recommend that our legal institutions formulate an objective test for sexual harassment where if there is a power imbalance, irrespective of the perception of the vulnerable survivor of the incident, the presiding officer should first decide if the conduct is objectively acceptable in light of the power imbalances in the workplace.

According to the Preamble of the International Labour Organization (ILO) in the Declaration of Philadelphia of 1944, labour is not a commodity. The ILO is of the view that people should not be treated like inanimate commodities, capital, another mere factor of production, or resources.[61] This view is further supported by Botha in that labour is not a commodity, because labour law is designed to protect workers against the economic logic of the commodification of labour, thus, labour is not a commodity.[62] However, Marx, correctly argues that labour is the measure of all value. [63] In essence, labour generates wealth, but in capitalism it also generates value.[64] Marx was convinced that in order to understand labour one had to study closely the commodity, which is at the centre of modern society and which has both a use value and an exchange value. Kurz expands on this point by noting that labour power, like the value of every single commodity, is equal to the total amount of labour required in its production.[65] This means that the value of an employee is how many hours of work they work, working hours in exchange for wages.

Collins further supports Marx in that employers indeed purchase labour like other commodities.[66] The logic behind this is that when the owner of a factory buys the premises and raw materials, in the process they buy labour as well, for example, sale of a business as a going concern. Collins argues further that a business does not own the worker in the same way as it

[59] (2006) 27 *ILJ* 1519 (LC).
[60] *Gaga v Anglo Platinum Ltd* (2012) 33 ILJ 329 (LAC).
[61] International Labour Organisation Preamble.
[62] MM Botha 'The different worlds of labour and company law: Truth of myth' 2014 17(5) *PER* 242 at 2050.
[63] Marx, Capital, Volume I (1954).
[64] Ibid.
[65] HD Kurz 'Marx and the law of value: A critical Appraisal of on the occasion of his 200th birthday' (2018) 77(304), *abril-junio de* 40-71.
[66] H Collins *Employment Law* (2010) 3rd Ed Oxford University Press New York.

owns the factory because without that limited freedom, workers would be slaves. On the other hand, the employer purchases the employee's labour for a period of time. Workers sell their labour power in exchange for remuneration. As with other market transactions dealing with commodities, the legal expression of this relation between an employer and employee is a contract of employment and like other contracts, it results in legally enforceable rights and obligations.

Through this logic, labour is in fact regarded as a commodity in a market society and its laws. The study submits that this debate necessitates an investigation of what the law says on the one hand and the reality of what labour is on the other hand in relation to the debate of whether labour is or is not a commodity. As a second example, section 76 of the Labour Relations Act 66 of 1995 deals with replacement labour during a strike and lockouts. This section provides that an employer may not employ any person in an attempt to continue production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike. It then becomes necessary to analyse whether replacement labour makes labour a commodity to be disposed of and acquired at the employer's will and discretion. The recent case being *SAAP v SAA (SOC) Limited.*[67] The case enforces what this study sought to address, which is the use and disposal of labour according to the needs of the employer, even if it is to the prejudice of workers. Modiri argues that CRT should not only be against racism but it should also be against capitalist. The question whether labour is a commodity has been asked, but not in the perspective of replacement labour in recent cases.

In *Makhanya v St Gobain,*[68] the CCMA held that 'boer' carries similar derogatory connotations to the 'k-word' and dismissed an application for unfair dismissal that arose from an African employee's use of the word. The study submits that the court in this case should have asked itself whether an African person can or cannot be racist. This has been a question that courts and the academic community have not dealt with concerning racism in the workplace. The study submits that the underlying factor in this argument is that race and racism is a power struggle going back many centuries. African people do not possess the will nor the historical power to create systems to enforce their biases, if any. However, this does not mean they do not

[67] [2021] ZALCJHB 57.
[68] [2019] 7 BALR 720 (NBCCI).

have prejudice.[69] In *Modikwa Mining Personnel Services v Commission for Conciliation Mediation and Arbitration and Others*[70] the court refused to look at the context of the utterance when determining racism in the workplace. The court in this case failed to look at the history of South Africa and what racism is. The study submits that had the court adopted CRT, its decision would have perhaps been different in the sense that it would have understood the racial power relations as directed by the history of South Africa, which is necessary when dealing with the context of an utterance. As such, going forward, the study recommends that the court in determining racism in the workplace must consider the historical perspective of racism and power relations that enforce it in order to have a complete understanding of what racism is and how it is enforced.

It would not be feasible to investigate decolonisation without mentioning Africanisation. Makgoba[71] correctly defines this concept as not being the exclusion of Europeans and their culture, rather it is the inclusion of the way of life of African people. Africanisation involves incorporating, adapting other cultures through African visions to provide an evolution that is essential in the global community to accommodate each other. Makgoba further defines Africanisation as the process of interpreting African identity and culture. The study submits that it is therefore necessary to investigate whether Africanisation has been achieved in labour law or whether our country has absolutely failed to make such adjustments. Louw[72] states that at this moment in time, in Africa, there is a sense amongst the continents' citizens that they no longer identify with the colonial masters of the global north, rather, with Africa in its own right.

An example of where the country stands would be provided by an analysis of *Kievits Kroon Country Estate v Mmoledi*[73] where an employee was dismissed after she had told the manager that she needed to attend a traditional healer's course (*isangoma*) and she did furnish a certificate from her mentor. The reasoning behind her dismissal was that the traditional healer's certificate was not from a medical practitioner as provided for by the Basic Conditions of

[69] G Yancy 'No, black people can't be racist' (2021) Truthout https://truthout.org/articles/no-black-people-cant-be-racists/ (Accessed 20 February 2022).
[70] (JR1904/2010) [2012] ZALCJHB 61 (29 June 2012).
[71] MW Makgoba *Mokoko: The Makgoba affair – a reflection on transformation* (1997) Florida: Vivlia.
[72] W Louw op cit note 10.
[73] (875/12) [2013] ZASCA 189.

Employment Act[74]. Another example is the classic case of *Dlamini and Others v Green Four Security* [75] where security guards were prevented from having their natural hair in observation of their religion.

In order to understand race, class and violent strikes, the study took a historical view of the issue which can be traced back to what is now referred to as the Rand Rebellion of 1922 right through to the Marikana Massacre. Baliard[76] provides a clear account of this incident. Towards the end of 1921, a sharp decrease in the price of gold 'forced' the owners of the South African mines to implement drastic measures which included the retrenchment of two thousand white miners out of twenty five thousand workers and the suppression of the racial bar that had reserved skilled jobs for white miners and unskilled jobs for black miners. That removal was meant to align white wages with black wages, saving the South African rand lords millions in the process. A strike began on 2 January 1922, in the mining region known as the Witwatersrand, by 9 January, all white miners had stopped working. These mine workers gathered their weapons and attacked police posts and seized power; however, this was short lived and the then government regained control. After the killing of dozens of strikers and civilians, the movement came to an end.

Breckenridge[77] suggests that part of the revolt was caused by the white workers' need to defend their racial privilege. Breckenridge[78] argues further that as part of the revolt, scores of white men armed with weapons staked out the streets of the suburb of Vrededorp and started attacking at any Africans they could find, including school children. Similar events took place in the suburb of Ferreirastown. This event highlights, unlike what has been suggested by Moodley above, the unfortunate reality of white workers who were protecting their white privilege and not merely an issue of skilled white labour versus unskilled black labour. On the other hand, it highlights and demands an investigation into the extent to which the brutal capitalist machine will go in order to make profits at the expense of the working class. The same can be said of the

[74] Act 75 of 1997.
[75] [2006] 11 BLLR 1074 (LC).
[76] YA Béliard 'A "Labour War" in South Africa: The 1922 Rand Revolution in Sylvia Pankhurst's Workers' Dreadnought' (2016) 57 (1) *Labor History* 20-34.
[77] K Breckenridge 'Fighting for a White South Africa: White working-class racism and the 1922 rand revolt'(2007) 57 (1) *South African Historical Journal* 228-243.
[78] Ibid.

Marikana massacre when armed but peaceful protesting African workers were mercilessly gunned down by those who were entrusted to serve and protect them.[79]

It is evident from the above that the limitations of the past research were the following:

(a) There is no clear definition of what decolonisation is, especially within the labour law context;

(b) Even though some scholars may have called for decolonisation and the use of CRT, there has not yet been any research that makes the reader understand how and why CRT links to labour law;

(c) There has not yet been a study that analyses labour as a commodity since colonisation was a capitalist project;

(d) Past research has not engaged in a discussion that infuses CRT into the debate of access to justice;

(e) Prejudice in the workplace is often left out of the discussion of the decolonisation of labour law; and

(f) Past research in labour law has not yet asked the question of whether black people can or cannot be racist to other people or even to other black people.

III RESEARCH METHODOLOGY

Generally, every research project must involve a disciplined and systematic approach to find the most appropriate results.[80] Qualitative research methodology is generally identified with the field of social sciences and humanities more than with the discipline of law. However, that is not to say that lawyers do not engage in qualitative research.[81] The case-based method of establishing the law through an in-depth analysis of a precedent is a form of qualitative research using

[79] T Ngcukaitobi 'Strike law, structural violence and inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836.
[80] HK Mohajan 'Qualitative research methodology in social sciences and related subjects' (2018) 7(1) *Journal of Economic Development, Environment and People* 23-48.
[81] L Webley 'Chapter 38: Qualitative approaches to empirical research' in Cane, P and Kritzer, H *Oxford Handbook Of Empirical Legal Research* 2010.

documents as source material. It is a method with a focus that involves an interpretive approach to the subject matter.[82]

The case-based method is a type of social science research that uses non-numerical data that seeks to interpret meaning from such data and help us to understand social life through the study of targeted populations, which in this study's context is the previously marginalised groups of people.[83] In essence, qualitative research, unlike quantitative research, does not largely depend on statistics, measurements and quantification, rather, it attempts to capture and categorise social phenomena and their meanings.[84] This study, in adopting qualitative research, attempted to utilise the data collected through an analysis of documents.[85] These documents were primarily textual materials such as case law, journal articles, textbooks and other internet sources.[86] This thesis makes use of words and not numbers in order to understand the social reality of the marginalised groups and individuals. The researcher submits that the study followed a qualitative research approach as it was concerned with making an in-depth analysis of the law through observation and interpretation of texts.

Moreover, this study, in an attempt to interpret the data from textual sources, adopted a socio-legal approach. Harris[87] is of the view that it is widely accepted that the socio-legal research approach is still a developing theory, furthermore, the understanding of both the components of 'socio' and the 'legal' aspects are subject to continuing debates. Furthermore, socio-legal research is commonly defined against the conventional doctrinal or black-letter

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[82] Denzin and Y S Lincoln *The SAGE Handbook of Qualitative Research* (2005) 3rd Ed 1–32. Thousand Oaks, CA: SAGE.

[83] Mohajan HK op cite note 80.

[84] MW Bauer 'Chapter 8 – Classical content analysis: A review', in MW Bauer, G. Gaskell and NC Allum *Qualitative Researching with Text, Image and Sound A Practical Handbook*, London, Thousand Oaks, New Delhi (eds.) (2000) Sage Publications.

[85] T May Social *Research: Issues, Methods and Practices*2nd Ed (2001) Buckingham: Open University Press.

[86] M Zohrabi 'Mixed method research: Instruments, validity, reliability and reporting findings' (2013) 3(2) *Theory and Practice in Language Studies* 254–262.

[87] DR Harris 'The development of socio-legal studies in the United Kingdom' (1983) 3 *Legal Studies* 315; F Cownie *Legal Academics: Culture and Identities* (2004); F Cownie and A Bradney 'Chapter 2 – Socio-legal studies: A challenge to the doctrinal approach' in D Watkins and M Burton (eds) *Research Methods in Law* (Routledge, Abingdon, 2011) p 34; S Blandy (2014) 'Socio-legal approaches to property law research' (2014) 3 (3) *Property Law Review* 166-175; also see A Sarat and T R Kearns 'Beyond the great divide: Forms of legal scholarship and everyday life' in A Sarat and T R Kearns *Law in everyday life* (1993) p 21, p 22 University of Michigan Press, Ann Arbor; Pound R, 'Law in books and law in action' (1910) 44 *American Law Review* 12; BZ Tamanaha 'A vision of socio-legal change: Rescuing Ehrlich from living law' (2011) 36 *Law and Social Inquiry* 297; C McCrudden 'Legal research and the social sciences' (2006) 122 *Law Quarterly Review* 632.

approach to legal writing.[88] The black letter law is rigid and inflexible due to not concerning itself with the social implications of the law, just what the law is and as such, was deemed not suitable for this study. Within the context of this study, the socio-legal methodology is understood as meaning that law is part of the wider social and political structure, it is inextricably related to the wider socio-political space, therefore, it can only be significantly understood if studied in that context.[89] The common thread is that the socio-legal approach is considered by legal scholars to be an aspect of social experience which can be analysed using tools drawn from various social science disciplines. Cotterell[90] suggests that proper understanding of legal thought is not possible without subscribing to the sociology of law, as informed by the social theory. In essence, law should not be viewed as an independent force which is imposed onto society, rather, it should be understood as being a tool that is sharpened by the lived experiences of people through the social, political and economic logics context.[91]

Such an approach grew out of law schools' interest in promoting interdisciplinary studies of law, which in this paper's context clearly links with the intersectionality of rights and understanding of labour law using political and lived experiences of the marginalised people.[92]

IV PROBLEM STATEMENT

The history of South Africa is a fascinating one, from the moment it became a democratic country with a constitutional foundation (1993 and 1996), to the era of the romanticisation of the new Republic (1994 to 2010). However, there were inequality issues lurking in the background.[93] The ugly face of these issues were exposed by a series of events such as the Marikana Massacre in 2012, in particular the #Feesmustfall and #Rhodesmust fall movements in 2015. It was clear 'that the historical inequalities, rooted in racial oppression and dispossession, remain part and

[88] DW Vick 'Interdisciplinarity and the discipline of law' (2004) 31 *Journal of Law and Society* 164.
[89] DO Donovan 'Chapter 7 – Socio-legal methodology: Conceptual underpinnings, justifications and practical pitfalls' in *Legal Research Methods: Principles and Practicalities* (2016) Clarus Press; also see R Banakar, 'Studying cases empirically: A sociological method for studying discrimination cases in Sweden' in R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (2005) Hart Publishing 139.
[90] R Cotterell *Law, Culture and Society: Legal Ideas in the Mirror of Society* (2006) Ashgate, Aldershot, at 1.
[91] S Blandy op cit note 49.
[92] R Banakar and M Travers *Theory and Method in Socio-Legal Research* (2005)
[93] S Heleta 'Decolonizing knowledge in South Africa: Dismantling the pedagogy of big lies' (2018) 40(2) *Ufahamu: A Journal of African Studies* 48 at 48.

parcel of the country's social fabric today'.[94] These must fall movements simply exposed what Heleta[95] regards as a 'big lie' of our post-apartheid rainbow nation. As a result, these events had one thing in common, the need for South Africa to start talking about decolonisation. The need for South Africa to unlearn its dominant narratives (the success of the post-apartheid narrative), revisit its history and laws and rewrite both.[96]

This study concerns the examination of South African labour law. As discussed above, in the general introduction, decolonisation has not yet been used extensively to address various labour law issues.[97] In addition, the unanswered questions on the debate about decolonisation is still ongoing and the dust has not yet settled on it; hence the study has attempted to address them.[98] South Africa has been experiencing a reversal of the transformation agenda in the sense that decolonisation is now regarded as being aggressive, ignorant and done in bad faith.[99]

The researcher is of the view that the first problem with the lack of use of decolonisation is that it leads to instances where the law is often seen as a neutral, colour-blind island of its own.[100] Another problem caused by the lack of use of decolonial thinking and specifically in labour law is, linked to colour-blindness, it leads to instances of the reversal of affirmative action, with white neoliberal groups stigmatising it and labelling it as reverse racism.[101] This means the lack of use of decolonisation has created an instance where white people, contrary to the historical reality of them being the enforcers of racism towards black people, are now deeming themselves as the victims of racism.[102]

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[94] Ibid, see also C Suransky and JC van der Merwe 'Transcending apartheid in higher education: Transforming an institutional culture' (2016) 19(3) *Race Ethnicity and Education* 577 at 577.
[95] Heleta op cit note 93 at 48.
[96] T Letsekha 'Revisiting the debate on the Africanisation of higher education: An appeal for a conceptual shift' (2013) 8 *The Independent Journal of Teaching and Learning* 5 at 9.
[97] Rycroft and Le Roux op cit note 7.
[98] Botha and Fourie op cit note 1.
[99] J Modiri 'Critical race theory is being attacked as need to take racism seriously can no longer be ignored' https://www.businesslive.co.za/bd/opinion/2021-06-24-joel-modiri-critical-race-theory-is-being-attacked-as-need-to-take-racism-seriously-can-no-longer-be-ignored/ [Accessed 14 January 2023].
[100] AD Mutua 'The rise, development, and future directions of critical race theory and related scholarship' (2006) 84 *Denver University Law Review* 329–394.
[101] N Ramalekana ''White backlash' Against affirmative action in the United States and South African courts' (2022) Oxford Human Rights Hub https://ohrh.law.ox.ac.uk/white-backlash-against-affirmative-action-in-the-united-states-and-south-african-courts/ [accessed 31 March 2022] ; see also Ramalekana, N 'A critique of the stigma argument against affirmative action in South Africa' (2022) 4 University of Oxford Human Rights Hub Journal 1–32.
[102] Modiri op cit note 99.

In a more practical perspective, there are specific statutes which, when analysed in a decolonial perspective are an issue and necessitate their decolonisation. Some of the issues, briefly, being who is an 'employee' under section 213 of the LRA, section 1 (xix)(v) of COIDA which also excluded domestic workers from the definition of 'employee'. Section 198(1) and (2) of the LRA allowing labour brokerage. These are just a few provisions, amongst many, that will be analysed in this study from a decolonial perspective.

V PURPOSE OF THE STUDY

The rationale for this study was to attempt to analyse labour law as more than just what the law is at face value, and rather attempt to analyse it as being influenced by socio-political narratives. To address this, the study poses much needed questions to this field concerning race, gender, and economics of the law, all of which have been ignored social issues, which are collectively at the forefront to understanding decolonisation. The study poses questions about the definition of decolonisation and the need to link it to labour law. The study poses questions and provides arguments about the danger of limiting poor African workers' right to access justice through the court systems. The study also poses questions and provides arguments concerning the lack of protection of domestic workers in labour law, the commodification of the workers' labour and the correct approach to addressing racism in the workplace.

In essence, what was of assistance to the study in solving the problem as discussed above was by using the underlying racial, gender and class elements in addressing the issues that ail the labour sector. The class contradictions are not lost to the study and are discussed as well. Perhaps, within the labour sector, the class contradictions are a reflection of the South African society, where race becomes the dominant tool of social division thereby destroying the class struggle which often takes the form of worker solidarity.

VI KEY QUESTIONS OF THIS STUDY

(a) What is decolonisation, and how does it link to labour law?

(b) What is critical race theory and what role can it play in the decolonisation of labour law?

(c) Has labour law advanced access to justice for the working class?

(d) Have our legal institutions made any strides towards protecting the most vulnerable people in labour law, the poor African women?

(e) How can labour law be used to address the issue of commodifying employees?

(f) What is the correct approach in dealing with racism in the workplace?

(g) Is there a link between the race, class and the right to strike?

VII STRUCTURE OF DISSERTATION

(a) Chapter 1: General introduction – this chapter dealt with the overview of the dissertation, highlighting the literature that was used in this study such as the Labour Relations Act and other relevant statutes, the leading cases, and the articles of the leading scholars such as Joel Modiri, Kimberlé Crenshaw, Derrick Bell and others. This chapter also pointed out key questions and the problem statement of the study. This chapter set the foundation of the other chapters;

(b) Chapter 2: Decolonisation, critical race theory and labour law – this chapter provided the history and the definition of decolonisation, critical race theory as well as other terms that were used throughout the thesis such as whiteness, blackness and who an African person is. Defining and contextualising these terms proved to be important in setting the background of their use and assisted in understanding why a particular term was used in that context;

(c) Chapter 3: Access to justice of the working class in labour law matters society – this chapter dealt with the issue of costs orders in labour law matters and provided submissions on why it is important to understand costs orders in relation to the recipient's race and class. The chapter also analysed the impact of employers not granting trade unions organisational rights to represent employees who do not fall withing the trade union's broader constitutional scope. This discussion linked to decolonisation in the broader context of access to justice for workers and how the employer, often an already resourced party could deny justice to an employee, often an under resourced, working class party and the need to then fix this power imbalance;

(d) Chapter 4: The delayed protection of women in labour law – this chapter discussed the *Mahlangu* case where an African woman working as a domestic worker was excluded from the definition of the word "employee" under COIDA. The highlight of the chapter was the

discussion of the court's application of intersectionality and in a way, the decolonisation of this entire area of human labour, helping in including domestic workers in the definition of an "employee" under COIDA;

(e) Chapter 5: Labour as a commodity to be bought, sold and transferred – this chapter discussed the question of whether labour is or is not a commodity. The study did this through a discussion of various well-known and leading scholars on the topic;

(g) Chapter 6: The correct approach to racism in the workplace – this chapter discussed what racism is, who can and who cannot be racist and used its understanding of this in analysing various cases dealing with racism from a person of a certain 'race' directed to a person of 'another race';

(f) Chapter 7: The link between race, class and the right to strike – this chapter dealt with whether there is any link between race, class and strikes in South Africa, who in the past has been granted this right, past incidences of strikes turning violent and deadly and how the right to strike is applied currently; and

(i) Chapter 8: Recommendations and conclusion – this chapter highlighted the findings as well as the limitation of the thesis. The chapter also provided recommendations on how to address the issues that were dealt with in the thesis as well as brief discussions of the areas where further research can be done.

VIII CONCLUSION

This chapter performed the function of providing a general introduction to the issues facing labour law, such as the lack of decolonial thought. The chapter highlighted the various literature that was reviewed and is presented across the thesis, ranging from journal articles and case law to relevant statutes. However, due to the nature of the study (being mostly concerned with underlying race, gender and economic elements of the issues facing the workers), it is possible to address other issues linked with decolonisation such as culture, sexual harassment in the workplace and many more. This means that the study's limitation is the issues the study does not address. This chapter also explained the manner in which the study was conducted. This was done through outlining the quantitative research methodology that was used to assist in planning the research, the thesis and to yield findings in accordance with the study. The chapter also

highlighted aim of the study, broadly being, the introduction of decolonisation in the labour law sector.

Accordingly, the next chapter deals with the various terms that are used throughout the study, such as decolonisation, critical race theory, whiteness and other terms.

CHAPTER 2

DECOLONISATION, CRITICAL RACE THEORY AND LABOUR LAW

I INTRODUCTION

> 'Four hundred years the white man has had his foot-long knife in the black man's back - and now the white man starts to wiggle the knife out, maybe six inches! The black man's supposed to be grateful? Why, if the white man jerked the knife out, it's still going to leave a scar! '[1]

This chapter defines and gives a holistic view of what decolonisation and critical race theory are and how they both link to labour law. As previously highlighted in Chapter 1 of this thesis, the post-colonial, post-apartheid South Africa (the paper also points out the illusion and danger of using the terminology of post-colonial and post-apartheid South Africa), in its search for a decolonial voice, experienced a wave of movements that sought to be rid of the stench of the colonial master. Such movements, which include the esteemed #feesmustfall and #rhodesmustfall opened up a much needed discussion around the topic of decolonisation. These movements protested the reflection of worldviews through the eyes of white, capitalist, heterosexual, Christian, men.[2] Botha and Fourie suggest that the call for decolonising labour law requires a radical rethinking of this subject.[3] In this statement lies the crux of this chapter, the call for rethinking labour law from a decolonial perspective. This chapter is an attempt to answer such a call.

Moreover, Modiri[4] argued that as a legally based philosophical discipline, critical race theory has not been adopted in mainstream South African legal scholarship and this is surprising for a state with a tragic history of race based segregation and institutionalised race-based discrimination and oppression. This study has also attempted to answer this call within the labour law perspective.

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[1] CJ Nan 'Adding salt to the wound: Affirmative action and critical race theory' (1994) 12(2) *Minnesota Journal of Law and Inequality* 553–572 cites Malcom X *The autobiography of Malcom X* (1964).
[2] TO Molefe 'Oppression must fall: South Africa's revolution in theory' (2016) 33(1) *World Policy Journal* 30–37; also see S Shay 'Decolonising the curriculum: It's time for a strategy' (2016) The Conversation, 13 June, from https://theconversation.com/decolonisingthe-curriculum-its-time-for-a-strategy-60598 [Accessed 29 March 2022].
[3] MM Botha and E Fourie 'Decolonising the labour law curriculum in the new world of work' 2019 (82) *THRHR* 177 at 178.
[4] J Modiri 'The colour of law, power and knowledge: Introducing Critical Race Theory (CRT) in (Post) Apartheid South Africa' 2012 *SA Journal on Human Rights* 405 at 406.

However, before proceeding with the crux of the chapter, it is necessary to deal with the three important concepts that are widely used in this thesis and to not only define them but also outline how they are used in this thesis. This is because when Europeans colonised the African continent, they constructed their own idea of what it means to be white and a system of whiteness. This study agrees with Wing[5] in that race is not a biological reality, rather it is a social construct that is fluid and flexible. A person who may be considered as being black in America can be classified as a so-called coloured in South Africa or even white in Brazil or Jamaica. The colonies of European colonial masters each had their own concept of black.[6] The concept of black and the concept of African are not used interchangeably within the context of this thesis, each term has a specific meaning and is used for a specific purpose in that particular context.

(a) Whiteness

Modiri[7] suggests that whiteness is to be understood not merely as a matter of the pigmentation of the skin or ethno-racial identity but more significantly as signifying those who possess structural racial privilege, economic advantage and cultural dominance. Whiteness is the understanding that the way in which white people see the world becomes the way the world is. Whiteness thus involves white people and their perspectives being the centre of the world views and the law, part of the problem critical race theory seeks to deal with.[8] Modiri further suggests that this is part of the reason why writings that make up the South African legal theory and scholarship take the form of a limited and inward looking conversation between white scholars, about other white

[5] AK Wing 'Is there a future for critical race theory?' (2016) 66(1) *Journal of Legal Education* 44 at 48.
[6] Ibid.
[7] JM Modiri *the jurisprudence of Steve Biko: A study in race law, and power in the "afterlife" of colonial apartheid* (Phd thesis University of Pretoria 2017) at 9 cites P Taylor 'Silence and Sympathy: Dewey's Whiteness' in G Yancy (ed) *What White Looks Like: African -American Philosophers on the Whiteness Question* (2004) 229; J Modiri 'Azanian political thought and the undoing of South African knowledges' (2021) 68(168) *Theoria* 42 at 47 suggests that whiteness is also about white people being the culturally and socially dominant group in South Africa and such domination results in white demographic overrepresentation in the academy and the expression of white people's perspectives as the world view; BM Magubane *The Making of a Racist State: British Imperialism and Union of South Africa 1875–1910* (1996) Trenton, NJ: Africa World Press; T Madlingozi 2017 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28(1) *Stellenbosch Law Review* 123–147 at 133 cites S Biko *I Write What I Like* (2004) 67 who notes that South Africa is subject to the white supremacy that oppresses black people in all aspects of life. This white power structure constrains black people's reaction to it by limiting the emancipatory strategy to end segregation and usher in a new age of democratisation; and, most importantly, the end of a system and structures that divided the world into the dominant white world and the dominated black world.
[8] Ibid.

scholars reflecting on and disagreeing over the concerns and anxieties of white people.[9] This is another issue that CRT seeks to address and which in fact this study has attempted to address. The perpetuation of whiteness in South African legal thought is so vast that one can be forgiven for thinking black legal thought is non-existent.[10] Such a state of legal thought creates a dilemma whereby jurists look to Europe for approval and assimilation and approval.[11] One such example, the study submits, is the construction of the Constitution of the Republic of South Africa. Modiri suggests that the reason for such a white-centred legal system, institutions and schools of thought was a deliberate construction of white colonial settlers who sought to ensure that their descendants do not forget their origins and remain connected to the events of their native homeland.[12]

(b) Blackness

The Black Consciousness Movement's (BCM's) understanding of blackness was adopted for this study and is used in this thesis. BCM concerns the study of the mind of a colonised black person and the power relations which influence what such a colonised person thinks about themselves and their coloniser.[13] Ndaba[14] notes that every struggle and movement has its hero. Burkina Faso in its anti-imperialism struggle of the 1980s had Thomas Sankara, the 26 July Movement in Cuba had Ernesto 'Che' Guevara, and Black Consciousness in South Africa had Steve Biko and Ongkopotse Abram Tiro. The BCM saw its rise in the 1970s, a time when the rest of the African continent was enjoying the fruits of ridding themselves, in part, of the colonial master, while South Africa was experiencing the height of the violent and corrupt colonial extension regime, apartheid South Africa.[15]

This group of young students (creators of the BCM) studied the pioneers of black thought such as the leader of the Liberation Front of Mozambique, commonly referred to as FRELIMO

[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid; also see N Dladla 'Decolonising the university in South Africa -- A precondition for justice' in AISA (ed) Peace and Security for African Development (2012) 160–174.
[13] B Ndaba et al *The Black Consciousness Reader* (2017) Jacaranda Media.
[14] Ibid.
[15] LA Hadfield 'Steve Biko and the Black Consciousness Movement' Oxford Research Encyclopedia of African History 27 February 2017 *https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-83*, [Accessed 8 April 2022].

and president of Mozambique Samora Machel, the Kenyan writer and post-colonial theorist Ngungi Wa Thiongo, Franz Omar Fanon's analysis of the psychological impact of colonialism, Tanzania's Julius 'Mwalimu' Nyerere's Ujaama, a version of African socialism that emphasised self-reliance and development for total emancipation.[16] They also read sources by black authors in America, specifically relating to the Black Power movement. They utilised the writings of Brazil's educationalist, Paulo Freire, from which they derived the idea of 'to conscientise'. To conscientise means to awaken people to a critical awareness of their situation and their ability to change their situation in order for them to not be complicit and dormant in their own oppression and exploitation.[17] This study also seeks to conscientise the reader as to the position of African people, the working class and women in labour law.

Black Consciousness regards being black or blackness as an attitude of the mind and a way of life and not merely as a matter of the pigmentation of the skin.[18] It enhanced the idea of black people to believe in their potential and value as a people and saw the need for black people to work together for total emancipation.[19] Black Consciousness scholars understood that black people had accepted their own inferiority in society, they did not seek to challenge the status quo.[20] Stephen Bantu Biko who is generally regarded as Steve Biko, a pioneer who spearheaded the movement, coined the famous quote 'The most potent weapon in the hands of the oppressor [was] the mind of the oppressed'.[21] Therefore, if black people did not concern themselves with who was light skinned, who was dark skinned, who was a descendant of Asia or the Caribbean Islands, the Oceanic Islands, the Indian subcontinent etc. they could unite under one banner, the banner of all of them being black people, collectively. Therefore, a person of Indian or Chinese or African ancestry is part of the concept of black person.

(c) African

This study adopted a Pan African understanding of who an African person is. Pan Africanism, before its formal adoption, existed through the practices of the legendary African rulers such as the brave and famous Zulu Emperor Shaka Zulu (*Ilembe eleqa amanye amalembe*

[16] Ibid at 3.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] S Biko *I Write What I Like* (1996) Randburg, South Africa: Ravan Press at 68.

ngokukhalipha, unodumo ehleli kamenzi), the first king of the Songhai Empire, Sunni Alli, and the queen mother of the Gold Coast Yaa Asantewaa.[22] These figures sought unity amongst the natives of the continent. Pan Africanism, according to Ngcukaitobi[23], was formally adopted by the first African lawyer and advocate in South Africa, practising in the Cape Colony, born in Trinidad, Sylvester Williams. This ideology was then advanced by its highly esteemed disciples such as the Jamaican born Marcus Messiah Garvey, the American born Booker T Washington and W.E.B Du Bois, the legendary South African Robert Mangaliso Sobukwe, the first president of an independent Ghana Kwame Nkrumah, the Tanzanian African Socialist Julius Kambarage 'Mwalimu' Nyerere, and the young yet legendary Patrice Lumumba of Congo. All of them equally African, none was more African than the other.

Pan Africanism was founded as a result of what Williams had witnessed in the Cape Colony and the other of the then colonies with regards to the treatment of people of African ancestry and with the influence of a black woman called Alice Victoria Kinloch.[24] While Williams was an educated person of African ancestry, he received the status of coloured and was treated slightly better than other natives who were in a less fortunate position. Kinloch had witnessed the horrors faced by African workers in the mines in Kimberly, whilst in the United Kingdom, Kinloch met Williams and they discussed the lived experiences of African workers who were treated in a slave-like manner with the blessing of Christian missionaries.[25] Kinloch went on to publish a pamphlet titled 'Are South African Diamonds Worth their Cost?' in which she argued that the world needed to factor the bloodshed and the lives of African workers into the price of such diamonds.[26] Ngcukaitobi[27] notes that the conditions of employment were so horrifying in these mines and African workers were imprisoned for refusing to work and for small offences. Influenced by Kinloch, Williams described the compound system enforced by the

[22] H Kah 'Kwame Nkrumah and the pan African vision: Between acceptance and rebuttal' (2016) *Austral Brazilian Journal of Strategy & International Relations* 141-164; also see D Golan 'The life story of King Shaka and gender tensions in the Zulu state' (1990) 17 *History in Africa* 95-111.
[23] T Ngcukaitobi *The Land Is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (2018) at 40.
[24] Ibid at 43.
[25] Ibid at 44.
[26] Ibid.
[27] Ibid.

capitalists in South Africa as being illegal.[28] It was Kinloch, a black woman, who was the backbone of the foundation of Pan Africanism.

Williams was of the view that African people must be self-reliant, mutually cooperative and pursue common ideas in order to achieve absolute emancipation from those who sought to put them in chains.[29] Pan Africanism, in seeking to unify all people of African ancestry, irrespective of the continents where they are located, created the identity of an African person. Levitt[30] provides that at its core, Pan-Africanism is the internationalisation of African liberation philosophy, which seeks to not only unify but to also empower people of African descent all over the world. It demands freedom and justice from the domestic and global forces of white domination. Pan Africanism is the solidarity amongst the children of Africa and their descendants, wherever they may be.[31] Thus, an African is a person of African ancestry, irrespective of the continent or country in which they reside or were enslaved in. Hence, an African includes and is not limited to descendants of African people that were enslaved in the Americas, the Caribbean Islands, those who reside in Eurasia, those who remained and suffered oppression on the African continent etc. African people, in essence, fall under the broader umbrella of the term black people.

(d) Decolonisation

It is important that before the thesis focuses on the concept of decolonisation, it first highlights the process of colonisation. At face value, colonisation was a process of the imposition of whiteness, which in turn was seen as a symbol of purity and the definition of what it meant to be a civilised, modern and human being.[32] According to Mutwa,[33] one of the primary objectives of this system was to deny the African person their identity in order to turn them into a puppet, make them dependent on white people and the exploitative ways of the western culture. African people were made to look down upon themselves, and as a result have other nations looking

[28] Ibid.
[29] Ibid at 41.
[30] JI Levitt 'Beyond borders: Martin Luther King, jr., Africa, and pan Africanism' (2017) 31(1) *Temple International & Comparative Law Journal* 301at 303.
[31]A Gearey 'WEB du Bois ambiguous politics of liberation: race, marxism and pan Africanism' (2012) 1(3) *Columbia Journal of Race and Law* 265 at 265.
[32] F Fanon *Black Skins, White Masks* (1967).
[33] C Mutwa *Africa's Hidden History: The Reptilian Agenda* (1964) at 11.

down on them as well. Nwadeyi[34] is of the view that colonialism and other systems of perpetuating white supremacy such as apartheid, not only affected the economic and political rights and freedoms, they violated every aspect of life of African people. The effects of colonisation and its legacy are still entrenched in South Africa even today. However, this study does not provide a discussion on the psychological effect of colonisation onto African people.

The process of colonisation concerned the conquest and domination of native people of a region by a foreign power and as a result the influx of settlers into that region.[35] The colonisation of Africa demanded that a legal system be imposed to maintain control over the peoples of that region and resolve disputes within that region.[36] These colonial masters established and imposed laws in accordance with their native lands at the expense and prejudice of their colonial subjects, disregarding already existing dispute resolution mechanisms as being primitive.[37]

In English speaking Africa, British common law was forcibly applied onto African people without any consideration of the local conditions.[38] Within the South African perspective, through the colonisation by both the Dutch and the British, the legal system became a hybrid system. This was due to an influence from the Roman-Dutch law, common law, English law and the deliberate exclusion of the customary law of the native peoples of the region. The British Colonial Law Validity Acts[39] cemented the domination of colonial law as it provided that colonial law shall not be defied or be in competition with other law.

South African labour issues go back to before the discovery of mineral resources such as diamonds and gold in the Northern Cape and Gauteng regions.[40] Through the imposition of the immoral and unjust head tax, which the famous Zulu warrior chief Bhambatha kaMancinza Zondi sacrificed his own life to fight against and after the land and cattle of Africans had been

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[34] L Nwadeyi 2016, 'We all have a responsibility to disrupt the status quo', Mail & Guardian, *http://mg.co.za/article/2016-06-29-we-allhave-agency-and-we-must-use-it-to-disrupt-the-status-quo* [Accessed on 29 March 2022].
[35] JA Ryan and AC Mullen *Unrepresented Nations and Peoples Organization Yearbook*: (1998) Kluwer Law International; also see J Rossouw 'South Africa's enduring colonial nature and universities' (2018) 40 *Strategic Review for Southern Africa* 65 Yearbook, Kluwer Law International.
[36] S F Joireman 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39(4) *The Journal of Modern African Studies* 571 at 571.
[37] Ibid, also see G D Triggs *International Law: Contemporary Principles and Practices* (2006) LexisNexis Butterworths.
[38] Ibid at 577.
[39] Acts 28 & 29 of 1865.
[40] L Callinicos 'Labour history and worker education in South Africa' (1993) 65 *Labour History* 162-178 at 164

stolen at gun point; scores of African people were forced to look to the mines for a source of income to sustain their families. Deep mining necessitated the introduction of British and Australian workers and their machines, and these workers brought with them violent, militant unions.[41] Furthermore, the colonisation of the African labour force was perpetuated through mechanisms such as the Master and Servant Act 15 of 1841 which prohibited Africans from engaging in strikes, amongst other things.

However, vulnerable African workers were not only reduced to unskilled labour, but they were also not absorbed into these unions.[42] The relevant colonial statute was the Industrial Conciliation Act[43] which prohibited African workers from being members of a trade union or registering a trade union. As such, the African workers did not enjoy minimum wages, the ability to sell their labour freely and trade union recognition. The protection of white workers' minimum wage was advanced through the colonial law called the Minimum Wages Act of 1925. It is important to understand that the African workers were deliberately not trained to have the necessary skill, which is evidenced by the fact that unskilled Afrikaner peasants were trained and absorbed into the unions. This created a double-edged sword for the white capitalist settlers as the low wage African had the potential to undercut the high waged white workers, thus, being forced to choose between profits and their corrupt racial preservation.[44]

The white workers called for the reservation of the so-called skilled jobs to be exclusive to white workers. This created what we now refer to as the colour bar. One of the statutes that was responsible for this was the Mines and Works Act[45] which only gave certificates of competency to white and so-called coloured workers. Such events led to what we now refer to as the Rand Rebellion of 1922, which is discussed in detail in Chapter 7 of this thesis along with the history of racially-based unionism.

African people were forced to carry a pass and as a result, they were excluded from being citizens in the land of their forefathers. This meant that Africans were not included in the definition of the word 'employee'. The effects of this are still felt today as can be seen in the *Mahlangu* case which is dealt with in detail in Chapter 4.

[41] Ibid.
[42] Ibid.
[43] No 11 of 1924.
[44]Callinicos op cit note 40.
[45] No 12 of 1911.

The exploitative nature of contractual labour and its effects can also be seen in the decision of the Labour Court in the case of *Uber SA Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)*[46] where the prospective employer sought to exclude the Uber drivers from the definition of the word 'employee'. This case concerned a transportation application called Uber and the drivers utilising the application to transport people. The Labour Court had to decide whether the drivers in question were employees as defined in 213 of the LRA, and if they were employed by Uber SA.

The CCMA stated that the Code of Good Practice: Who is an Employee? (the Code) established a comprehensive test to determine who is an employee since the already existing tests were not much helpful (control test, the organisational test, the economic dependence test and the dominant impression test).[47] The CCMA proceeded to state that this comprehensive test looks at the reality of the relationship between the parties. This test demands that irrespective of the form of the contract between the parties, a person deciding whether someone is an employee or an independent contractor must consider the real relationship between the parties.[48] Using this test, the CCMA proceeded to reject Uber South Africa's submission that the drivers were employees of the partner whose vehicles they drove, or that they were independent contractors.[49] In its reasoning, the CCMA stated that it adopted a generous interpretation of section 213 of the LRA. The commissioner believed that such an approach is justified by the requirement to adopt an

[46] (2018) 39 *ILJ* 903.
[47] Ibid para 57; also see *Medical Association of South Africa v Minister of Health* (1997) 18 ILJ 528 (LC); *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC); *SABC v McKenzie* (1999) 20 ILJ 585(LAC); on the control test see *Colonial Mutual Life Association v McDonald* 1931 AD 412*; R v AMCA Services Ltd* 1954 (4) SA 208 (A); *J and JN Freeze Trust v The Statutory Council for the Squid and Related Fisheries of South Africa* (2011) 32 ILJ 2966 (LC); *Mandla v LAD Brokers (Pty) Ltd* (2000) 5 LLD 457 (LC); R Le Roux 'The evolution of the contract of employment in South Africa' (2010) 39 ILJ 139; *Ongevallekommissaris v Onderlinge Versekerings Genootskap Avbob* 1976 (4) SA 446 (A); on the organizational test see O Kahn-Freund 'A note on status and contract in British law' (1951) 14 Modern Law Review 504; Smit v Workmen's Compensation Commissioner 1979 SA 51 (A); on the economic test see *SITA (Pty) Ltd v CCMA* (2008) 29 ILJ 2234 (LAC); *NEHAWU v Ramodise* (2010) 31 ILJ 695 (LC); on the dominant impression test see *Smit v Workmen's Compensation* 1979 SA 51 (A); *Borcheds v C W Pearce and J Sherward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC); *Board Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC); E Mureinik 'The contract of service: An easy test for hard cases' (1980) 97 SALJ 246; M Brassey 'The nature of employment' (1990) 11 ILJ 889; M Wallis 'The LRA and the common law' (2005) 9(2) *Law, Democracy and Development* 181-192.
[48] Ibid.
[49] Ibid para 59.

interpretation which is in compliance with the Constitution and which promotes social justice and effective dispute resolution.[50]

In the Labour Court, the court provided that the starting point is s 213 of the LRA, which defines an employee in the following terms: an employee refers to "(a) anyone, excluding an independent contractor, who works for another or for the State in exchange for remuneration; and (b) any other person who in any manner assists in carrying on the business of an employer".[51] S 200A of the LRA extends a presumption in favour of persons who work for any other person, irrespective of the contract between the parties, the status of employee, provided that one or more listed factors are present.[52] The factors in question are: '(a) the manner in which the person works is subject to the control of another person; (b) the person's hours of work are subject to the control of another person; (c) in the situation of a person who works for an organisation, is that the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person.'

However, the Labour Court turned using *Liberty Life Association of Africa Ltd v Niselow*[53] to state that it is an important precondition for a party to establish the existence of a contractual relationship between themselves and the employer in question, irrespective of whether or not the presumption of employment under s 200A is relied on.[54] The Labour Court in effect disregarded section 200A and as a result held that the lack of a contractual agreement between the drivers and Uber SA was fatal to the drivers' claim to be employees of Uber SA. The

[50] Ibid para 60.
[51] Ibid para 65.
[52] Ibid para 66.
[53] (1996) 17 *ILJ* 673 (LAC).
[54] For a further discussion on S200A, also see *Universal Church of the Kingdom of God v Myeni* (2015) 36 ILJ 2832 (LAC) (28 July 2015); *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo* (2007) 28 ILJ 1100 (CC); *Van Zyl v WCPA Department of Transport* (2004) 25 ILJ 2060; J Theron 'The shift to services and triangular employment: Implications for labour market reform' (2008) ILJ 1-21; J Theron 'Erosion of workers' rights and the presumption as to who is an employee' (2002) 6(1) the *Law, Democracy and Development* 27-56.

court was of the view that the commissioner had committed a substantial error of law, which justifies the setting aside of her ruling.[55]

Van Eck and Nemusimbori [56] suggest that the approach of the court in this case was flawed. The court could and should have used foreign decisions to come to a decision favourable and fair to the drivers. However, this study is not concerned with a comparative approach. What is of importance is that Van Eck and Nemusimbori state that our courts have previously unravelled schemes where one company, usually an empty shell, undertakes the administrative tasks of an employer.[57] Without the establishment of Uber SA as a subsidiary company, Uber BV would have experienced difficulties operating in South Africa, hence, the court should have sought to remove this complex scheme.[58]

This study submits that the court missed an opportunity to develop labour law in order to achieve social justice. The development of the common law is entrusted to the courts by section 39 of the Constitution. The court could have adopted the corporate common law principle of piercing the corporate veil, in this study's context, an attempt to pierce the labour veil. This principle provides for liability against people who hide behind a company, thus, piercing the veil metaphorically.[59] Using this principle, the court could have expanded on this already existing test in order to bypass the contractual relationship required by section 200A in order to achieve social justice and offer protection to the Uber drivers. However, this is discussed in detail in Chapter 8 of this thesis when dealing with recommendations.

Maguire[60] argues that the mission of decolonisation is far from coming to an end. Therefore, it is necessary to understand what decolonisation is, however, it is equally important

[55] *Uber* supra 46 para 72.
[56] S van Eck and N Nemusimbori 'Uber drivers: Sad to say, but not employees of Uber SA' (2018) 81 *THRHR* at 473
[57] *August Läpple (South Africa) v Jarrett* (JR 1651/01) [2003] ZALC 113 (20 October 2003); *Footwear Trading CC v Mdlalose* (2005) 5 BLLR 452 (LAC)
[58] van Eck and Nemusimbori op cit note 56 at 481.
[59] J Cohen *Veil piercing a necessary evil? A critical study on the doctrines of limited liability and piercing the corporate veil* (University of Cape Town, Unplublished LLM Theses, 2006 UCT).
[60] A Maguire 'Contemporary anti-colonial self-determination claims and the decolonisation of international law' (2013) 22(1) *Griffith Law Rev* 238-268; Madlingozi op cit note 7 at 134 notes that Biko and Sobukwe were of the view that decolonisation imperative was to overburden the whole system colonial system in order to achieve a total end of the anti-black world.

to understand that the concept of decolonisation has not yet been clearly defined.[61] At face value, decolonisation concerns the disruption of whiteness.[62] Decolonisation concerns moving away from a Eurocentric understanding of the law, connected to legal structures which traditionally stem from colonialism.[63] This concept of decolonisation entails drawing from various sources of law to promote the transformative capability of the law in achieving more social and economic justice.[64] Decolonisation goes beyond what the law is, it concerns itself with how these laws are used in society.[65] Within the labour law perspective it becomes necessary to utilise the constitutional rights of workers as they are important considerations to take into account in the bid for decolonising labour law.[66] As highlighted in Chapter 1 of this thesis, this approach was best utilised in the *Mahlangu* matter where the Constitutional Court achieved social justice through considering the intersectionality of constitutional rights. This case will also be dealt with in great detail in Chapter 4 of this thesis.

Moreover, decolonisation has shifted from seeking independence from external domination to seeking the transformation of institutions that were the centre of producing racial prejudices that were enforced in colonial times.[67] The study submits that labour law is one such institution that enforced racial prejudices, which necessitates its transformation and rethinking in a radical manner. Therefore, the discussion of what the decolonisation of labour law is should be re-imagined in light of this discussion.[68] In essence, in order to decolonise, courts must transform how they interpret and apply the law and attempt to do this by using critical race theory which is discussed below. CRT is part of the attempt to decolonise the law, labour law.

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[61] C Himonga 'The constitutional court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law' (2017) *Acta Juridica* 101.
[62] S Heleta 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa' (2016) 1(1) *Transformation in Higher Education* 1–8; A Thornton 'Decolonisation' (1963) 19(1) *International Journal* 7-29; KB Motshabi 'Decolonising the university: a law perspective' (2018) 40(1) *Strategic Review for Southern* 104–115 describes decolonisation as a project that is working toward a vision of human life that is not structured by the imposition an ideal of society by one group over those that differ from that society.
[63] C Himonga op cite note 61.
[64] C Himonga and Diallo, F 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) *PER* 1 at 5.
[65] Ibid.
[66] MM Botha and E Fourie 'Decolonising the labour law curriculum in the new world of work' 2019 (82) *THRHR* 177 at 177, see TR Jeewa and J Bhima 'Discriminatory language: A remnant of colonial oppression' (2021) 11 *Constitutional Court Review* 323–339 on a discussion that judgments and laws that do not consider the lived experiences of the people cannot lead to substantive equality.
[67] M Mamdani 'Between the public intellectual and the scholar: Decolonization and some post-independence initiatives in African higher education' 2016 *Inter-Asia Cultural Studies* 79.
[68] Botha and Fourie op cit note 66.

It is equally important to point out that the quest for decolonisation is not without its dissenter's as it has and continues to face resistance. Sindane notes that the resistance towards decolonisation has, so far been those who either dismiss it in its entirety or those who have dismissed it in favour of different approaches.[69] Sindane notes that those who dismiss decolonisation entirely do so under the opinion that is simply Marxist anarchy that is bound to fail.[70]

On the other hand, those who favour nuanced approaches critique decolonisation under the opinion that it focuses too much on race and racial issues while ignoring class and gender issues.[71] The srudy is of the view that this perspective is even more dangerous because it fails to recognise that the inseparable nature of class, race and gender in the colonisation and it creates oppression Olympics. This view on decolonisation creates what Ehrenreich[72] labels as the infinite regress problem where the oppressed become obsessed with the differences amongst them to the extent they split into smaller groups instead of their unification against the single oppressor and coloniser. The study views this critique of decolonisation as lacking substance as it simply assumes that a struggle for racial equality means neglecting a class or gender struggle.

Jonathan Jansen[73] provides further counterarguments to decolonisation and he notes that the issue with this principle within the South African perspective is, South African adopted decolonisation later on, which limited its understanding of the principle. This created 'the lack of an intellectual and political tradition of decolonisation on South African soil'. Jansen argues that this late adoption of decolonisation in South Africa created the second problem, that is the context of its application.[74] The South African application simply focused on Apartheid, it did not go any further back to address colonisation itself.[75]

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[69] N Sindane 'Prophecy and the Pandemic: The Vindication of Decolonial Legal Critical Scholarship' 2022 37(1) *Southern African Public Law* 1 – 13 at 9.
[70] Ibid at 9; see also W Gravett 'Of "Deconstruction" and "Destruction" – Why Critical Legal Theory cannot be the Cornerstone of the LLB Curriculum' (2018) 135(2) *SALJ* 285 – 323 at 289.
[71] Ibid at 10; see also J Dugard 'Bringing Gender and Class into the Frame: An Intersectional Analysis of Decoloniality-as-race Critique of the Use of Law for Social Change' (2021) 32(1) *Stellenbosch Law Review* 29.
[72] E Nancy 'Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*'* 2002 *University of Missouri Kansas City Law Review* 2002 at 251; see also Chang, Robert and McCristal Culp Jr, Jerome. 'After Intersectionality' 2002 *University of Missouri Kansas City Law Review* 71(2) : 486 – 492.
[73] J Jansen 'The problem with decolonisation: entanglements in the politics of knowledge' 2023 *Journal of Modern African Studies* 139-156 at 141.
[74] ibid at 142.
[75] Ibid.

Before proceeding with the analysis of CRT, it is important to discuss Africanisation and post-colonialism in order to distinguish these concepts from decolonisation, decolonisation being the focus point of the study. Fanon[76] suggests that decolonisation and Africanisation are not synonymous and that Africanisation could be an obstacle to decolonisation. Fanon dismissed Africanisation on political grounds as he saw it as having the potential for chauvinism, which in turn could mutate into prejudice.[77] As briefly discussed in Chapter 1 of this thesis, Makgoba[78] is of the view that Africanisation does not concern the exclusion of Europeans and their culture, but rather, it is the inclusion of the way of life of African people. Africanisation involves integrating, modifying other cultures through African visions to provide an evolution that is essential in the global community to accommodate each other. Makgoba further defines Africanisation as the process of interpreting African identity and culture. Louw[79] states that at this moment in time, in Africa, there is a sense amongst the continent's citizens that they no longer identify with the colonial masters of the global north, rather, they identify with Africa in its own right. The study submits that within the context of decolonisation of labour law, Africanisation would then mean the inclusion of African value systems in the employment space and the way the courts interpret the law. This is portrayed through the adoption of analysing the social aspect of the law, not just what the law is.

Africanisation involves the strategic deployment of African people in positions that enable them to gain control of the broader society.[80] This study submits that within the labour law perspective, Africanisation would be the calculated promotion of African workers into key managerial positions in order to give effect to the voices of African people in the workplace. Simply put, the difference between decolonisation and Africanisation is that decolonisation is the undoing of colonisation while Africanisation is about the inclusion of African voices in white spaces and institutions.[81] The researcher is of the view that while Africanisation is important, the

[76] L le Grange 'Decolonising, Africanising, indigenising, and internationalising curriculum studies: Opportunities to (re)imagine the field' (2018) (74) *Journal of Education* 4 at 8; F Fanon *The Wretched of the Earth* (1963) New York, NY: Grove Press.
[77] G Mheta 'Decolonisation of the curriculum: A case study of the Durban University of Technology in South Africa' (2018) 38 (4) *South African Journal of Education* 1 at 3.
[78] MW Makgoba *Mokoko: The Makgoba affair – a reflection on transformation* (1997) Florida: Vivlia.
[79] W Louw 'Africanisation: A rich environment for active learning on a global platform' (2010) 32(1) *Progressio* 42–54.
[80] Ibid at 9.
[81] Ibid at 8.

first step is undoing colonisation, hence, the focus of the thesis is on decolonisation and not Africanisation.

It is also important to briefly discuss the post-colonial framework. Maqutu[82] provides that the postcolonial theory is an branch of the anti-colonial movement which preceded decolonisation and swept through the African continent in the mid to late twentieth century. Maqutu argues further that postcolonial theory establishes a critical legal thinking from which to examine current governing structures and their operation. The postcolonial theory does not only mean the period after colonisation, it is also a quest for a base of identity and culture of colonised peoples.[83] While it is important to aspire for an after colonisation labour law, this study did not utilise postcolonial theory as a tool of analysis.

(e) An investigation of critical race theory

In recent times, there has been a rise in the misguided right-wing rejection of critical race theory through viewing it as reverse racism. There has also been a rise in the neoliberal politics to use tactics of colour blindness as means to undermine the struggle of African people. As such, it is important for this chapter to engage in a holistic discussion of CRT.

Critical race theory is the study of the relationship between race and power.[84] Litowitz[85] suggests that this school of thought developed in the late 1980s as a result of the failure of critical legal studies[86] (CLS) to deal sufficiently with racial issues. At face value, CLS is a political location for scholars on the left of the political spectrum who extend the domain of the

[82] L Maqutu *The postcoloniality of labour law: A South African perspective* (PhD theses, University of KwaZulu Natal 2020) at 34; on postcolonialism and postcolonial theory also see S Nagy-Zekmi 'Frantz Fanon in New Light: Recycling in Postcolonial Theory' (2007) 4 (3) Journal of Caribbean Literatures 129-139; Z R. Chaudhary 'Subjects in Difference: Walter Benjamin, Frantz Fanon, and Postcolonial Theory' (2012) 23 (1) A Journal of Feminist Cultural Studies 151–183

[83] Ibid at 40; also see S Seth 'Postcolonial Theory and the Critique of International Relations' (2011) 40 Millennium Journal of International Studies 167 at 174.

[84] J Stefancic and R Delgado Critical race theory: An introduction (2010).; also see D A Bell 'Who's afraid of critical race theory' (1995) 4 University of Illinois Law Review 893-910 at 898, Bell notes that Critical Race Theory also has white scholars who fight to overthrow their own white privilege in search for equality. Thus, CRT is a redemptive philosophy and not destructive in nature; V Gentilli 'A double challenge for critical race scholars: The moral context' (1992) 65 Southern California Law Review 2361-2386; J McCristal Culp Jr 'To the bone: Race and white privilege' (1999) 83 Minnesota Law Review 1637.

[85] D E Litowitz 'Some critical thoughts on critical race theory' (1997) 72(2) Notre Dame Law Review 503-530.

[86] For a discussion on CLS, see A W Haines 'The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Scepticism and Solipsism?' (1987) 13(4) *William Mitchell Law Review* 685–736.

left in the legal academia.[87] Litowitz argues further that CLS was a failure because most of its scholars where white males whose work followed the traditional method of legal scholarship. Traditional legal thought did not apply the interdisciplinary approach and viewed the law as being neutral and objective.

The history of CRT is confirmed by RA Jones[88] in detail in that CRT evolved from Bell's critique of Critical Legal Studies at Harvard's Law School. It was a consequence of Harvard's failure to resolve the debates concerning race and law. A conference to create an alternative recourse called the Critical Race Theory Workshop was held at the University of Wisconsin Law School on 8 July 1989.[89] The workshop was organised by Crenshaw, Gotanda and Phillips. Among the guest speakers were:

'Benita Ramsey, Robert Suggs, Kendall Thomas, and Patricia Williams, Anita Allen, Taunya Banks, Derrick Bell, Kevin Brown, Paulette Caldwell, John Calmore, Harlon Dalton, Richard Delgado, Linda Greene, Trina Grillo, Isabelle Gunning, Angela Harris, Mari Matsuda, Teresa Miller, Philip T Nash and Elizabeth Patterson.'

It was Crenshaw who coined the term critical race theory.[90] These critical race theorists were of the view that despite the hard won political and legal victories of the highly esteemed Dr Martin Luther King's Civil Rights movement of the 1960s, the justice system of the United States of America continued to systematically prejudice many minority groups, specifically people of African ancestry.

These pioneers not only challenged the prevailing thought on race amongst mainstream liberals and conservatives in the field of law, but they also confronted the silence of legal radicals, specifically critical legal studies writers who critiqued liberalism, yet rarely addressed

[87] M Tushnet 'Critical Legal Studies: A Political History' (1991) 5 *Yale Law Journal* 1515-1544 at 1516.
[88] RA Jones 'Philosophical methodologies of critical race theory' (2009) 1(1) *Georgetown Journal of Law & Modern Critical Race Perspectives* 17-40.
[89] A Onwuachi-Willig 'Celebrating critical race theory at 20' (2009) 94 *Iowa Law Review* 1497; L Greene 'Critical race theory: Origins permutations, and current queries' (2021) 2 *Wisconsin Law Review* 259; also see KW Crenshaw 'The first decade: Critical reflections, or 'A foot in the closing door' (2002) 49 *UCLA Law Review* 1343.
[90] Ibid; also see A Mutua 'The rise, development, and future directions of critical race theory and related scholarship' (2006) 84 *Denv. Univ Law Rev* 329.

the role of deep-rooted racism towards black people.[91] These pioneers rejected the view that the law is neutral and objective.[92] Critical race theorists rejected the mere assumption that the law is a tool to mediate social conflicts, they took it a step further. They viewed the law as being part of the social fabric, their point of departure from critical legal studies being that the former saw the law as producing racial relations that support white supremacy, to the detriment of black people, while the latter had been silent on the issue.[93] In essence, CRT is an interdisciplinary remedy to jurisprudence as it applies the intersectionality between philosophy, politics, and law, therefore, it is accordingly regarded as a higher and more meaningful tool of analysis.[94]

The logic behind this interdisciplinary approach is highlighted by BD Jones[95] in that the law at its core was bound by some form of ideology, be it of class, race, or gender. In brief, the law only conformed and protected a specific group of people, such privilege being reserved based on race, gender and class. Therefore, in an attempt to expose inconsistencies in such legal doctrine, the critical legal theorists looked for an external source for doctrine. These sources sought may not be explicitly stated, they are implied by the indication of the interests at stake, these interests being race, gender and class. As a result, the aim of critical race theorists is to discover, expose and engage in discussions regarding the racial agenda of the law.[96] BD Jones[97] argues further that critical race theorists agree with the legal realists in that judicial decision making is political in nature; however, they went a step further and suggested that law could also be coercive in nature. In the South African perspective, the coerciveness of the law can be seen through the issue of cost orders which deter people from seeking justice; fortunately, labour law has sought to remedy that by not allowing cost orders to follow the results. This issue is dealt with in detail in Chapter 3 of this thesis.

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[91] K Crenshaw *Introduction, in Critical Race Theory: The Key Writings that formed the movement* (1995); also see MJ Matsuda 'Voices of America. Accent, antidiscrimination law, and a jurisprudence for the last reconstruction' (1991) *Yale Law Review* 1329-1407 that institutions that fortify white power ought to be resisted.

[92] Ibid; also see MJ Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Rev* 2320–2381; J McCristal Culp Jr 'Toward a Black Legal Scholarship: Race and Original Understandings' (1991) *Duke Law Journal* 39-105; AD Davis 'Identity notes part one: Playing in the light' (1996) 45 *American University Law Review* 695–705.

[93] AD Mutua op cit note 90.

[94] RA Jones op cit note 88 at 23; also see K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics' (1989) University of Chicago Legal 139.

[95] BD Jones 'When critical race theory meets legal history' (2006) 8(1) *Rutgers Race & the Law Review* 1–26 at 6.

[96] Ibid.

[97] Ibid at 6.

As a result of its coerciveness, the law lacked legitimacy as it did not uphold justice but merely supported the status quo which was in favour of the wealthy white men and it oppressed the powerless. Within the South African perspective, the legal institutions had previously favoured owners of the means of production against workers, in which owners' contractual rights to labour were protected, but workers had no right to unionise and found it difficult to recover damages for on-the-job injuries. This is discussed further in Chapter 5 of this thesis.

Critical race theory views the law as a creation of the power of the elite.[98] Through reversal methodology, the order of things are reversed from the invisible causes of certain issues to the visible effects of those issues.[99] Critical race theorists view the law as representing the culmination of power struggles in our societies, with the elites dominating the working class and the poor through the law's legitimation.[100] As an example, whiteness is viewed as a protectable commodity in the law, to the prejudice of people who are not part of such whiteness.[101] Therefore, such whiteness is the visible cause of prejudice.

CRT not only tries to understand the social situation of the black population; fortunately, it also attempts to change it. It sets out to understand not only how society organises itself along social abstract concepts such as racial lines and hierarchies, but to transform such a society for the better.[102]

In order to fully understand and see the results of CRT in South Africa, Delgado's approach becomes necessary. Litowitz[103] appropriately summarises CRT using Delgado's[104] perspective in the following manner: (a) Legal scholarship, including the presiding officers and law makers, is racially situated. This means that there is a white and black understanding of legal issues; (b) The current legal system is not colour-blind even if it pretends to be. Notwithstanding the pretence of neutrality, this legal system prejudices against African people and all black populations; (c) Statutes, court decisions and matters before the court must be understood historically and contextually. This means that issues before the court must be understood from

[98] RA Jones op cit note 88 at 23.
[99] Ibid.
[100] BD Jones op cit note 88 at 6.
[101] Ibid.
[102] J Stefancic and R Delgado Critical race theory: An introduction (2010).
[103] D Litowitz op cit note 85 at 505 to 506.
[104] R Delgado 'Words that wound: Tort action for racial insults, epithets, and name-calling' (1982) 17(1) *Harvard Civil Rights Civil Liberties Law Review* 133–182

the perspective of the people/person it concerns, be it an African, a woman's or a working class perspective – often in the South African context, all three; (d) The personal experiences of the African, women and working class people render them especially well-suited for analysing racially-related and discriminatory laws. This is because such people see the world differently, they see racism, classism and sexism where their counterparts cannot; (e) CRT aims to eliminate all subjugation, be it of race, gender and class.

In an attempt to develop a South African approach, Modiri[105] argues that developing a critical race theory that is suitable to the historical demands and the shifting realities of post-colonial and post-apartheid South Africa cannot be done by simply regurgitating the CRT of the United States of America. In the South African perspective, post-colonial studies, post-colonial jurisprudence and socialist theories are some of the philosophical methodologies that should be adopted to support such a critical race theory. Modiri[106] argues further that critical race theory within the South African perspective necessitates the understanding of the post-apartheid society in two ways.

First, racism is a normal feature that has been integrated into the social structures and it appears often in covert ways. Moroosi[107] suggests that racism in South Africa is a normal order of things. Warmington,[108] Gillborn[109] and Bonilla-Silva[110] also suggest that racism is ordinary business to the extent that its existence is denied and a colour-blind approach is adopted through the promotion of meritocracy and individual ability by the neoliberal politics. The colour-blind approach is in fact racism as it blames the victim default position of institutionalised and socially

[105] J Modiri 'The colour of law, power and knowledge: Introducing critical race theory (CRT) in (post) apartheid South Africa' 2012 *SA Journal on Human Rights* 405 at 406.
[106] Ibid at 406; also see R Delgado & J Stefancic op cit note 84.
[107] P Moroosi 'Colour-blind educational leadership policy: A critical race theory analysis of school principalship standards in South Africa' (2021) 49(4*) Educational Management Administration & Leadership* 644–661 at 648; also see G Ladson-Billings 'Just what is critical race theory and what's it doing in a nice field like education?' (1998) 11(1) *International Journal of Qualitative Studies in Education* 7–24; Vaught SE and Castagno AE '"I don't think I am a racist": Critical race theory, teacher attitudes, and structural racism' (2008) 11(2) *Race Ethnicity and Education* 95–113.
[108] P Warmington 'Critical race theory in England: Impact and opposition' (2020) 27(1) *Global Studies in Culture and Power* 20–37 at 5.
[109] D Gillborn 'Racism as policy: A critical race analysis of education reforms in the United States and England' (2014) 78 (1) *The Educational Forum* 26–41.
[110] E Bonilla-Silva *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States* (2006) Lanham: Rowman Littlefield Publishers; also see P Margulies 'Inclusive and exclusive virtues: Approaches to identity, merit, and responsibility in recent legal thought' (1997) 46(4) *Catholic University Law Review* 1109–1162.

acceptable approach for neoliberals and the approach has become a tool for the maintenance of the racial order.[111]

The importance of CRT is that it challenges the idea of colour blindness in law. The colour blindness approach suggests that that race, like eye colour, is irrelevant to the determination of individuals' opportunities in our societies.[112] Critical race theory, while maintaining that race is not like eye colour, suggests that the issue with colour blindness is that it assumes that a colour-blind society already exists, it assumes that there was no race-based marginalisation of people to begin with.[113] CRT in essence provides that the society is racially constructed and nowhere near colour-blind, therefore, it is fitting for the law to also be conscious of race.[114] The effects of the colour-blind approach are that it deliberately justifies, ignores and cements the racial caste system constructed by the law and its institutions.[115]

(f) Affirmative action and the colour-blind approach

It was necessary for this study to examine affirmative action. According to Ziqubu,[116] affirmative action involves treating people belonging to a specified demographic group differently in an attempt for those people to collectively move towards obtaining an equitable share of resources and opportunities. At face value, this may be seen as being discriminatory and a violation of equality; however, the Constitution through its equality provision of section 9 makes exception for policies needed to redress the wrongs of the colonial and apartheid governments.[117] Affirmative action ensures that these groups that were violated by the colonial and apartheid

[111] Ibid at 3.
[112] A Mutua op cit note 90 at 334.
[113] Ibid.
[114] AK Wing op cit note 5 at 48.
[115]A Mutua op cit note 90; N Gotanda 'A critique of "our constitution is colorblind' (1991) 44 *Stanford Law Review* 1
[116] P Ziqubu *A critical evaluation of the Affirmative Action policy in South Africa in relation to the case of South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) (LLM Theses, University of KwaZulu Natal 2015) at 1; also see JW Little 'Affirmative action: Legal bases and risks in the United States and South Africa' (1994) Stellenbosch Law Review 263; S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 SAJHR 214, 220; O Dupper 'In defence of affirmative action in South Africa' (2004) 121 *South African Law Journal* 189; *Moresport (Pty) Limited v Commissioner for the South African Revenue Service* (36853/2006) [2008] ZAGPHC 95 (27 March 2008); A Rycroft 'Obstacles to employment equity? The role of judges and arbitrators in the interpretation and implementation of affirmative action policies' (1999) 20 ILJ 1411.
[117] Ibid.

regimes are represented and protected in the workplace.[118] The equality provision of the Constitution, section 9, is what gives life to this principle and in turn, what gives life to section 9 is the Employment Equity Act.[119]

In this study's perspective, an example would be the growing right-wing and neoliberal approach towards the empowerment statutes in South Africa. Ramalekana[120] categorises this as white backlash against affirmative action. Ramalekana argues that the campaigns to dismantle affirmative action, in favour of the colour-blind approach in South Africa, are happening through the courts. The strategy has been to find complainants belonging to other disadvantaged groups, shifting the focus away from the white male.

Before discussing the relevant case law, a broad overview is first provided of what necessitates affirmative action. As highlighted above under the discussion of decolonisation, the colonial regime enacted statutes that reserved certain jobs for white people, to the detriment of African people. The South African labour market was, like the social life, organised and segregated along the racial lines.[121] This corrupt behaviour from whiteness went back to before apartheid, even in the 1800s English speaking white workers restricted certain work from being done by African workers.[122] When the Afrikaans speaking white workers overran the mining industry, they too continued the corrupt practice of reserving certain jobs from being done by African workers.[123] As highlighted above, this job reservation had little to do with skill or lack thereof, it was corruption by people engaging in unfair and unjustified discrimination. The 1911

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[118] Ibid; also see J Faundez 'Promoting affirmative action' 1994 (11) 4 *Indicator SA* p 1; O Dupper 'Affirmative action and substantive equality: the South African experience' (2002) 14(2) *South African Mercantile Law Journal* 275-292.

[119] Act 55 of 1998; *Public Servants Association of SA v Minister of Justice* (1997) 18 ILJ 241 (T); *IMA WU v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC); *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA); *Stoman v Minister of Safety and Security & others* 2002 (3) SA 468 (T); C Albertyn and J Kentridge 'Introducing the right to equality in the interim constitution' (1994) South African Journal on Human Rights 149; C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) *SAJHR* 441.

[120] N Ramalekana ''White backlash' against affirmative action in the United States and South African courts' (2022) Oxford Human Rights Hub *https://ohrh.law.ox.ac.uk/white-backlash-against-affirmative-action-in-the-united-states-and-south-african-courts/,* accessed 31 March 2022 ; examples of empowerment statutes in South Africa include the Broad-based Black Economic Empowerment Act 53 of 2003 as amended by the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013, the Employment Equity Act 55 of 1998, the Skills Development Levies Act 9 of 1999, the Preferential Procurement Policy Framework Act 5 of 2000.

[121] M Mariotti 'Labour markets during apartheid in South Africa' (2012) 65(3) *The Economic History Review* 1100-1122 at 1102.

[122] Ibid at 1103.

[123] Ibid.

Mine and Works Act solidified this discriminatory position even in its amendment in 1926 as it reserved jobs for white and so-called coloured workers.[124] The study submits that this is one of many instances when the law, of which the effects can be felt to this day, was race conscious. Marotti[125] points out that this system of racial hierarchies in the labour sector informed the development and implementation of policies. The then colonial government favoured the so-called civilised labour policy which meant reservation of high paying jobs for white workers and the punishment of industries that did not conform to such policies.[126]

The corruption was also solidified by the Industrial Conciliation Act[127] which essentially excluded all African workers from the definition of the word 'employee', the effect of this being that African workers could not participate in industrial relations activities. This exclusion of African workers from the definition of employee was seen as justifying paying them extremely low and inhumane wages.[128] The colonial government went on to pass the Wage Bill of 1925 in its attempt to put African workers out of employment and reserve jobs for white workers.[129] The ideology of the time was that white workers considered it a disgrace for them to have the same low living standards as African workers.[130]

H Bhorat and N Mayet [131] suggest that currently, almost three decades since the end of formal apartheid, race continues to be the determining factor in the probability of participation, employment and earnings. In essence, so-called coloured workers, Indian workers and white workers have consistently been more likely to not only be in employment but also earn higher wages than their African counterparts even though they may have the same qualification, skill and produce the same quality of work.[132]

In an attempt to address the deep rooted race-based economic challenges created in large part by the colonial and apartheid regimes that continue to define our socio-economic landscape,

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[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Act 11 of 1924; Ibid; also see C Jordaan and WI Ukpere 'South African Industrial Conciliation Act of 1924 and current Affirmative Action: An analysis of labour' (2011) 5(4) *African Journal of Business Management* 1093-1101 at 1094.
[128] E Webster *Essays in Southern African Labour history* (2001) Johannesburg: Ravan Press at 99.
[129] C Jordaan and WI Ukpere op cit note 120.
[130] Ibid.
[131] H Bhorat and N Mayet 'Chapter 4 Employment outcomes and earnings in post-apartheid South Africa' in A Black *Towards employment intensive growth in South Africa* (2016) UCT Press at 81.
[132] Ibid at 84.

our Republic enacted the National Minimum Wage (NMW) Act 9 of 2018.[133] The NMW Act is an active policy response to our Republic's pressing concerns and it comes at a time when income inequality is constantly on the rise, the household poverty levels remain high, the labour market is experiencing low wages and private sector union membership is constantly declining.[134] The Act comes at a time when black workers earn significantly less than their white colleagues for the same work,[135] which is corruption that can be described as racial wage discrimination. Racial wage discrimination is formally defined as the difference in income and or earning capacity amongst people of different races whose productivity output is the same and sometimes better than the one getting paid higher.[136]

According to section 2 of this Act, its purpose is to advance economic development and social justice through the protection of workers from unreasonably low wages and improving the wages of those who are already being paid low wages.[137] Section 3 of the Act states that the Act is applicable to all workers.[138] The change provided by this statute has been significant as in 2019 it started the minimum wage for all hours worked at twenty rands per hour and this was adjusted in 2021 to twenty one rands, sixty one cents an hour, thereby raising the wages of those who earned extremely low wages.[139] However, it is worth noting that the Act set the wages of the most vulnerable group of workers, these being domestic workers and farm workers, lower than other workers as it started at fifteen rands per hour for the former and eighteen rands an hour for the latter.[140] Fortunately, in 2022 the minimum wage for both domestic workers and farm

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[133] H Bhorat, A Lilenstein and B Stenwix *The Impact of the National Minimum Wage in South Africa: Early Quantitative Evidence* (2021) Development Research Unit at 2.
[134] Ibid.
[135] Editorial 'Whites still earning three times more than blacks in SA' (2019) News24 15 November 2019 *https://www.news24.com/fin24/Economy/South-Africa/whites-still-earning-three-times-more-than-blacks-in-sa-20191115*, [Accessed 4 May 2022].
[136] N Mabuza *Salary disparities in South Africa: An analysis on race and gender in the Labour Market* (Masters Dissertation University of Cape Town 2020) at 9; also see JB Knight and MD McGrath 'The Erosion of Apartheid in the South African Labour Market: Measures and Mechanisms' (1987) Applied Economics Discussion Paper No. 35, Oxford Institute of Economics and Statistics; B Fisher, M Biyase, F Kirsten and S Rooderick 'Gender wage discrimination in South Africa within the affirmative action framework' (2020) *EDWRG Working Paper Number* 01-20.
[137] National Minimum Wage Act 9 of 2018 section 2.
[138] Ibid section 3; schedule 1.
[139] Staff Writer 'New minimum wage announced for South Africa' *BusinessTech* https://businesstech.co.za/news/finance/556460/new-minimum-wage-announced-for-south-africa/ [Accessed 8 February 2022].
[140] National Minimum Wage Act 9 of 2018 schedule 1 (a) and (b).

workers increased to twenty three rands, nineteen cents an hour to be on the same level as all workers.[141]

However, H Bhorat, A Lilenstein and B Stenwix[142] engage in the negative effects that may override the aspired positive effects of this statute. First, the levels of non-compliance with the already existing sectoral minimum wages have always been high, and there is no clear evidence to suggest that this will change in the short term. High levels of non-compliance with the NMW will as a result undermine and mute the positive wage effects of the statute for covered workers.

The apartheid government continued where its forbearer had left off as in 1951 it enacted the Building Workers Act 27 of 1951 which allowed African workers to be trained as artisans in the building industry, which had to that point been reserved for white workers. However, the African workers were only allowed to work within a specific area for designated for African people, it was a criminal offence for the African workers to perform artisan labour in an area designated for white people.[143] Further down the corruption line, the Bantu Laws Amendment Act[144] created the ministerial power to implement job reservations against African workers in any field of employment.[145] Without being exhaustive of all the corrupt colonial and apartheid labour legislation that unjustly uplifted white workers at the expense of African and other black and female workers, it is within this context that the need and aspiration for affirmative action must be understood.

People who attack affirmative action do so under the misguided fallacy of labelling it as reverse racism.[146] This thesis deals with the concept of reverse racism in Chapter 6. Rycroft's[147] perspective onto affirmative action is that it makes an assumption that all members of the designated groups are 'disadvantaged', regardless of their individual circumstances. He argues further that if race has not prevented the education of a person, the use of the term disadvantage

[141] Government Gazette 45882, dated 07 February 2022.
[142] H Bhorat, A Lilenstein and B Stenwix op cit note 126 at 3.
[143] Ibid at 1095; also see A Kaye 'Apartheid Labour Legislation in South Africa' 1976-1977 (5) *Indus. & Lab. Rel. F*. 13.
[144] Act 42 of 1964.
[145] P Ziqubu op cit note 116 at 7.
[146] MB Abram 'Affirmative action: Fair shakers and social engineers' (1986) 99 *Harvard Law Review* 1312 at 564; also see VE Hamilton (2021). 'Reform, retrench, repeat: the campaign against critical race theory, through the lens of critical race theory' (2021) 28(1) *William & Mary Journal of Race, Gender, and Social Justice* 61–102.
[147] Rycroft op cit note 116 at 1423.

is inappropriate in that person's circumstance. According to Rycroft, any person seeking to use empowerment provisions needs to prove, on a balance of probabilities, that they are a disadvantaged person because of their race.

Another neoliberal approach which stigmatises equity and redress is highlighted by Ramalekana[148] who points out that Brassey[149] was of the view that the beneficiaries of affirmative action in essence, swap their pride for a job. This suggests that black people, women, the disabled and all other marginalised groups are not deserving of their jobs since they were only obtained by way of affirmative action. Ramalekana[150] suggests that our courts are also party to this stigmatisation behaviour. This is evidenced by the court decisions in *South African Police Service v Solidarity obo Barnard*[151] as confirmed in *South African Restructuring and Insolvency Practitioners Association (SARIPA) v Minister of Justice and Constitutional Development*; *In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development*.[152] The court was of the view that over reliance on race when giving effect to affirmative action is dangerous as it risks disadvantaging its beneficiaries by creating the impression that the beneficiaries are hired based on race and not merits. The *Barnard* decision is dealt with in detail later in the chapter.

This stigmatisation of affirmative action and empowerment equity is further enhanced through strategic litigation by well-resourced right wing/conservative Afrikaner-nationalist trade union Solidarity.[153] Some of these strategic litigation cases in an attempt to undermine redress are also discussed later on in the chapter. This study agrees that such stigmatisation is nothing but a façade to dismantle affirmative action in order protect the interests of privileged groups (which in Chapter 1 is categorised as the typical capitalist, white, heterosexual, Christian, male).

[148] N Ramalekana 'A critique of the stigma argument Against affirmative action in South Africa' (2022) 4 *University of Oxford Human Rights Hub Journal* 1 at 2
[149] M Brassey 'The Employment Equity Act: Bad for employment and bad for equity' (1998) *Industrial Law Journal* 1366.
[150] Ramalekana op cit note 148 at 3
[151] 2014 6 SA 123 CC.
[152] 2015 2 SA 430 WCC.
[153] Ramalekana op cit note 148 at 3; also see S Budlender, G Marcus and N Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) The Atlantic Philanthropies at 16.

This is all a part of white backlash against actions to redress inequality in the Republic of South Africa.[154]

This study agrees with Dupper's[155] analyses of Rycroft's historically insensitive and narrow approach to affirmative action. Dupper suggests that this approach is not in line the concept of substantive equality that supports South Africa's statutory provisions regarding affirmative action. Substantive equality places an emphasis on the group rather than the individual. The substantive approach is delicate due to the fact that a person's race and gender determine their opportunities in life.

Furthermore, as highlighted above, the discrimination against black people and African people in particular, was sanctioned by the state against the entire group of black or African people. As an example, the Bantu Education Act 47 of 1953 which was later renamed the Black Education Act 47 of 1953, did not target individuals, but the entire group of African people. This study submits that it is therefore illogical and questionable to suggest that in order to enforce redress, individuals have to prove an individual disadvantage, this approach is a denial of the struggles of African people against racial injustices caused by white power structures and existence of racism against African people. Rycroft's approach has not received judicial support as our courts point out that it is difficult to prove individual disadvantage, the broad approach is more acceptable.[156]

This study also agrees with Ramalekana[157] that any stigma attached to those who benefit from affirmative action is not caused by affirmative action itself. Rather, the 'stigma is rooted in the unequal power relations inherent in the systems of domination and oppression to which the beneficiaries of affirmative action are subject.' This study submits that this is a tactic by neoliberals to invalidate affirmative action through ridiculing its beneficiaries.

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[154] Ibid at 5; on white backlash, see A Mbembe 'Passages to freedom: The politics of racial reconciliation in South Africa' (2008) 20 *Public Culture* 5, 10–11; JM Modiri 'Towards a "(Post-)Apartheid" critical race jurisprudence: "Divining our racial themes"' (2012) 27 *Southern African Public Law* 231 at 254.

[155] O Dupper op cit note 118 at 286.

[156] *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) at 593 594; *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC) at 1774G.

[157] Ramalekana op cit note 148, stigma is different from a stereotype in that the former can only be enforced by those with power, it takes the form of culture and politics; T Eastland 'The case against affirmative action' (1992) *William & Mary Law Review* 33, 41–2 self-doubt is also an issue for black people concerning affirmative action.

This study submits that this stigma is a continuation of eugenics[158] where a certain group is not only viewed as being the default normal but they are also viewed as being the evolved and most worthy of being human beings. The people who are regarded by the group of 'normals' as being 'the other' are by default stigmatised. People who are considered as 'the other' possess an undesired differentness.[159] The other, who bears this kind of differentness (usually a matter of race, gender, class or disability, in South Africa usually an intersection of these) is reduced in the minds of the default 'normal', from being a complete human being, to being a tainted and undesired human being.[160] Using CRT, the study notes that 'the other' takes the shape of black people who are marked as inferior; thus stigmatised. The normal people take the shape of white people. This scientific theory of race-based human evolution of eugenics supported the idea that white people were superior and thus had the divine right of dominance over all black people, who were regarded as the morally deprived and uncivilised, enforcing white supremacy.[161]

As highlighted above, another tactic used by neoliberals and the right wing is to push the perspective that affirmative action is an anti-theses of merit. As will be highlighted below in some of the decisions of the Equality Court and Supreme Court of Appeal (SCA), our courts have also fallen prey to this misguided perspective. This perspective, at face value and to an unsuspecting eye, is legitimate. This is because it advocates for skill and qualifications to be the reason why people are hired and promoted, this being what equality is about.[162] However, if analysed closely and critically, using CRT, it is flawed and racist in nature. Like colour blindness, it assumes that people are on an equal footing irrespective of race, gender, class and disability.[163] It assumes that there are no privileged people in our society and people are where they are because of hard work. Needless to say, this is false and a denialist shield against the reality of state sanctioned racism where preference for certain jobs and salaries was and to a certain extent still is reserved not based on hard work, rather solely on race, ability/disability and or gender. This is still the case because black people, people living with disabilities and African

[158] B Glass 'Racism and eugenics in international context' (1993) 68 (1) *The Quarterly Review of Biology* 61–67.
[159] Ramalekana op cit note 148 at 9, on stigma also see B Link and J Phelan 'Conceptualizing stigma' (2001) *Annual Review of Sociology* 363 at 375.
[160] Ibid.
[161] Ibid at 10.
[162] R Fallon 'To each according to his ability, from none according to his race: The concept of merit in the Law of Antidiscrimination' (1990) *Boston University Law Review* 815 at 822; C McCrudden, 'Merit principles' (1998) 18 (4) *Oxford Journal of Legal Studies* 543–579*;* IM Young *Justice and the Politics of Difference* (1990) Princeton University Press 200.
[163] Ramalekana op cit note 148 at 21.

women in particular still do not have access to resources and education in order to obtain the necessary skills to occupy certain jobs. The reality is, merit is not neutral, it is based on privilege, domination and subordination.[164] This study submits that one's race, gender, class, disability or lack thereof, determine the employment opportunities one gets and or does not get. The adoption and application of merit blindly could lead to perpetual disadvantage for the poor/working class African, women and the disabled.

Within CRT, there are two views held with regards to affirmative action. On the one hand, critical race theorists such as Patricia Williams[165] argue that affirmative action is a form of social and professional responsibility. Williams[166] is of the view that since black people were deliberately omitted from advancement through the false narrative of colour blindness, the ill-informed notion of reverse racism and the misguided stigmatisation of affirmative action, there must be a positive affirmation towards the hiring of black people in order give life to the lived experiences of black people in the workplace. This includes both a social and professional responsibility. Robin Barnes is also of the view that affirmative action is a small measure towards reparations for the injustices suffered by black people and it is of great importance as it provides the poor and working class black people education, employment, and business opportunities.[167] Barnes[168] is of the view that women and black people are entitled to it not only to remedy the past and today's exclusionary practices, but also to address the perpetual domination that is a normal conduct of the white male.

On the other hand, theorists such as Derrick Bell argue that affirmative action is given to a few, hand selected black people so as to not threaten white interests.[169] Delgado[170] argues that

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[164] Ibid.
[165] MB Abram op cit note 146 cites PJ Williams *The Alchemy of Race and Rights* (1991) 121.
[166] Ibid P Williams 48 and 49.
[167] R Barnes 'Politics and passion: Theoretically a dangerous liaison' (1992) 101 *Yale Law Journal* 161–1659.
[168] Ibid.
[169] MB Abram op cit note 146; also see D Bell *We are not saved* (1987); D Bell 'Xerces and the Affirmative Action Mystique' (1989) 57 *George Washington Law Review* 1595.
[170] R Delgado 'Affirmative action as a majoritarian device: Or do you really want to be a role model?' (1991) 89 *Michigan Law Review* 1222; T Madlingozi 2017 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28(1) Stellenbosch Law Review 123–147 at 124 and 125 noted that the idea behind white humans and black sub-humans remains a reality in South Africa, the only difference today being that historical beneficiaries of this morally corrupt social structure, white South Africans, are realigning it with their sympathisers, the black boer's. This is terminology is meant to relay the sense that the black elite, which is in part, similar to colonial as well as neo-colonial rulers, benefit from, and indeed have an interest in, maintaining a world of exploitation and segregation based on race. These black elites

affirmative action, in this sense, was created to promote the interests of the controllers of power as it only ensures that a small number of black people are hired, promoted and given access to resources. Those who favour reparations as a form of redress for the injustices suffered by black people and women, such as Motshabi,[171] are of the view that affirmative action breeds incompetence and a sense of inferiority to its beneficiaries.

In essence, Motshabi, Bell and Delgado argue that affirmative action is not bad as a principle, rather, it is deliberately applied in an ineffective manner that gives rise to the black elites at the expense of the rest of the black population. This kind of skewed application of affirmative action has given rise to black boers, who if examined closely, bring nothing of value to black workers nor to the broader society.[172] An example of this form of corruption is South

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often subscribe to the politics of white liberals which is in a sense a neo-apartheid ideology were the capitalist exploitation has been repackaged and humanised through and sustained by social relations inherited from colonialism. Madlingozi citing Fanon *The Wretched of the Earth* 51 argues further that this transformative constitutional project post 1994 is actually complicit in the continuation of this anti-black societal structure, and as such, colonialism and apartheid has survived the transition period as evidenced by the fact that impoverished black people remain ensnared in a zone of stasis. Unlike in other African countries were African people were exterminated, the South African colonial, apartheid and neo-apartheid project acquired African people as a form of cheap labour. That is how they resolved the native question is a white man's independent settler colony.

[171] K Motshabi, 'Decolonising Affirmative Action in 21st-Century Africa: Reparatory Alternatives for Affirming South Africa' (2020) 2 *Journal of Decolonising Disciplines* 1 at 6.

[172] Madlingozi op cit note 7 at 131 to135 cites L de Kock, L Bethlehem & S Laden (eds) *South Africa in the Global Imaginary* (2004) 117 in showing that this class of black elites has always existed or a certain group of black people have always aspired to be black boers. He notes that in their minds, black emancipation had taken form of civil imaginary in that to prove their worth, they aspired for inclusion into the Christian religion and attainment of European education, which would in turn lead to them being recognised as human beings. This extension of civil rights would lead to their integration into the South African social hierarchy as British subjects. These black elites back then constituted mainly of lawyers and the *petit-bourgeoisie*. They were driven by the fear that the abyssal societal structure of the Union that had left them out and incorporated the then uneducated, poor boer instead, meant the possibility of them being forever banished to the other side and reduced to the ranks of uneducated and uncivilised Africans, what they referred to as *Amaqaba.* They asserted that they were as mature and civilised as any Englishman, who in turn considered himself better than the uncivilized Afrikaaner, and thus they, the civilised Africans, were deserving of recognition, incorporation and equal opportunities in the Union. These black elites accepted the reduction of African people to mere economic animals to be offered crumbs from the oppressors and not. According to Sobukwe, the black elites accepted being brain-washed, fathered and absorbed into a false so-called South African Multiracial Nationhood, whilst the vast masses of African people were being exploited and denied their basic rights ; Madlingozi op cit note 7 cites Biko who prophesised the future position of this black elite when he noted that is that unless white supremacy is destroyed in its totality, transformative constitutionalism and democracy would simply lead to a position where the black elites are shifted from the black world and its realities into the white world and its illusions, this has come into a reality in the neo-apartheid state of South Africa; Biko further notes that in such a neo-apartheid state, black-on-black exploitation would be the mode of operation as it would be ensuring that black elites have a stake in maintaining an anti-black society. This is how scholars such as Rycroft and Le Roux op cit note 7 have the misguided and ill-informed notion that South African labour law has been decolonised due to a black 'created' constitution and any violations from there are simply black on black. Biko's thinking on the black elite and adopting their approach was in line with F Fanon *Black Skin, White Masks* (2008) 163-173 in the esteemed essay *The Negro and Recognition*, in that this was an application to be a colonial subject since it meant seeking recognition from colonisers; T Lodge *Black Politics in South Africa since 1945* (1983)

African major institutions and employers targeting certain leaders of the current ruling party, the African National Congress. This organisation produced a number of business magnates;[173] and these tycoons became wealthy through empowerment deals. These black boers are of the view that they did not engage in the struggle in order to end up poor.[174] According to Cyril Ramaphosa, empowerment 'It also brings in added value to a company because the black employees feel much more attached to their business when they see that their own people or themselves have a stake in it.' [175] As highlighted above, this narrative is not correct. It is these few individuals who benefit from empowerment statutes and not the designated group of African people, black people or black women.

Fred Hampton of the Black Panther Party puts it best 'We say we're not going to fight capitalism with black capitalism, but we're going to fight it with socialism.'[176] It must be understood that the aim of empowerment should not be to enrich a few African individuals, the aim is not to replace white people on top of the capitalist ladder, rather, the aim should be for African people to do better by aiming to provide equal prosperity and progress of all people. The targeted enrichment of a few individuals, the creation of pseudo-business schemes by prominent white business institutions through putting a few African people in positions of power in order to bypass the need to empower the whole designated group of African people is in itself backwards and anti-progress.[177]

2; GM Gerhart *Black Power in South Africa: The Evolution of an Ideology* (1978) 38; M Motlhabi *The Theory and Practice of Black Resistance to Apartheid: A Social-ethical Analysis* (1984) 40–41.

[173] S Bridge and A Moses 'Ramaphosa's BEE Bonaza' IOL 16 July 2004 *https://www.iol.co.za/news/south-africa/ramaphosas-bee-bonanza-217325* [accessed 4 May 2022]; also see A Mngxitama 'Lessons in the paradoxes of race and capital' *Mail and Guardian* 15 December 2015 https://mg.co.za/article/2015-12-10-lessons-in-the-paradoxes-of-race-and-capital/ [Accessed 4 May 2022], Mngxitama argues that the crux of this the fight against empowerment is that blackness is associated with bad and whiteness with good and he highlights the irony that it these few African beneficiaries who are now at the center of the narrative that BEE is bad and reverse racism.

[174] Editorial 'Many cadres today are living testimony of Smuts Ngonyama's 'I did not struggle to be poor' statement' *IOL* 5 August 2020 https://www.iol.co.za/the-star/opinion-analysis/many-cadres-today-are-living-testimony-of-smuts-ngonyamas-i-did-not-struggle-to-be-poor-statement-310fac49-8b7e-4e9d-b504-b9416e6c388f *[A*ccessed 4 May 2022].

[175] Editorial 'BEE: Who are the beneficiaries' *Fin24* 16 July 2004 https://www.news24.com/Fin24/BEE-Who-are-the-beneficiaries-20040716 [accessed 4 May 2022].

[176] A Olla 'Fred Hampton was a radical revolutionary. Judas and the Black Messiah ignores that' *The Guardian* 25 February 2021 https://www.theguardian.com/commentisfree/2021/feb/25/judas-and-the-black-messiah-misses-the-mark-in-its-portrayal-of-fred-hampton [Accessed 4 May 2022].

[177] P Mashele 'Job-creation is business people's craft, not BEE beneficiary like Cyril' *The Sowetan* 19 August 2019 https://www.sowetanlive.co.za/opinion/columnists/2019-08-19-job-creation-is-business-peoples-craft-not-bee-beneficiary-like-cyril/ [Accessed 5 May 2022].

The attempt by the right wing and neoliberals to undermine the pain of African workers and the Republic's attempt to enforce equality can be seen through the Constitutional Court case of *South African Police Service v Solidarity obo Barnard.*[178] In this case the National Commissioner advertised a vacancy for the rank of superintendent; however, the vacancy was not reserved for a designated group. Ms Barnard responded to the advert and at her interview, she had the highest score amongst the candidates and the panel recommended her as the top candidate. During the course of the discussion with the Divisional Commissioner, the panel was informed by the Divisional Commissioner that black men and women were underrepresented in the division in which the vacancy was advertised and if such is allowed to continue, it would make matters worse. Another vacancy was posted to which Ms Barnard also applied. Ms Barnard again had the highest score and was recommended. The Deputy National Commissioners and the Divisional Commissioner did not appoint Ms Barnard to this position. Ms Barnard felt aggrieved and referred the matter to the CCMA for unfair discrimination. Ms Barnard was of the view that the National Commissioner did not properly take into account her merit and competence, he had not considered all relevant factors before deciding on the promotion. She was of the view that weight was placed on demographics instead of competence.[179] The matter then proceeded to the CC.

The Constitutional Court stated that our constitutional democracy was founded on explicit values which sought to achieve equality in a non-racial, non-sexist society. The court went further stating that the constitution demands us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination as past disadvantages are still prevalent. Moseneke DCJ expressed that we need to ensure that the measures taken to advance substantive equality do not infringe the dignity of other individuals, especially those individuals who were themselves disadvantaged.[180] Mosekene DCJ went further by explaining that restitution measures alone cannot do all the work to advance social equity. A socially inclusive society is a function of a good democratic state, on the one hand, and the function of the individual and the state's citizens on the other hand.[181] The State must take

[178] (2014) 35 *ILJ* 2981 (CC).
[179] Ibid para 58.
[180] *Barnard* supra 178 para 31.
[181] Ibid para 33.

reasonable and effective measures to realise the socio-economic needs of all its citizens, specifically the marginalised.[182]

A closer examination of the equality protection displays that direct or indirect unfair discrimination by the state or anyone on any of the listed grounds is prohibited, unless such discrimination is proven not to be unfair.[183] Affirmative action entails taking steps towards the attainment of substantive equality, its objective is to protect and advance the interests of people who were unfairly discriminated against based on their race, gender and class.[184] The test for whether a restitution measure falls within the scope of the equality provision of section 9(2) is whether the following take place: (a) target a particular class of people who have been susceptible to unfair discrimination; (b) be designed to protect and advance those classes of persons; and (c) promote the achievement of equality.[185] Once the restitution measure meets these criteria it ceases to be discriminatory in nature, because the Constitution says so.[186] Therefore, those who aspire for affirmative action within the ambits of section 9(2) do not engage in unfair discrimination.[187]

The Constitutional Court then engaged in an examination of the Employment Equity Act. The objectives of the Act are to give life to the constitutional guarantees of equality, to eliminate unfair discrimination at the workplace and to ensure implementation of employment equity in order to redress the effects of hate and prejudice enforced by the colonial and apartheid regimes.[188] The EEA does not only prohibit unfair discrimination,[189] it also provides that affirmative action measures must be done in accordance with the Act.[190] The South African Police Service as a designated employer has the duty to ensure that suitably qualified employees from designated groups are equally represented in each working category of the designated employer.[191] Moseneke DCJ pointed out an important aspect of the equity provisions in that the designated groups must be suitably qualified people in order to preserve the efficiency and

[182] Ibid.
[183] Ibid para 34.
[184] Ibid.
[185] Ibid para 36.
[186] Ibid para 37.
[187] Ibid.
[188] Ibid para 40.
[189] Ibid; Section 6(1).
[190] Ibid; Section 20.
[191] Ibid; Section 15(1).

competence of remedial employment. In accordance with what has been highlighted above regarding meritocracy as an ungenuine anti-CRT stance, the DCJ further provides that the Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent people.[192] The important aspect of this is the listing of the DCJ's points. If race, gender and class are the primary measures, then competency is by default part of such as a secondary measure. In essence, one must look at the group based on race, gender and class and not use meritocracy as a tool to gate keep positions from the marginalised. Simply put, the primary aspiration of equity at the workplace is to employ and retain people who are not only from a designated racial group or gender or class, but who are also competent and effective in delivering goods and services to the public.[193]

The court in its finding stated that:

'The Employment Equity Plan obliged the National Commissioner to take steps to achieve the targets, provided he acted rationally and with due regard to the criteria set by the Instruction. He was within his right and indeed duty to take steps that would achieve the set targets. It is so that the implementation of a valid plan may amount to job reservation if applied too rigidly. But was that the case here? For several reasons, I do not think that the National Commissioner pursued the targets so rigidly as to amount to quotas. First, over-representation of white women at salary level 9 was indeed pronounced. That plainly meant that the Police Service had not pursued racial targets at the expense of other relevant considerations. It had appointed white female employees despite equity targets. Had the Police Service not done so, white female employees would not have been predominant in any of the levels including salary level 9 nor would they have been able to retain their posts.'[194]

In this case, the court refused to be bated into undermining our country's attempt to achieve empowerment.

Ramalekana[195] argues further that when these right-wing and neoliberal groups are unsuccessful, they shift to other racial minorities such as people classified as the so-called coloured people in South Africa. Essentially, they attempt to pit the different disadvantaged

[192] Ibid para 41.
[193] Ibid.
[194] Ibid para 66.
[195] Ramalekana op cit note 148.

groups against each other, thus forcing the courts to make complex determinations of deserving and undeserving beneficiaries. In truth, these issues have little to do with the carefully hand selected claimants, they simply seek to entrench the privilege and hegemony of white people, particularly white men.

In accordance with the argument of Ramalekana above, the Constitutional Court was again put to task in *Solidarity v Department of Correctional Services.*[196] In 2011, the Department advertised vacancies in the Western Cape to which applicants applied for. The applicants consisted of so-called coloured men, women and one white man. The Department had adopted an employment equity plan, which is a plan recommended by section 20(1) of the Employment Equity Act which an employer adopts in order to achieve employment equity in its workplace.[197]

The applicants were subsequently not appointed to the positions for which they had applied. The reasoning behind not appointing the male candidates was that they were so called coloured people and so called coloured people were already overrepresented in the relevant occupational levels. With regards to not appointing the female candidates, the logic was that women were already overrepresented in the relevant occupational levels. This meant that appointing these prospective candidates to the positions for which they had applied would not be in accordance with the department's employment equity plan.[198]

Feeling aggrieved, the applicants instituted legal proceedings for unfair discrimination on the ground that they belonged to a race or gender that was already overrepresented on the relevant occupational levels and this discrimination was an unfair labour practice.[199]

The Constitutional Court had to deal with an important issue, whether the principles laid in the *Barnard* case would be applicable against black candidates? The applicants argued that the department could not in law refuse to appoint a candidate based on the reason that he or she was a so called coloured person or was a woman. Their understanding was that the employer could not do that against so called coloured people because they too are black people and black people are one of the designated groups intended to be beneficiaries of employment equity.[200] Does the

[196] 2016 (5) SA 594 (CC).
[197] Ibid para 4.
[198] Ibid para 6.
[199] Ibid para 17.
[200] Ibid para 37.

Barnard principle apply to African people, so called coloured people, Indian people, people with disabilities as well as women or is this principle strictly limited to White people?[201] As a matter of principle, Ms Barnard, two years earlier had been refused a promotion on the basis that white people were already overrepresented in the occupational level to which she wanted to be appointed.

Zondo J (as he was then) firmly expressed that the *Barnard* principle in its application cannot be limited to white candidates. Black candidates, irrespective of whether they are so called coloured people, African people or Indian people, are also subject to the Barnard principle. Equally, both men and women are subject to that principle. The logic behind this principle is that transformation of the workplace requires that the workforce of an employer should be broadly representative of the people of South Africa. This study agrees with the reasoning of Zondo J as the Justice used section 9(2) of the Constitution to argue that a workplace that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce.

Using the principle stated in *Motala v University of Natal*[202], Zondo J argued further that although under apartheid racially discriminatory laws all black people suffered racism, this system had the greatest effect on African people. Therefore, any remedial action, such as affirmative action, cannot succeed in reversing the imbalances caused by the colonial and apartheid governments if it is based on the notion that black people would be equitably represented in a workplace if so called coloured people and Indian people are represented while African people are not represented at all.[203] All black people must be represented in the workplace, simply having one or two group or segments of the black population whilst excluding the other will not suffice to meet the aspirations of the EEA and the Constitution, which both require that our history as a country be taken into account when dealing with affirmative action.[204] This study submits that Zondo J must be applauded for being alive to the fact that our society is race conscious, the law is race conscious, and therefore, it is appropriate for our courts to also be race conscious in their decisions.

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[201] Ibid.
[202] 1995 (3) BCLR 374 (D).
[203] *Solidarity* supra 196 para 48.
[204] Ibid para 48 and 49.

However, this *Barnard* approach as confirmed in *Solidarity* was short-lived as the judiciary wearing the hat of the Equality Court reversed such progress in the case of *Kroukamp and Another v The Minister of Justice and Constitutional Development*.[205] In this case, after considering all the relevant factors, the Magistrates Commission recommended only the complainant for the vacant post of Senior Magistrate in the Alberton region. The Minister then requested that the commission provide him with further information as the information before him was not sufficient to enable him to make judicial appointments. According to the commission, gender and racial balance in the Alberton region would not be disturbed by the appointment of this white male candidate.[206] However, the Minister questioned why only one candidate was recommended for each of the twenty three vacant positions, the commission responded stating that in these circumstances, only three candidates were shortlisted per post and only one candidate was found suitable for appointment, hence, only one name was submitted to the Minister. The commission went further stating that the other suitable candidate, an Indian lady, had been appointed at the Johannesburg region.[207]

However, the Minister whilst accepting the recommendation of one candidate per post still refused to make any appointments as he was not satisfied with the pool from which the recommendations were made. The Minister viewed these positions as being critical to the transformation of the judiciary, therefore, necessitating the consideration of black women judicial officers.[208] The court expressed its view stating that the only reason for the Minister refusing to appoint the complainant as a Senior Magistrate of Alberton was simply because he is not black and a woman.[209]

The complainant, feeling aggrieved, launched proceedings claiming that there was unfair discrimination on the basis of race and or gender in contravention of s 6, 7 and or 8 of the Equality Act.[210] The complainant argued that the decision based on considerations of race and gender, does not stand in the face of the requirement that affirmative action must be applied in a situation sensitive manner that prioritises the ability of the applicant. The complainant was of the

[205] (74236/2013) [2021] ZAGPPHC 526 (16 August 2021).
[206] Ibid para 9.
[207] Ibid para 13.
[208] Ibid para 14.
[209] Ibid para 15.
[210] Ibid para 16.

view that the application of race and gender alone went against the appointment of candidates, and as such, service delivery was being negatively affected by the Minister's preoccupation with race and gender representation to the exclusion of other considerations such as competency.[211] The respondents argued that no appointments were made even in instances where African males had been recommended.

The court stated that the Equality Act forbids unfair bias. It is legislation that gives life to section 9 of the Constitution, the equality clause. Using the principle of subsidiarity, the court reasoned that it is the provisions of the Equality Act that must be applied and there must be no direct reliance of section 9 of the Constitution. The court gave effect to the principle laid down in *MEC for Education, KwaZulu-Natal v Pillay*,[212] in that a party cannot circumvent statutes enacted to give effect to a constitutional right by attempting to rely directly on the constitution right.

This study submits, in this specific case, would this approach not lead to the failure to understand substantive equality that is the primary purpose of the equality clause? As can be seen from *Minister of Home Affairs v National Institute for Crime Prevention*,[213] substantive equality is a legally enforceable right.

This study also submits that the approach that the court sought to adopt in this case is dangerous as it harbours clear legal and social boundaries that sustain conventionally gendered and racialised ideas of society.[214] Albertyn[215] suggests that equality jurisprudence must be consistent in order to properly address the systematic inequalities of our society and overcome the detrimental effect of legal formalism, which the court seemed to adopt in this case. This study submits another rhetoric, how beneficial is it to our already racially and gender divided society to continue to express the law in the perspective of a white male in a majority African population, in an African country?

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[211] Ibid para 21.
[212] 2008 (1) SA 474 (CC) para 40.
[213] 2005 (3) SA 280 (CC) para 21; *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 para 62; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.
[214] C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23:2 *South African Journal on Human Rights* 253–276 at 254.
[215] Ibid.

Using the Magistrates Act [216] which provided for the appointment of any fit and proper person as a magistrate, the court sought to bypass the need for transformation and adopted once again the legal formalism which is a tool for colour blindness.[217] In furtherance of the neoliberal approach of non-genuine meritocracy, the court stated that it preferred the approach where the first step is to find the candidates who are the very best in terms of criteria of merit. Then, only then, if the ranking of candidates does not reflect the required representation would race and gender apply to candidates who may not have been the first or second choice on the ranking but that notwithstanding, comply with the text of merit and hence are appropriately qualified.

The researcher of this study submits that this suggestion by the court comes across as suggesting that race and gender are issues that are secondary, based on sympathy and not valid primary issues that are sought to be achieved from the start of the process.[218] This is precisely what Delgaldo sought to explain when he expressed that there is a black and white perspective to the law and such colour blindness is to the prejudice of the marginalised populations of society. The court further provides a problematic approach when it states that our society may not become a united society and heal the divisions of the past, if it continues to apply the apartheid inequalities in reverse. The court seems to suggest that African people have the strategy, power and systems in place to effect racially-based hate; needless to say, this is not the case. This idea of who can and cannot be racist in the labour law perspective is dealt with in detail in Chapter 6 of this thesis.

The court went further and stated that it agreed with Ledwaba J (as he was then) in *Singh v Minister of Justice and Constitutional Development*[219] that race and gender in section 174(2) of the Constitution must not be misconstrued to be excluding the other crucial factors mentioned in section 9(3) of the Constitution.

A few months later, the SCA failed to live up to the standard set by Moseneke DCJ in *Barnard* in *Magistrates Commission and Others v Lawrence*.[220] In this case, Mr Lawrence, an

[216] 90 of 1993.
[217] *Kroukamp* supra 205 para 40 and 41.
[218] Madlingozi op cit note 7 at 132 notes that Robert Mangaliso Sobukwe, the first president of the Pan African Congress of Azania argued that the attempt by white people to reduce the race question to a secondary question and the main issue become that of class rather than race was a deliberate strategy of deflection by those who sought to reduce the evils of colonialism and racism to a class question.
[219]2013 (3) SA 66 (Equ) para 27.
[220] [2022] 1 All SA 321 (SCA).

acting magistrate, applied for the position of a permanent magistrate in the magisterial districts of Bloemfontein, Botshabelo and Petrusburg.[221] He was not shortlisted for any of these posts, and feeling discriminated against and aggrieved, he instituted legal proceedings. The court started off by highlighting Regulation 3[222] which deals with the appointment of magistrates. This regulation provides that what must be considered in the appointment of these judicial officers is the qualifications, level of education, relative merits, efficiency and competency for the office of persons who qualify for the relevant appointment or promotion. The appointment procedure was approved, taking note of s 174(2) of the Constitution which provides for consideration of racial and gender demographics at a specific office in an attempt to redress the corruption and imbalances caused by the colonial and apartheid regimes.[223]

Mr Lawrence had commenced acting as a magistrate on 2 January 2015 and at the time of the shortlisting process, he had been acting for four years and in addition he had been acting as the Head of the Petrusburg office for two years.[224] Therefore, his competence was not in question. Mr Lawrence was known for managing his office very well, he held meetings with stakeholders of the community to identify problems and took remedial actions to better the service delivery of the office.[225] The SCA noted that he met the requirements of regulation 3 in that he was a South African citizen, fit and proper and had the necessary qualifications.[226] Potterill AJA then proceeded to imply the unimaginable. According to him, the committee had disregarded the fact that Mr Lawrence had acted and managed the Petrusburg office and that he was knowledgeable in the beliefs and traditions of that predominantly Afrikaans and farming community.[227] Potterill AJA stated further that the committee had not balanced the relevant experience, qualifications, needs of that office and the appropriate managerial skills, rather, it had focused on race as an exclusionary measure to side-line candidates who were white.[228]

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[221] Ibid para 1.
[222] Regulations for Judicial Officers in Lower Courts, 1994 GN R361, GG 15524, 11 March 1994.
[223] *Lawrence* supra 220 para 17.
[224] Ibid para 19.
[225] Ibid para 21.
[226] Ibid para 22.
[227] Ibid para 25.
[228] Ibid, the court relied on *Solidarity and Others v Department of Correctional Services* 2016 (5) SA 594 (CC)

To further justify its reasoning, the court relied on the decision of the Equality Court in *Singh v Minister of Justice and Constitutional Development*.[229] In *Singh*, the court had found that the mention of race and gender in s 174(2) of the Constitution should not be misunderstood to be excluding the other important factors provided for by s 9(3) of the Constitution which should also be factored in when short listing magistrates.[230] The SCA also relied on the Equality Court decision in *Du Preez v Minister of Justice and Constitutional Development*[231] in that such exclusionary measures create the absolute exclusion of non-designated groups. Potterill AJA was of the view that this approach by the committee leads to an instance where no white candidate is considered. The court went further to provide that the approach of the committee was inconsistent with the proper interpretation section 174 of the Constitution. In his view, rather than considering race as but one of the factors, the committee set out to exclude candidates, including the respondent, on the basis of their race. This approach does not meet the standard set by our courts.[232]

This study submits that this majority judgment had no regard for the reality of South Africa. Furthermore, the judgment had no regard for substantive equality. This principle is rooted in the understanding that inequality is a result of political, social and economic discrimination of certain groups of our society and it is not some arbitrary and irrational circumstance.[233] Substantive equality acknowledges that inequality is systematic in nature, it is the implementation of corrupt social values by the institutions and power relations. Langa CJ noted that substantive equality required a social and economic revolution so that everyone shall enjoy equal access to the resources and amenities of life.[234] This social revolution necessitates the dismantling of systemic inequalities. The late revolutionary President of Cuba, Fidel Castro in

[229] 2013 (3) SA 66 (EqC).
[230] Ibid para 27.
[231] 2006 (5) SA 592 (EqC).
[232] *Lawrence* supra 220 para 34
[233] C Albertyn op cit note 214 at 254; also see P de Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17(2) *South African Journal on Human Rights* 258-276; P de Vos ''Substantive equality after Grootboom: The emergence of social and economic context as a guiding value in equality jurisprudence' (2001) 52 *Acta Juridica* 52-69*;* S Fredman 'Providing equality : substantive equality and the positive duty to provide' (2005) 21(2) *South African Journal on Human Rights* 163-190; S Fredman 'Substantive equality revisited' (2016) 14(3) *International Journal of Constitutional Law* 712–738.
[234] Ibid; also see P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 352–353

his trial in 1953 understood it best 'A revolution is not a bed of roses. A revolution is a struggle to the death between the future and the past.'[235]

This study submits that substantive equality is not an easy task that will appease everyone, it is a struggle between South Africa's race-based discriminatory past, present and its desired non-racial future. Simply pretending as though white men do not have an upper hand in society, in this study's context, the labour sector, is not only turning a blind eye on racism but it is racism itself.[236] Therefore, this study submits that the court in this case missed an opportunity to continue the tradition laid by Moseneke DCJ in *Barnard*, as upheld by Zondo J in *Solidarity* of looking into the history of the country, the aspirations of section 9 of the Constitution and the demographics of South Africa.

Molemela JA provided the minority judgement. According to the minority, context is everything, section 174(2) must therefore be understood in the context of substantive equality.[237] According to the minority, substantive equality is not only a core and foundational value provided for in the preamble of the Constitution, it is also an enforceable right enshrined in the bill of rights.[238] Molemela JA stated that the equality clause of section 9(2) requires the state to take legislative measures to protect and advance persons that have been disadvantaged by unfair discrimination. This understanding of equality in a substantive manner unavoidably demands us

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[235] Editorial 'Castro in quotes' the Guardian 19 February 2008 https://www.theguardian.com/world/2008/feb/19/cuba1 [Accessed 9 April 2022].

[236] The researcher is of the view that this approach by Potterill AJA mirrors the approach that was exposed by the students of the Black Consciousness Movement when they exposed white liberals and leftists as equally ignorant in the social dynamics of racial domination see A Webster 'On conquest and anthropology in South Africa' (2018) 34(3) *South African Journal on Human Rights* 398–414; A Gordon and C Newfield 'White philosophy' (1994) 20(4) *Critical Inquiry* 737–757 who argues that white moderate politics that presents itself as being advocates in favour of the opposition to racial discrimination while also rejecting race consciousness and downplaying the continuing significance of racism is liberal racism. This liberal racism upholds and defends systems and discourses that produce anti-black effects. Such liberal racism does not seek to understand racism, rather, it seeks to treat the intellectual categories for engaging racism as conceptual errors and as being intellectually flawed. Liberal racial understanding presents itself as grounded in reason and not in history, law, politics and ideology; F Furedi *The Silent War: Imperialism and the Changing Perception of Race* (1999) New Brunswick, NJ: Rutgers University Press suggests that these white liberals push the narrative that less race-talk will in turn lessen the blow of racism. They seek to redefine the problem not as historically entrenched structural racism as the victims and prospective victims of racism assert, rather, they seek to depict anti-racist discourses and movements as the issue; DT Goldberg *The Threat of Race: Reflections on Racial Neoliberalism* (2008) suggest that the fight against racialism takes precedent over the fight against racism. Modiri op cit note 99 provides that this is supported by how the majority of academics on race in South Africa focus on the theoretical deconstruction of racial categories rather than directly engaging on a critical analysis towards the dismantling of institutional and structural racism.

[237] *Lawrence* supra 220 para 38.

[238] Ibid; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 22.

to recognise the need to rectify the entrenched inequalities in our society. The minority judgment relied on *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association*[239] in that restitution is an important part of our transformative constitutional order. This study submits, how can we enforce restitution and redress if our courts pretend that race, the first factor of discrimination in the past and the present, is not an import factor to consider?

Section 174(2) aspires for a judiciary that reflects the race and gender demographics of South Africa, it is focused on achieving substantive equality.[240] Therefore, the measures taken in terms of ss 174(2) are equally important to the transformation of our courts.[241] The court cited Langa CJ that the justice system of the colonial and apartheid South Africa had a white unwelcoming face with black people as its victims, the injustice was administered by the courts which were not only alien but were also hostile to black people.[242] The minority judgement noted that even after decades of the new constitutional dispensation, white males remained over represented in magisterial districts.[243] The race of Mr Lawrence and the demographics of the magistrate offices must not be considered an irrelevant and unspeakable topic, even though a non-racial society is the end goal of our country.

(g) Critical disability theory

As discussed above, people living with a disability are part of those who are discriminated against. It then becomes necessary to think critically about their position in labour law from a decolonial, critical race theory perspective as they are then part of 'the other' with an undesirable differentness in the minds of 'the normal'. From a socio-political perspective, disability is a matter of political and social construct and not necessarily a problem of an individual.[244] This is

[239] 2018 (5) SA 349 (CC).
[240] *Lawrence* supra 220 para 44.
[241] Ibid.
[242] Ibid para 46.
[243] Ibid para 48.
[244] ST Rocco 'From Disability Studies to Critical Race Theory: Working Towards Critical Disability Theory' (2005) *Adult Education Research Conference;* MC Marumoagae 'Disability discrimination and the right of disabled persons to access the labour market' (2012) 1(15) *PELJ* 345–428 states that even though academics have engaged in a discussion regarding discrimination relating to race, religion and gender, they have not yet sufficiently engaged the issue of disability discrimination in the workplace. Marumoagae argues further that people living with disabilities continuously face difficulties in exercising their basic social, political and economic rights. Discrimination against people living with disabilities is one of the worst social stigmas that our society has not been able to have open and honest discussions on in order to overcome the stigma. People living with disabilities are amongst the most

because previously, what society considered as a disability was no different from other 'miseries' of life, this must not be misunderstood to downplay the various kinds of issues that people living with a disability face.[245] It was during the creation of capitalism in the industrial revolution where people living with disabilities became a form of surplus with diminished capacity to contribute towards the making of profits in the labour sector. In essence, our societies are the problem as they create unhealthy environments that harbour stigma.[246]

As a result of such discrimination by our society, including employers, scholars from disability studies borrow from CRT to formulate the critical disability theory (CDT). This study submits that this theory has not yet been used in South Africa to examine the condition of people living with disabilities in the perspective of labour law. The importance of this principle is that the continued commodification of labour leaves those living with disabilities at a stage of poverty and isolation.[247] The CDT scholars have worked hard to get disability recognised as part of the triad for race, gender and class.[248] As such, it becomes obligatory for any scholar who engages in CRT to also engage in CDT. In this thesis, the phrase 'people living with a disability' is used and not disabled people as such a term has stigma and categorises this group of people as being unable.

The Constitutional Court had to deal with the issue of a person living with a disability in *Damons v City of Cape Town.*[249] However, this study is concerned with the minority judgment of Pillay AJ which deals in great detail with the socio-legal perspective of the issue. Mr Damons was a firefighter who was employed by the City of Cape Town. He was injured on duty, during a fire drill, due to the employer ignoring safety requirements. During the drill, Mr Damons was required to hop onto the back of another trainee, and he fell from the second floor to the first floor.[250] As a result, Mr Damons was injured permanently and now cannot carry anything heavy.

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marginalised in all societies and face unique challenges in the enjoyment of their human rights. In order to effectively exterminate employment challenges, the notion of equality advocated for in South Africa with regards to this group of people has to be one of substantive equality.

[245] Ibid.

[246] Ibid.

[247] Ibid; also see Item (t) of the Preamble to the Convention on the Rights of Persons with Disabilities, 13 December 2006 (CRPD); Foreword to the Code of Good Practice on Employment of Persons with Disabilities, GN 1085 GG 39383, 9 November 2015 (Code) as alluded to in section 3(c) of the Employment Equity Act 55 of 1998.

[248] Ibid; also see A Asch 'Critical race theory, feminism, and disability: Reflections on social justice and personal identity' (2001) 62(391) *Ohio State Law Journal* 391–423.

[249] (CCT 278/20) [2022] ZACC 13 (30 March 2022).

[250] *South African Municipal Workers Union obo Damons v City of Cape Town* (2018) 39 ILJ 1812 (LC).

Physical fitness is a requirement for firefighters. Mr Damons commenced his employment as a firefighter in 2001 and would have been promoted in 2010 but for his permanent injury.[251] In 2013, Mr Damons was 'accommodated' by his employer through alternative employment and was placed in the Fire and Life Safety Section to perform administrative and educational work. He retained his title as a firefighter and his salary. Mr Damons then applied for a position as a senior firefighter and asked that his employer relaxes the requirement of physical fitness.[252] The employer refused, and Mr Damons has not had any promotion since.

Feeling aggrieved, Mr Damons instituted legal proceedings under the EEA. He claimed that he was being unfairly discriminated against as the employer refused to the physical fitness requirement and to promote and advance him, preferably in his job as a firefighter. The employer on the other raised the defence that physical fitness is an inherent job requirement for firefighters.[253] The issue was reduced to a simple question, does the City of Cape Town have an obligation to reasonably accommodate Mr Damons?[254] This calls for an investigation into the co-existence of inherent job requirement and the duty not to discriminate against, rather, to reasonably accommodate people living with disabilities.

Mr Damons acknowledged that he would not have been successful in applying for any other promotion as he did not have the necessary skills or qualifications, he applied to be a senior firefighter.

In its decision, the Labour Court was of the view that since Mr Damons was injured under duty, his employer could not simply apply its policy on the inherent job requirement in a way that prevented Mr Damons from advancing due to the disability he lives with.[255] The Labour Court, whilst acknowledging the employer's defence of inherent job requirement, was of the view that the discrimination against Mr Damons was unfair as it was an infringement on the Code that prevented the employment of people living with disabilities on less favourable terms.[256] The Labour Appeal Court relied on *TDF Network Africa (Pty) Ltd v Faris*[257] which held

[251] *Damons* supra 249 para 3.
[252] Ibid para 6; the court confirmed this position in *Imatu v City of Cape Town* 2005 26 *ILJ* 1404 (LC) at para 28.
[253] Ibid para 8.
[254] Ibid para 9.
[255] Ibid para 25.
[256] Ibid.
[257] (2019) 40 *ILJ* 326 (LAC); also see *South African Airways (Pty) Ltd v V and Another* (2014) 35 *ILJ* 2774 (LAC).

that a job requirement is inherent if it is rationally connected to the performance of the work. The LAC set aside the decision of the LC as it held that it was not possible for Mr Damons to perform the vital activities expected from an active firefighter; furthermore, it was not in the public interest to have firefighters not capable of dealing with the outbreak of fires.[258] The study submits, is it in the public interest to simply exclude people living with a disability altogether from certain employment without considering the alternative?

In the Constitutional Court, Pillay AJ asked the primary question – was the City of Cape Town discriminating unfairly against Mr Damons on the grounds of his disability?[259] The secondary question the court put forward was whether the City of Cape Town had a duty to reasonably accommodate Mr Damons, to which the City of Cape Town denied it had and raised the defence of an inherent job requirement.[260]

The Constitutional Court in the minority judgment of Pillay AJ began by making an analysis of the statutory framework. Section 2 of the EEA refers to the purpose of statute as being (a) to promote equal opportunity and fair treatment by eliminating unfair discrimination; (b) to implement affirmative action measures to redress the disadvantages of designated groups. Section 3 of the EEA resembles the preamble as it gives life to the constitutional right of equality as enshrined in section 9 of the Constitution as well as the right to fair labour practice.[261] The court also engaged in an analysis of international law which is not relevant for this study's purpose.[262] Turning to the Code, the court noted that it does not create additional rights and obligations regarding disability, what is of relevance is item 6 of the Code which imposes

[258] *Damons* supra 249 para 31.
[259] Ibid para 43.
[260] Ibid.
[261] Ibid para 44.
[262] Ibid; on international law see section 233 of the Constitution; A Lawson 'Disability law as an academic discipline: Towards cohesion and mainstreaming?' (2020) 47 *Journal of Law and Society* 558 at 559; C Ngwena and C Albertyn 'Special issue on disability: Introduction' (2014) 30 *SAJHR* 214; United Nations Declaration on the Rights of Disabled Persons, 9 December 1975; Nussbaum 'Capabilities and human rights' (1997) 66 *Fordham Law Review* 273 at 277; Dugard 'International law and the South African Constitution' (1997) 8 *European Journal of International Law* 77 at 92; Convention 11 of 1958 of the International Labour Organisation; *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* (2008) 29 *ILJ* 1239 (LC); International Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965 https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial [accessed 15 November 2022]; the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the United Nations Declaration on the Rights of Disabled Persons of 15 December 1975 https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women [Accessed 15 November 2022].

positive duties on employers to reasonably accommodate workers and in the process promote equality and eliminate discrimination.[263]

The court also noted that section 6 of the EEA prohibits unfair discrimination, including on the ground of disability. Using the test set in *Harksen v Lane N.O,*[264] the court noted that the burden of proof rests on an employer to prove that the discrimination is fair, and if it is not fair, that it at least is justifiable.

An inherent job requirement is protected against a claim of discrimination and the employer in such an instance cannot be compelled to waive that requirement in an attempt to accommodate a worker living with a disability. [265] In this case, it is a settled principle that physical fitness is an inherent requirement for firefighters.[266] Mr Damons alleged that his employer applied this requirement to him, whereas it did not apply to other workers who were promoted to senior firefighters. The other workers were promoted without the need for them to perform physical tasks. The court noted, however, felt that Mr Damons lacked evidence for this and since the implementation of the policy, no firefighter has been promoted without the application of this requirement.[267]

The Constitutional Court in its minority judgment accordingly found that the application of this inherent job requirement is not unfair discrimination. Pillay AJ also agreed with both the Labour Court and the Labour Appeal Court with regards to their finding that physical fitness is indeed an inherent requirement of the job of operational firefighters. The court also upheld the decision of the Labour Appeal Court in when it set aside the decision of the Labour Court which had held that the application of the Policy to Mr Damons amounted to unfair discrimination in terms of section 6(1) of the EEA.[268]

With regards to the issue of reasonable accommodation, the court stated that it is not synonymous with affirmative action.[269] The court suggested a broad interpretation of this phrase

[263] *Damons* supra 249 para 62.
[264] 1998 (1) SA 300 (CC).
[265] Ibid para 67.
[266] Ibid para 68; *Pharmaco Distribution (Pty) Ltd v EWN* (2017) 38 ILJ 2496 (LAC); *Department of Correctional Services v Police and Prisons Civil Rights Union* 2013 (4) SA 176 (SCA).
[267] Ibid para 70.
[268] Ibid para 72 and 73.
[269] Ibid para 75.

so as to mean any adjustment or modification. The court stated further that employment cannot be limited to familiar physical requirements, it must include psychological counselling, career training etc. in order to maximise participation of people living with disabilities.[270] According to the court, reasonable accommodation does not only include participation but it also includes advancement and it is about the need to promote substantive equality and to eliminate discrimination. Therefore, the failure or refusal by the employer to reasonably accommodate a worker living with a disability would not achieve the objectives of the EEA. The employer has the duty of preventing unfair discrimination, failure to reasonably accommodate the worker then becomes unfair discrimination.[271] The court went further to explain that reasonable accommodation under the EEA is reserved for designated groups, it does not extend to everyone; however, it does extend to people living with a disability.[272]

The concept of Ubuntu[273] also plays a role in this matter as it solidifies the moral claim of reasonable accommodation. Treating people living with disabilities as a problem goes against the culture of human rights. It must be understood that reasonable accommodation must be genuine and though of in an attempt to fix a disadvantage in order to pave a way for the implementation of equality of opportunity and remuneration.[274] Employers have the duty to consult with the person living with a disability and this consultation by the employer must be in good faith and made in order to clarify whether such reasonable accommodation would in fact be necessary. If so, what form the reasonable accommodation might take. Further to this, reasonable accommodation is person specific.[275]

The duty to reasonably accommodate disability is not charity nor is it optional or some form of welfare that the employer applies at its own will, rather it is a statutory requirement. The court noted that it is not desirable that once the employer merely raises the defence of the inherent job requirements, the employers obligations to exterminate discrimination simply

[270] Ibid para 78.
[271] Ibid para 81 and 82.
[272] Ibid.
[273] Ibid; also see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37; *S v Makwanyane* 1995 (3) SA 391 (CC) para 308; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 14 and 100; Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).
[274] Damons supra 335; Ngwena 'Interpreting aspects of the intersection between disability, discrimination and equality' (2005) 16 Stellenbosch Law Review 3 at 5.
[275] Ibid; reasonableness plays a hand see *Association for Mineworkers and Construction Union v Anglo Gold Ashanti Limited* (2022) 43 ILJ 291 (CC).

end.[276] In the court's view, the ultimate aim of reasonable accommodation is not about the person in question simply fulfilling the vital functions of the job but 'a' job. In the search for reasonable accommodation, an employer is not limited to a particular job. However, once a job is identified, then assessment, access and suitability for 'the job' applies. The court noted that reasonable accommodation is the appropriate manner to accommodate incapacities, enable capabilities and restore identity and dignity. This is further scrutinised in this matter as the worker was injured on duty to the liability of the employer. The permanent injuries of Mr Damons strip him of some of his dignity as he is no longer the self-sufficient man he once was. Furthermore, the City of Cape Town led no evidence to discharge its obligation to explore ways of accommodating Mr Damons in other lines of employment.[277]

The CC in its dissenting voice was of the view that the appropriate remedy in this case must be for the City of Cape Town to explore the positions Mr Damons could occupy and for the city to look into the accommodations that could be made for Mr Damons in order to enhance his responsibilities so that he has prospects for advancing his career. If need be, the City of Cape Town must facilitate counselling, reskilling, retraining and reassigning to the applicant functions that he can perform. The City of Cape Town's head view of what is doable should, with creativity and imagination, craft a career path that the Mr Damons desires. The court held that:

'Consequently, the respondent is in breach of sections 5 and 6(1) of the EEA in that its refusal to reasonably accommodate the applicant in a job, with prospects for advancement, for which physical fitness is not required, amounts to unfair and unjustifiable discrimination of the applicant as a person with disabilities.'[278]

This study submits that this minority judgement is significant and has a social impact in that it lays the practical foundation for the fight against ableism. It demands the employer to reasonably accommodate the employee and does not allow the latter to simply allege inherent job requirements as a defence without proof. This in a way takes away the commodification of labour and the reduction of people living with disabilities into 'the other'. The judgment seeks to protect the dignity of the worker and as proposed by critical disability theorists above, it paves

[276] Ibid para 90.
[277] Ibid para 95.
[278] Ibid para 105.

the way for the inclusion of people living with disabilities into the triad of race, gender and sexuality.

The same way Steve Biko sought to unite all groups of people that were marginalised by racism, this study suggests that critical race theorists in South Africa cannot engage in CRT without discussing CDT and start including it in a discussion about race, gender, class and or sexuality. All of these engagements must be understood from the root cause, the façade of the European eugenics which sought to reduce that which it did not understand into 'the other'. Without being exhaustive, this study is opening the discussion in South Africa into examining cases of this nature and it leaves room and calls upon other scholars to critically engage in this issue.

Secondly, according to Modiri, white supremacy does not mean the mainstream right wing hate groups that consciously promote white superiority at the expense of the subjugation of other groups of people, rather, such racism denotes a system in which white people maintain overwhelming control and power in relation to other populations. Modiri[279] suggests that part of the illusion in our Republic regarding the question of race is the misguided belief that since 1994, the end of formal apartheid, white people and black people equally enjoy formal legal rights. This school of thought is supported by the use of the phrase 'previously disadvantaged group' to refer to black people. In essence, Modiri is of the view that racist practices entrenched in the law and legal institutions can in fact exist long after the abolishment of the racial laws. This study submits that part of the reason for the continued racist practices in the realm of labour law that show themselves as white liberal thought and colour blindness is due to this misguided notion of South Africa being a post-apartheid, post-colonial state. South Africa, simply put, is a continuation of apartheid with the black elite as the political faces, law makers and enforcers of the 'law'. This is confirmed by Sachs[280] in his famous quote 'apartheid is dead. Viva neo-apartheid!'.

[279] Modiri op cit note 4 at 406.
[280] A Sachs 'A freedom charter for South African artists' (1991) 9 *Staffrider* 45 at 46.

II CONCLUSION

In conclusion, Vincent Harding, a historian urges black intellectuals to speak the truth as a fundamental prerequisite for the collective survival in a racist world.[281] Harding encourages scholars in the diaspora to speak the truth about our people so that black men, women and children will be able to free their minds. All of this rests in the understanding of the conditions facing black communities.[282]

This chapter, in an attempt to shine light on the conditions of African people as the working class, clearly defined decolonisation as the inclusion of African intellect and opinion in systems that govern African people, specifically the court system when dealing with labour law. The study obtained this definition through the practical application of CRT as a tool of analysis which, if used correctly, can lead to court decisions like that of *Barnard* and *Solidarity* where the ill-informed racism denialist right wing and neoliberal approaches seek to undermine the condition of African people through colour blindness in a colour conscious society. Furthermore, decolonisation refers to the undoing of colonial laws and legal structures which in a sense include freeing the minds of the colonised and the minds of the descendants of the colonised from colonial ideology that sought to reduce African people into mere economic animals through the enforcement of racist structures which have unsurprisingly survived into our neo-apartheid state.[283] This study obtained this definition through an investigation of colour blindness and an antithesis to affirmative action and as such, this enabled it to effectively the critique position of dominant white liberal jurists that reduce the struggle against racism and domination of African people to a secondary issue and an afterthought.

The chapter also clearly identified how the lack of use for decolonial thought, critical race theory, section 9 of the constitution and taking into account the history of the treatment of African people and black people in general, can lead to decisions that reverse the progress of substantive equality, constitutionally unsound and undesirable decisions such as those laid by the Equality Court and the Supreme Court of Appeal in *Kroukamp* and *Lawrence*.

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[281] J Torok 'Freedom now race consciousness and the work of de-colonization today' (2004) 48(1) *Howard Law Journal*, 351 at 364.
[282] Ibid.
[283] S Sekalala, L Forman, T Hodgson et al 'Decolonising human rights: how intellectual property laws result in unequal access to the COVID-19 vaccine' (2021) *BMJ Global Health* 1–9.

This study expressed its view that part of the problem with the use of this terminology of post-apartheid and post-colonial is the illusion that leads to the displacement and relegation of race, creating an impression that racism is no longer an issue and cause of discrimination towards African people and all black people.[284] Rather, this 'progressive white liberal approach views the lived experiences of racially oppressed and colonised populations as invisible and secondary to individual meritocracy and opportunity, thus, one has to prove their individual disadvantage. This approach has played a deep role in side-lining, silencing and disregarding how victims of racism view the problems of racism, decolonisation, and white supremacy.'[285] Modiri puts it, 'The problem of race, we might say, is the Achilles heel of all white thought and white politics.'

Modiri[286] cites Pierre[287] that another problem that leads to the denial of the need for redress and substantive equality is the misunderstanding that at the dawn of 'independence' of African countries, white legal thought adopted the impression that race, white supremacy, imperialism were no longer of concern. This all came under the false impression of formal political independence with self-determination, liberation, and national, cultural sovereignty for African people.[288] The end of formal apartheid, as seen in the perspective of the judgments delivered by the Equality Court and the Supreme Court of Appeal above, silenced the need to critique and redress the issues that still exist in our neo-colonial, neo-apartheid Republic.[289] The logic is that due to the existence of African elites, race is no longer an issue, if it is, it is reverse racism, therefore a colour-blind approach is adopted.

However, the limitation of this chapter is that it did not discuss the economic philosophy differences within the Black Consciousness movement. This would have entailed a discussion of how Marcus Garvey, respectfully, even though a stalwart of Pan Africanism, was a capitalist.[290] The importance of this being the objective of the total emancipation of African people is not to adopt a Eurocentric economic system, which clearly oppresses the workers or the working class, rather, to obtain equality and unity for all workers of the world, specifically African workers in

[284] Modiri op cit note 7 at 53.
[285] Ibid.
[286] Modiri op cit note 7 at 54;
[287] J Pierre *The Predicament of Blackness: Postcolonial Ghana and the Politics of Race* (2013) Chicago: University of Chicago.
[288] Ibid.
[289] Ibid.
[290] Torok op cit note 281 at 193 to 194.

accordance with African socialism as provided for by Mwalimu Nyerere when he coined Ujaama. However, the economics of labour and its effect on the working class will be dealt with in detail in Chapter 5 of this thesis.

CHAPTER 3

ACCESS TO JUSTICE OF THE WORKING CLASS IN LABOUR LAW MATTERS

I INTRODUCTION

Often, the poor and the working class African people face difficulty in navigating the labour law sector in that they do not have enough money to institute legal proceedings against their employers or once they have instituted such proceeding, they fail to pay legal costs orders. They may also face a limitation of this right when there is an attempt on the part of the employer to prevent their trade unions from assisting them on the grounds that they (workers) do not fall within the scope of the constitution of the trade union which they form part of. This (exclusion of workers from protection of trade unions when the workers are not protected by the union constitution) has an impact on worsening the already unequal power imbalance between the employer and the employee. It is within this context and this power imbalance that this discussion must be understood. This then products the need attempt to decolonise this aspect of labour law. There may be other issues that limit the workers' rights to access to justice; however, the study only deals with the two highlighted above. In essence, the purpose of this chapter is to discuss in detail, using recent case law, the limitation or attempt to limit access to justice for the poor, working class, often African workers. The chapter, in the form of case analysis examines a much needed reaffirmation of a settled principle of law regarding costs orders in labour law in the case of *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd*. The chapter then discusses the attempt by a trade union to ignore its own constitution in the case of *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe).*

II Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd (2021) 42 ILJ 2371 (CC)

The case of *SA Custodial Management (Pty) Ltd* [1] concerns the departure, without reason, by the Labour Court from the settled principle in labour cases that costs orders do not follow the result in a matter. This departure led to the Constitutional Court setting aside the decision. The chapter highlights the arguments of the parties before the Constitutional Court and engages in a

[1] *Union for Police Security &Corrections Organisation v SA Custodial Management (Pty) Ltd & others* (2021) 42 ILJ 237.

discussion of the legal reasoning provided by the court in reaching its decision. It seeks to provide an analysis of cost orders in labour law by examining the implications and the groups of people affected by such orders. This analysis aims to provide an insight into how the matter engages with issues relating to race and class in South Africa, which should not be ignored.

(a) Facts

This case, inter alia, concerns an application for leave to appeal against a costs order imposed by the Labour Court. The applicant was a trade union, the Union for Police Security and Corrections Organisation, acting on behalf of its members employed by the respondents. The first respondent was a company, South African Custodial Management, which provided prison services to the Department of Correctional Services, while the second to fifth respondents were subcontractors to the first respondent in its provision of services.[2] The central issue in the dispute revolved around an audit report which contained findings meant to be binding on the first to fifth respondents. The union launched proceedings in the Labour Court seeking to enforce the obligations contained in the report.[3] The court found that it had no jurisdiction in the matter since the documents were part of a collective agreement, but no costs order was made. It is only when the union filed an application for leave to appeal in the same court that the court dismissed it with costs.[4]

The Labour Appeal Court (LAC) for want of reasonable prospects of success or any compelling reason dismissed a tardy attempt by the union to petition it for an appeal to be heard. The LAC made no order as to costs.[5] The union thereupon sought leave to appeal in the Constitutional Court against the order of the Labour Court on the merits as well as against the costs award. What follows in this chapter concerns only the second issue – that is, the appeal against the costs award imposed by the Labour Court.

(b) Issue and arguments before the court

The issue before the court discussed in this chapter was whether the Labour Court was justified in awarding a costs order against a party without providing any reason for such an order.[6] The

[2] Ibid para 3.
[3] Ibid para 7.
[4] Ibid paras 8-9.
[5] Ibid para 10.
[6] Ibid para 9.

union was of the view that in imposing the costs order the Labour Court had failed to follow the correct approach in labour and constitutional matters[7] that the losing party should not be overburdened with costs. The companies argued that the Labour Court was entitled to award costs in the leave to appeal matter as its decision to refuse the appeal — on the basis that it lacked any prospects of success — could not be questioned.

(c) The Constitutional Court's discussion of the proper approach to costs in labour matters

The Constitutional Court has made it abundantly clear on a number of occasions that the rule in civil litigation that costs follow the result is not applicable in labour matters.[8] The court in casu stated that it found it concerning that in recent times it was being asked to overturn judgments of the Labour Court and the LAC in which the general rule that costs follow the result in a matter had been applied. Accordingly, the court found it important to clarify that in labour matters it was not merely out of generosity on its part that it found that costs did not follow the result, but that this was rather a constitutional and statutory obligation.[9]

The Constitutional Court stated that the rule in question flowed directly from the Labour Relations Act 66 of 1995 (LRA) and the Constitution of the Republic of South Africa, 1996.[10] The court noted that two constitutional provisions were relevant to this matter. The first was s 23 of the Constitution. This section dealt with various labour rights, including the right to fair labour practices. This constitutional right was given effect to by the LRA, as expressed in one of its primary purposes,[11] which was the effective resolution of labour disputes.[12] To this end, the LRA established alternative dispute resolution mechanisms such as conciliation, mediation, and arbitration in addition to the formal court institutions such as the Labour Court and the LAC,

[7] Ibid paras 12 and 14.
[8] *SA Custodial Management supra* 1 para 24; see also *Zungu v Premier of the Province of KwaZulu-Natal* (2018) 39 ILJ 523 (CC); *SA Commercial, Catering and Allied Workers Union & others v Woolworths (Pty) Ltd* (2019) 40 ILJ 87 (CC); *National Union of Mineworkers obo Masha and Others v SAMANCOR Limited* (Eastern Chromes Mines) (2021) 42 ILJ 1881 (CC); and *Long v SA Breweries (Pty) Ltd & others 2019* (40) ILJ 965 (CC).
[9] Ibid para 24.
[10] Ibid paras 25 to 27.
[11] s 1*(d)*(iv) of the LRA.
[12] See *Association of Mineworkers & Construction Union & others v Royal Bafokeng Platinum Ltd & others* (2020) 41 ILJ 555 (CC) para 103; *SA Transport & Allied Workers Union of SA v PUTCO Ltd* (2016) 37 ILJ 1091 (CC) para 28; and *Equity Aviation Services (Pty) Ltd v CCMA & others* (2008) 29 ILJ 2507 (CC) para 22 as cited by the Constitutional Court. For a further discussion of this section see *National Union of Metalworkers of South Africa & others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), (2003) 24 ILJ 305 (CC) para 13.

these two courts having exclusive jurisdiction to decide matters arising from the Act.[13] The intention, according to the Constitutional Court, was clearly to provide for 'simple and accessible' dispute resolution structures, so that workers who were granted the labour rights in the Constitution could exercise these rights 'speedily and cost-effectively'. When workers were threatened with cost orders if their claims were unsuccessful, this legislative aspiration was violated.[14]

The second constitutional right relevant to this matter, stated the court, was s 34, which granted persons the right to have their disputes resolved before a court or another 'independent and unbiased tribunal or forum' by the application of the law in 'a fair public hearing'.[15] The section thus entitled people to alternative dispute resolution mechanisms as provided in the LRA. Section 34 essentially guaranteed the peaceful and orderly resolution of disputes before a legal forum.[16] The court went further to endorse what it had said in *Chief Lesapo v North West Agricultural Bank and another*[17] that s 34:

'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. [It] is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to [courts or other independent and impartial tribunals] is indeed of cardinal importance.'

The court also cited Zondo JP (as he was then) in *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin*[18] that making decisions on costs was about attempting to strike a fair balance between not unduly discouraging parties from approaching the Labour Court on the one hand and, on the other hand, not allowing them to bring to court baseless claims that wasted the court's time.[19]

The court elaborated further that when institutions created by the LRA unjustly closed their doors to litigants by overburdening them with costs orders, they opened a door to litigants'

[13] *SA Custodial Management* supra 1 para 26.
[14] Ibid paras 26-27.
[15] Ibid para 28.
[16] Ibid para 29.
[17] 2000 (1) SA 409 (CC) para 22.
[18] 2008 (29) *ILJ* 1707 (LAC) para 19.
[19] *SA Custodial Management* supra 1 para 30.

seeking redress by means of unlawful industrial action rather than by the resolution of conflict through those institutions.[20] Endorsing *Dorkin*, the court emphasised that such an approach could lead to unwanted unlawfulness (in contrast to lawful strikes which it supported as 'indispensable' to the country's democracy) and undermine 'the foundational value of the rule of law underpinning our democratic order'.[21] According to the court, it was therefore of great importance that labour dispute resolution forums remained easily accessible to parties wishing to voice their grievances, so that the 'potential consequences' of unwanted industrial action were avoided.[22]

These principles, the court held, formed the foundation of how the question of costs should be dealt with in labour matters. They were reflected in s 162 of the LRA that had abandoned the principle that the costs of litigation should follow the result, preferring instead an approach based on 'law and fairness'.[23] The LRA and the constitutional provisions discussed above were the guiding principles of such fairness.

Nevertheless, the court reasoned further that this judgment did not mean that costs could never be ordered against a party in labour issues. Costs were a matter of discretion as the court had found previously and would continue to apply in labour matters.[24] However, the court should only depart from the settled law of not awarding costs against losing parties after, firstly, having considered the reasons for doing so and, secondly, having applied its mind to the principle of fairness and the constitutional and statutory imperatives that supported it.[25]

The court held that the Labour Court had not exercised its discretion judicially.[26] Its perspective that it could not find a reason for costs not to follow the winner indicated that the court's view was informed by an incorrect understanding of the law. The Labour Court chose not to follow settled jurisprudence and blindly followed the civil litigation rule that costs followed the loser unless there was a reason not to do so.

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[20] Ibid.
[21] Ibid paras 31 and 32.
[22] Ibid para 31.
[23] Ibid para 33.
[24] Ibid para 34; see also *Public Protector v SA Reserve Bank* 2019 (6) SA 253 (CC) para 144; see also *Samancor* supra 8 para 32.
[25] ibid para 35; see also *Zungu* supra 8 para 35; *Bester v Small Enterprise Finance Agency SOC Ltd & others* (2020) 41 *ILJ* 877 (LAC), *Long* supra 8.
[26] *SA Custodial Management* supra 1 paras 38 to 40.

(d) Discussion of costs

As mentioned above, in civil litigation costs are awarded to the winning party in order to protect it from the financial burden incurred after having been unjustly compelled to initiate or to defend litigation.[27] These costs are considered as being necessary for the purpose of obtaining justice and defending the rights of any party.[28]

In *Crosnier v Easigas (Pty) Ltd*,[29] heard some years before *SA Custodial Management*, the Labour Court, deciding whether a costs order was warranted in a labour matter, took much the same approach as the Constitutional Court in casu. It held that when it comes to costs in labour matters, the court must exercise its discretion judicially. The court went further explaining that this judicial discretion must be applied in a way that is suitable and fits the facts and circumstances of the matter. Significantly, the Labour Court stated in *Crosnier*:

'The nature and extent of the statutory injunction to exercise a judicial discretion in relation to costs having regard to the requirements of the law and fairness has never been better expressed than the unanimous judgment of what was then the Appellate Division of the Supreme Court in *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 *ILJ* 1221 (A) at 1241J in relation to the similarly worded powers afforded to the industrial court established under the 1956 LRA.' Goldstone JA said inter alia:

> 'The provision that 'the requirements of the law and fairness' are to be taken into account is consistent with the role of the industrial court as one in which both law and fairness are to be applied. The general rule of our law that in the absence of special circumstances costs follow the event is a relevant consideration. However, it will yield where considerations of fairness require it. Proceedings in the industrial court may not infrequently be a part of the conciliation process. That is a role which is designedly given to it. Parties, and particularly individual employees, should not be discouraged from approaching the industrial court in such circumstances. Orders for costs may have such a result and consideration should be given to avoiding it especially where there is a genuine dispute and the approach to the court was not unreasonable.'[30]

[27] *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467; *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union* 2002 (2) SA 64 (CC) para 15.
[28] President of the Republic of South Africa and Others ibid; see also *R v R* 2018 (3) SA 507 (WCC) para 23.
[29] (2016) 37 *ILJ* 1686 (LC) paras 8 and 10.
[30] Ibid para 7

In the case under discussion, the Constitutional Court was correct to use fairness as a standard in deciding the awarding of costs orders.[31] In *Bester v Small Enterprise Finance Agency SOC Ltd*,[32] the LAC relied on fairness in considering the circumstances of the worker. In so doing, the court did allow the costs to follow to the result after taking into consideration that the worker in question was a mother of three children and she was representing herself and was thus not assisted by a trade union. The court was of the view that such costs would be a burden to the individual worker.[33] Thus, fairness was appropriately relied on by the court in this instance to justify costs following the result, thus protecting a vulnerable worker.

The researcher submits that the Constitutional Court in *SA Custodial Management* could have highlighted the concept of the equality of arms in litigation. The court could have gone into more detail regarding the importance to protect those with fewer resources in litigation against their employers who often have greater resources. This is relevant in that it gives life to s 164 of the LRA in relation to the fairness principle and gives effect to the principle of not deterring litigants from engaging in the justice system as discussed above in *East Rand Gold*. The South African reality is that a large number of people still face significant socio-economic challenges many years after the advent of our constitutional democracy.[34] Simply put, in our justice system as it stands, many people are denied access to the courts because of the inherent expenses involved.[35] Therefore, the researcher concurs with the Constitutional Court in *SA Custodial Management*[36] that costs in labour matters should not blindly follow the result. It is fitting if the courts in labour matters continue to apply their judicial discretion which protects litigants with fewer resources, if they lose, from being overburdened by having to pay the litigation costs of those with greater resources. Should the court depart from this settled principle, then sound reasons should be given for the departure.[37] The reasoning behind this approach is, as Zondo JP (as he was then) stated in *Dorkin*[38] above, that such a departure would prevent employees from trusting the judicial system and lead to instances where they resorted to illegal, violent strikes.

[31] *SA Custodial Management* supra 1 para 35.
[32] *Bester* supra 25.
[33] Ibid para 16.
[34] D Holness 'Improving access to justice through law graduate post-study community service in South Africa' (2020) *PER* 1 at 1.
[35] Ibid.
[36] *SA Custodial Management* supra 1 para 24.
[37] *Zungu* supra 8 para 24–25.
[38] *Dorkin* supra 18 above para 19.

On the other hand, the courts, by applying the principle of law and fairness would strike a balance that ensured no frivolous claims were allowed.[39]

Social justice is about the equal distribution of legal resources in communities.[40] It is also a purpose of the LRA and, according to the Act, may be achieved in a number of ways, including through the effective resolution of disputes in labour matters.[41] Hence, as stated by the Constitutional Court in *Samacor*,[42] awarding costs orders where they are not warranted will have a chilling effect by denying workers the right to access to justice and, as discussed by the Constitutional Court above, will infringe ss 23 and 34 of the Constitution.

A country with gross inequality and high levels of unemployment, where the majority of the people live in extreme poverty, cannot afford to deter litigants from accessing the courts by means of costs orders in the event their claims fail.[43] The researcher submits that if this approach were to be allowed in labour law, it would create a two-fold problem: firstly, unequal arms in litigation and, secondly, as a direct result, workers' resort to illegal industrial action. It also argues that if costs were allowed to favour the winning side, and where that side comprised the 'haves', our justice system would effectively be reserving access to justice to the 'haves' only and systematically marginalising the 'have-nots'. This would widen the already existing inequality gap highlighted above. To elaborate further, if the winning side in a matter comprises the 'haves', awarding costs orders in their favour would be creating further inequality in our already unequal society by further disadvantaging the 'have-nots' who would have to pay the 'haves'.

It is a known fact that in our democracy there are unequal power relations in the labour market where those who sell their labour to make a living face exploitation.[44] It has been widely

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[39] Ibid para 19.
[40] McQuoid-Mason 'Access to justice' in *Windsor YB* (1999) 15 fn 109, as quoted by D Holness n 34 above.
[41] MM Botha and M Lephoto 'An employer's recourse to lock-out and replacement labour: An evaluation of recent case law' (2017) *PER* 1 at 2; s 1 of the LRA, social justice is also considered to be the central power for the transformation of the South African society. See also D Moseneke 'The fourth Braam Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309-318.
[42] *National Union of Mineworkers obo Masha and Others v SAMANCOR Limited* (Eastern Chromes Mines) (2021) 42 ILJ 1881 (CC).
[43] D Holness op cit note 34 at 1; see also M Anstey 'Marikana – and the push for a new South African pact' (2013) *SAJLR* 133-145; T Ngcukaitobi 'Strike law, structural violence and inequality in the Platinum Hills of Marikana' 2013 *ILJ* 836-858; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 1 *Stellenbosch Law Review* 125.
[44] *Bapotrans (Pty) Ltd v Association of Mineworkers and Construction Union* [2021] ZALCJHB 435.

argued by critics of capitalist societies that the concentration of resources in the hands of a privileged few leads to such exploitation.[45] The researcher submits that it is in this context that costs should not be allowed to follow the result. This approach is not based on an overzealous desire to succumb to the whims and wishes of the working class; rather, it is based on a constitutional obligation as highlighted above by the Constitutional Court.[46]

Labour matters concern issues relating to a person's livelihood and dignity based on the right to work. It is out of respect for these considerations that the established rule that costs follow the result should not apply in labour matters. Violating this approach would mean violating a worker's dignity.[47] Workers, who are often vulnerable, must be shielded, and those granted the power to adjudicate labour disputes should not undermine such protection.[48]

It would be a mistake not to highlight the racial implications of the above discussion in this section of the chapter. As a result of centuries of colonialism, South Africa has long had a pool of cheap black labour, readily available for exploitation.[49] In essence, black people were labourers who bore the brunt of exploitation with the white population enjoying the financial outcomes of such exploitation.[50] It is trite that the companies that control and dominate the economy of South Africa trace their foundation to colonialism and apartheid.[51]

The country, in its current form, has a divided labour market. On the one side, secure, well-paying jobs tend to be the purview of the white population and, on the other, insecure, low paying employment is dominated by black workers.[52] The researcher submits that while cheap labour is not restricted to black people, it is this impoverished and economically disadvantaged population that will mainly bear the brunt of costs orders it cannot afford to pay.

It would be a mistake not to discuss the Constitutional Court's warning regarding employees' preferring industrial action should they lose trust in the courts for fear of the

[45] Ngcukaitobi op cit note 43 at 841.
[46] *Bapotrans* supra 44 para 1.
[47] Ibid para 1.
[48] Ibid.
[49] B Magubane 'The problem and its matrix: Theoretical and methodological issues' in *The political economy of race and class in South Africa* (1979) https:// knowledge4empowerment.files.wordpress.com/2011/08/magubane-1979-1990_ch1_poliecon-raceclass.pdf [Accessed 23 January 2022].
[50] G Tshikota 'Racial epostemology at a time of a pandemic: A synopsis of South Africa's persisting inequalities through the lens of #FeesMustFall and #FreeDecolonisedEducation' (2021) *Pretoria Student Law Review* at 27.
[51] S Mpofu *The New Apartheid* (2021) NB Publishers.
[52] B Magubane op cit note 49 at 17.

imposition of costs orders. As the Constitutional Court noted above, a violation of the principle in labour law that costs should be awarded on the basis of discretion and not automatically according to the civil standard that costs follow can result in unwanted self-help action by workers. South Africa has a long history of violent strikes. The country's socio-economic issues may influence and shape the way in which workers approach labour relations.[53] If workers fear cost orders, they might resort to strikes rather than approach the courts for redress, and in an attempt to get an employer to fast track the resolution of disputes, they may resort to violent strikes.[54] This perpetuation of violence in strikes may shift the balance in bargaining power, increasing economic pressure on the employer, who eventually succumbs to the force of such violence.[55] It is exactly such conduct that the Constitutional Court warns us against.

The study, as outlined above, supports the conclusion reached by the Constitutional Court in this case. The court refused to validate the change made by the Labour Court to the approach to costs awards outlined in legislation and generally applied by the labour courts and highlighted the possible deleterious implications of such a change. The chapter has provided further discussion on how the issue of costs orders may negatively affect workers. It has endorsed the court's view that such orders could encourage workers' engagement in unlawful industrial action of a violent nature. In addition, it has illustrated how the application of the notion of fairness may be critical in protecting a worker from being buried in costs incurred during legal proceedings. In discussing the issue of fairness, the researcher has dealt with, albeit briefly, issues relating to race and class as a critical aspect of understanding the law on costs awards and its application by legal institutions.[56]

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[53] MM Botha and M Lethopo op cit note 41 at 2.

[54] E Tenza 'The effects of violent strikes on the economy of a developing country: A case of South Africa' (2020) 4 *Obiter* 519–537; on violent strikes see *SA Chemical Catering & Allied Workers Union & others v Check One (Pty) Ltd* (2012) 33 *ILJ* 1922 (LC), *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others* (2007) 28 *ILJ* 1827 (LC), *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC).

[55] A Myburgh 'The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law' 2013 23 (1) *CLL* 1-4; on strikes that cause economic loss to the employer, see *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 *ILJ* 2589 (LC); *Rustenburg Platinum Mines Ltd v Mouthpeace Workers Union* (2001) 22 *ILJ* 2035 (LC); *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union & others* (2015) 36 *ILJ* 2292 (LC); *SA Transport & Allied Workers Union & another v Garvas & others* (2012) 33 *ILJ* 1593 (CC); *Mangaung Local Municipality v SA Municipal Workers Union* (2003) 24 *ILJ* 405 (LC).

[56] C Serron 'Law and inequality: Race, gender…and, of course, class' (1996) 22 Annual Reviews of Sociology 187 at 188; for a further discussion on race, class and legal institutions see 'Race, class, and the regulation of the legal

III National Union of Metal workers of South Africa v Lufil Pakcaging (Isithebe) (2020) 41 (ILJ) 1846 (CC)

The decision of the Constitutional Court (CC) by Victor AJ in *Lufil Packaging (Isithebe)*[57], (*Lufil Packaging*), provides that a trade union cannot claim organisational rights from an employer through ignoring its own constitution by trying to admit workers who don't fall within its scope as members. This sets a new precedent. The judgement goes through an analysis of 4(1)(b) of the Labour Relations Act 66 of 1995 (the LRA), the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 (the Convention) and details out freedom of association in the Constitution of the Republic of South Africa, 1996 (the Constitution). The judgment also goes through common law about why a union cannot act contrary to its own constitution.

(a) Facts

Lufil Packaging (Lufil) manufactured printed and plain paper bags and associated paper or paper-derivatives based products *Lufil Packaing (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd) v Commossion for Conciliation, Mediation and Arbitration*.[58] On 27 January 2015, the National Union of Metal Workers of South Africa (Numsa) wrote to Lufil asking it to provide stop orders for the deduction of union fees for its alleged members who where employees of Lufil. The deduction of union fees by the employer from the salary of the employee is an organisational right provided for by S 13 of the LRA. Lufil responded saying its core business does not form part of the Union's scope and referred Numsa to its own constitution in Annexure B. Clause 1(2) of Numsa's constitution provides that the scope of the union is the metal industry. Annexure B details the industries to which Numsa's membership is open to and it does not include the paper and packing industry in which Lufil operates in. Lufil alleged that the trade union, in recruiting members from Lufil's operation, Numsa acted ultra vires to its own constitution. Lufil didn't recognise Numsa and declined to act on implementing union stop order deductions in its work.

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profession in the progressive era: The case of the 1908 canons' (2003) 12 *Cornell J of Law and Public Policy* 607–24.

[57] *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* (2020) 41 (ILJ) 1846 (CC).

[58] (2019) 40 *ILJ* 2306 (LAC) at 2 to 3.

(b) Issue

The Constitutional Court was of the view that the issue in this case was something new which did not resemble anything already known in law.[59] The question was, simply put, can a trade union ignore its own constitution and demand organisational rights from the employer for its own members, despite the members not forming part of the scope of the trade union's constitution which defines membership eligibility?

(c) Decision of the Labour Appeal Court

In handing down its decision, the Labour Appeal Court set aside the decisions of the CCMA and the Labour Court which had found that the Numsa was entitled to organisational rights in the workplace of Lufil (*Isithebe*). The Labour Appeal Court ruled in favour of the employer, Lufil. The Labour Appeal Court found that Numsa was not entitled to organisational rights in Lufil's workplace. Lufil's employees fell outside Numsa's scope based on Numsa's own constitution and therefore, it was not sufficiently representative. The Constitutional Court in *Lufil Packaging* cites *AMCU v Chamber of Mines of South Africa*[60] that the LRA does not define the term 'sufficiently representative' for trade unions to enjoy organisational rights. However, Victor AJ holds that unions that are sufficiently representative have been explained as those unions whose members form the majority of employees employed by an employer at the workplace. The concepts of sufficiently representative and organisational rights are not dealt with in this case analysis as it does not form the crux of the matter. The reasoning of the Labour Appeal Court was that under S 4(1)(b) of the LRA, the employee has a right to join a union, subject to its constitution, the constitution of the union in this instance did not allow for such.[61]

(d) Numsa's contentions in the Constitutional Court

Numsa argued that this matter concerned a constitutional issue. They were of the view that the right to join a union is a constitutional right which is available to all workers and the same can be said about freedom of association.[62] They utilized s 39(2) of the Constitution to argue that the statute be interpreted so as not to limit these rights in question. Numsa made a submission that the LRA and its own constitution should be interpreted a less restrictive manner as this would

[59] *Lufil Packaging* supra 57 para 1.
[60] (2017) 38 *ILJ* 831 (CC) para 53.
[61] *Isithebe* supra 58 para 11.
[62] *Lufil Packaging* supra 57 para 12.

give effect to the fundamental rights in s 18 and s 23 of the Constitution.[63] Section 18 deals with freedom of association while s 23 deals with fair labour practices. Numsa's interpretation is that the phrase 'subject to its constitution' in s 4(1)(b) of the LRA meant that if the union and its members were in an agreement concerning their relationship, then it would not be for the employer or any other third party to challenge the relationship by looking at the trade union's constitution.[64] Numsa argued that no employer should intervene in the internal operation of a trade union.[65]

(e) Lufil's contentions in the Constitutional Court

Lufil argued that Numsa's constitution stated that only the employees in certain industries could be its members and the LRA provided that the trade union must give effect to its own constitution.[66] Numsa must be bound by its own constitution as the lawmakers could not have intended that a trade union qualify for organisational rights in the LRA by acting contrary to its own constitution.[67] Unions can only rely on lawfully admitted members when they claim organisational rights.[68]

(f) Analysis of the law by the Constitutional Court

The Constitutional Court used the same logic as the Labour Appeal Court that in common law, trade unions only have the powers and capacities that are given to them by their own constitutions.[69] The Constitutional Court accordingly cited *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd*[70], in that a union acts against its own constitution when it allows membership of individuals who should not permited to be members of that union in terms of the union's own constitution. A trade union cannot create a class of membership which falls outside

[63] Ibid para 13; see *also POPCRU v SACOSWU* (2018) 39 *ILJ* 2646 (CC), *SATAWU v Moloto* (2012) 33 *ILJ* 2549 (CC).
[64] Ibid para 14.
[65] Ibid para 16; see also *National Union of Mineworkers obo Mabote v Commission for Conciliation, Mediation and Arbitration* (2013) 34 ILJ 3296 (LC); *Bidvest Food Services (Pty) Ltd v National Union of Metalworkers of SA* (2015) 36 ILJ 1292 (LC); *Nestoil plc v National Union of Petroleum and Natural Gas Workers Suit* No: NIC/LA/08/2010.
[66] Ibid para 18.
[67] Ibid para 19.
[68] Ibid para 21, in para 20, Numsa limits the case to an argument that the trade union has an obligation to prove that the members it claims in order to obtain organisational rights joined the trade union lawfully).
[69] Ibid para 8.
[70] [1997] 7 BLLR 906 (LC) 910.

its own constitution, if they do so, they exceed their powers and the act in question has no validity.

S 4(1)(b) of the LRA provides that every employee has the right to join a trade union subject to the trade union's constitution. Numsa argued that this phrase was an internal mechanism that can be ignored at will. The LRA requires a union to determine in their constitutions the employees that are eligible to join them. The Constitutional Court noted that s 3 of the LRA required that the interpretation of the LRA be in compliance with the Constitution and the State's international obligation. Articles 2, 3 and 10 of the Convention provided that workers' organisations have the right to draft their own constitutions and rules and public authorities must refrain from any interference which could restrict this right. The Convention further holds that workers shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. The Constitutional Court accordingly found that the wording of s 4(1)(b) of the RLA mirrors that of the Convention.[71] The Constitutional Court through this analysis proved that the union was bound by its constitution and cannot ignore it at will.

Numsa relied on *NUM obo Mabote v Commission for Conciliation, Mediation and Arbitration*[72] to make its argument about the employer not being allowed to interfere with the internal mechanisms of a trade union. Mabote was a member of the National Union of Mineworkers (NUM). NUM's constitution opened membership to all workers in the mining, energy, construction and allied industries. Mabote was employed in the hospitality industry by Kalahari Country Club.[73] Using s 4(1)(b) of the LRA, it appeared that since Mabote did not work in the mining sector, he was not a valid member of NUM. However, the judge was of the view that this provision should not be interpreted so restrictively. The court found that it could not have been the intention of the lawmakers to restrict the right of representation by a trade union to the extent that it is up to interference by the employer to deny workers the right through the union's constitution. The court found that it was not for the employer to interfere with the internal decisions of a trade union as to who can be a member of the union.

[71] *Lufil Packaging* supra 57 para 45.
[72] (2013) 34 ILJ 3296 (LC).
[73] M Meyerwitz 'Which trade unions are allowed to represent employees at the CCMA?' South African Labour Guide https://www.labourguide.co.za/most-recent/1815-which-trade-unions-are-allowed-to-represent-employees-at-the-ccma (Accessed 15 January 2022).

Victor AJ in the Constitutional Court, successfully rebutted this by citing Woolman[74], who explained that it was extremely important for a trade union to have control over its membership policies and internal affairs. Instances in where the trade union admitted individuals who did not fall within its purpose had the effect of altering the identity of the trade union. The Constitutional Court noted that Woolman continued arguing that without capacity to police their membership and regulate their internal affairs, trade unions risked having their aims substantially changed.[75] The trade union must have the power to control the entrance of members because without built-in limitations, members and outside parties could easily change and ruin the functioning and character of the trade union.

In *Turner v Jockey Club of SA*[76], the court held that the constitution of a trade union together with other rules and regulations is essentially an agreement created by the trade unions members. That constitution not only regulates the trade union's scope of existence but also its powers and that of its office bearers.

With regards to freedom of association and the right to join a union, Victor AJ said the following: Workers joined Numsa for its knowledge in the metal industry, in choosing to join Numsa, they elected, by choice, not to join unions in other industries.[77] Numsa's disregard of its constitution violated the existing members' right to associate with it and disassociate from it. Furthermore, in line with the Convention and the LRA, Numsa formulated its constitution. Numsa made the decision to limit the scope of eligibility of its members. Thus, it could not be said that the right to freedom of association was impacted.[78]

(g) Decision of the Constitutional Court

Numsa refused to amend its constitution to include the paper and packaging industry, while at the same time it did not attack s 4 (1)(b) of the LRA.[79] The submission that the trade union and the employees could ignore a provision in that trade union's own constitution was logically inconsistent as the members and the trade union were bound by the agreement they had entered into themselves. Lufil was in the paper and packaging industry which was not included in

[74] Woolman et al Freedom of association' Constitutional Law of South Africa Service 6 (ed) (2014) at 44-2-3.
[75] *Lufil Packaging* supra 57 para 33.
[76] 1974 (3) SA 633 (A) para 644 G-645 C.
[77] *Lufil Packaging* supra 57 para 35.
[78] Ibid para 46.
[79] Ibid para 52.

Annexure B of Numsa's constitution. Therefore, Numsa was not eligible to demand organisational rights from Lufil. Lufil could not be said to interfere with Numsa's internal workings by holding it accountable to a constitution that Numsa drafted voluntarily and to which the existing members have agreed.[80] Numsa argued that the word 'only' did not appear in clause 2(b) of its constitution (workers who are or were working in the metal industry or other related industries are eligible for the membership of Numsa) and this should have been interpreted to mean that any industry can be admitted.[81] This argument, in the court's view lacked logic and legal persuasion.[82] Through its own self-imposed limitation, Numsa was prevented from making contractual agreements with workers who fell outside its scope and object.[83] To allow unions to operate outside of their constitutions at their discretion would violate core constitutional values such as accountability, transparency and openness.

(h) Evaluation of the judgment of the Constitutional Court

To fully comprehend the precedent set by the Constitutional Court in this case, it is necessary to briefly outline here the position of the judiciary prior to this judgment. This position can be found in *McDonalds Transportation Upington (Pty) Limited v Association of Mineworkers and Construction Union.*[84] In this case, employees were dismissed for a violent strike. The employer raised an objection at the dismissal hearing, based on the Association of Mineworkers and Construction Union's (AMCU) constitution that AMCU could not represent the employees in question as they were no longer AMCU's members due to the lapse of their subscription of membership.[85]

The Labour Appeal Court in *McDonalds* reasoned that when a trade union demands organisational rights from the employer, it must prove that the employees in question are its members.[86] However, in dismissal proceedings, the employee and not the trade union, is the party. As such and in accordance with the Rule 25 (1)(c) of the Commission for Conciliation, Mediation and Arbitration, an employee has a right to choose its own representative. The only

[80] Ibid para 68.
[81] Ibid para 49.
[82] Ibid para 50.
[83] Ibid para 62 and 64.
[84] (2016) 37 *ILJ* 2593 (LAC).
[85] Ibid para 3.
[86] Ibid para 35.

relevant question being the employee's right to choose that specific trade union.[87] Simply put, the Labour Appeal Court was of the view that the employer should not concern himself with whether the trade union's membership information is up to date or any other aspect of the relationship between individual employees and their chosen trade union.[88]

The judgment of the Constitutional Court has various strengths. The Justice in this matter was able to rebut the *Mabote* case which supported the union being allowed to admit members who don't fall within their scope with the Woolman argument that such interpretation, if allowed, would change the core character of the Union, thereby prejudicing other members who joined it for its special focus on a certain sector. The researcher agrees with the Justice in this instance as unions are created to cater for that specific sector, not to be broad and allowing the *Mabote* interpretation would cast the net too wide, for example, it would lead to a situation whereby a union for teachers ends up admitting the security staff. Furthermore, considering that unions draft their own constitutions according to how they see fit, it would be illogical for them to then try to admit employees they left out under their scope voluntarily.

The Justice successfully provided an alternate method that Numsa could have used to admit the workers of Lufil as their members thus get the organisational rights. The Constitutional Court is of the view that if Numsa wished to admit Lufil employees as its members, then it should have amended its constitution.[89] Clause 14(1) of Numsa's constitution provides for the amendment of its constitution. Numsa could have simply passed a resolution of its central committee to amend its scope if it really sought to admit Lufil's employees to its membership.[90] Numsa has previously amended its constitution to include industries outside its metal industries. However, in this case it chose not to make the amendment, thus making it difficult to conceive how a provision of a union's constitution about its own scope can limit the right of freedom of association.[91] The question is, simply put, considering that the trade union has previously amended its constitution to cater for other industries in the past, why did it not simply do that again?

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[87] Ibid para 35.
[88] Ibid para 40; see also *Transport and General Workers Union and Others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC).
[89] *Lufil Packaging* supra 57 para 69.
[90] Ibid para 57.
[91] Ibid para 61.

However, the judgement does have a weakness. The judgement points out the cases on which Numsa based its argument, one of them being the *Mabote* case, but it fails to produce the facts and reasoning of these cases so as to give the reader the context within which they were decided as these cases formed the core of Numsa's arguments on the internal interference. Giving facts of a leading case in a judgement is crucial as the reader and other judges may be able to distinguish for themselves the facts of the case and the matter at hand.

The researcher submits that on paper, the court reached a correct decision when refusing to let Numsa break its own constitution to get organisational rights. This can even be supported by *Food and Allied Workers Unioin v Ferucci t/a Rosendal Poultry Farm*[92], which provides that in order for a union to exercise organisational rights in a workplace, the scope of the union's constitution must provide for the particular business of the employer. This is based on a reasoning that allowing unions to admit employees as its members without regard for their own constitutions subverts these purposes to the potential detriment of their existing members and the public at large.[93] In the current context, because Numsa's constitution only deals with the metal industry, it should only admit members from that industry and not from other industries, therefore it should not be entitled to organisational rights in the workplace of Lufil.

However, it would be a mistake not to highlight in this chapter the social implications of this judgment. The right to freedom of association is a cornerstone of our democracy, it stems from a basic human need for a society with a shared purpose in a freely chosen enterprise.[94] This right is an important part of any labour market as it protects individual workers from the vulnerability of isolation and it ensures the worker's effective involvement in the workplace and labour market. This right is particularly significant as a basis for securing trade union freedom from interference by the employer.[95] As such, no employer can effectively attack freedom of

[92] (1992) 13 *ILJ* 1271 (LC).
[93] E Fergus and S Godfrey 'Organising and bargaining across sectors in South Africa: Recent developments and potential problems' (2016) 37 ILJ 2211 at 2230-1.
[94] M Budeli-Nemakonde 'Understanding the right to freedom of association at the workplace: Components and scope' (2010) *Obiter* 31 at 1.
[95] Ibid; see also M Budeli-Nemakonde 'The protection of workers' right to freedom of association in international and regional human rights systems' (2009) 42(1) *De Jure* 136-138; for a wholistic understanding of this right and trade unions from the historic perspective, also see Finnemore and Van der Merwe *Introduction to Labour Relations in South Africa* (1996) 22); Ringrose *The Law and Practice of Employment* (1983) 5. It ensures effective and equal engagement power between the employer and the workers (M Budeli cites Von Prondzynski *Freedom of Association and Industrial Relations: A Comparative Study* (1987) 225).

association without impairing the very foundations of society.[96] This means that a violation of this right is a violation of the social norms and rights of the working class.

Freedom of association is the single essential right for workers from which all other rights flow and without this right, all the other rights are an illusion.[97] S 23 of the Constitution provides for the right to fair labour practice, as noted by the court in *Mabote*, and this right includes the right of a worker to join a trade union and, as such, a trade union has the right to determine its own internal workings. The Supreme Court of Appeal in *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Other*[98] further provides workers with the right to legal representation.[99] Clearly, allowing employers to interfere with the internal workings of a trade union, if not controlled, could have the drastic effect of employers dictating to their workers which trade unions they can and cannot join and which ones can and cannot represent them. This would be an unwanted limitation of the representation of the working class where the workers are denied access to justice simply because they do not fall within the scope of a trade union, thus limiting their right to associate with that trade union. This is not the intention of the LRA. S 1 of the LRA provides that the LRA has the intention of providing social justice where the employers and employees can engage in dispute resolution. Thus, limiting the association of workers with trade unions would violate the principle of social justice and, as highlighted above, make the right access to justice for the workers an illusion.

The judgement has wider social and legal implications because employers may now refuse to grant organisational rights to a trade union where the union's constitution does not cover the sector in which the particular employer operates.[100] This will help prevent a situation where unions try to get more members in an industry that they are not knowledgeable in, which will have a negative consequences should the worker need representation only to find that the union lacks basic information about that industry and its procedures, policies and protocols.

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[96] Woolman (eds) *Constitutional Law of South Africa* (1996) 22-1, as cited by M Budeli-Nemakonde 'Workers' right to freedom of association and trade unionism in South Africa: An historical perspective' (2009) *Southern African Society of Legal Historians, Fundamina: A Journal of Legal History* 15(2) 57-74.
[97] Ibid M Budeli-Nemakonde.
[98] 2002 (5) SA 449 (SCA).
[99] See also *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2005) 2 All SA 479 (SCA)).
[100] *AFGRI Operations limited v MacGregor* (2013) 34 ILJ 2847 (LC).

It must be noted that this issue is far from being settled. In *Multiquip (Pty) Ltd and Another v National Union of Metalworkers of South Africa*[101] the court confirmed the position of *McDonalds* that the contents of the trade union's constitution are irrelevant when the trade union is providing representation in the protection of the worker's right to be represented. Perhaps it is this *Multiquip* position that is more desirable to decolonisation as it leads to the representation of workers rather than the *Lufil* position which simply takes the law as is and leads to unequal power imbalances.

The CC's judgment is a well-written and reasoned judgment. The Justice, for every conclusion drew from a previously made analysis and application on such a conclusion. The court left no stone unturned as it dealt with all the contentions of Numsa, ranging from freedom of association, the right to ignore its constitution at its own will and internal interference by the employer. The court also successfully interpreted the LRA and common law. The Justice also went further by providing an alternative method which can be used by other unions in the future such as simply amending their constitutions to gain new members. Through its reasoning, one can see that the court understood the social impact of its decision and what it would mean to allow Numsa to breach its own constitution. The decision of the CC is clear, a union cannot obtain organisational rights from the employer by acting beyond the powers given to it by a constitution that it voluntarily drafted as allowing such would have the possibility to change the character of the union.

[101] D 477-20) [2021] ZALC 7 (17 August 2021).

CHAPTER 4

THE DELAYED PROTECTION OF AFRICAN WOMEN IN LABOUR LAW

I INTRODUCTION

> "In South Africa it is often said that African women are oppressed in three ways: oppressed as blacks, oppressed as women, and oppressed as workers. Domestic service comprises one of the major sources of wage employment for African women in South Africa, and it is an important nexus of this triple oppression"[1]

This quotation lays the crux of this chapter, i.e. the oppression of people based on race, gender and to an extent class. The quote is further enhanced by Ginsburg's argument that whilst apartheid was good for no one, none was worse off than the African woman.[2] As discussed in Chapter 2 of this thesis, the colonial and apartheid governments restricted the education and jobs that were available to African people. One of the jobs that was reserved for Africans was domestic work.[3] Since this work did not require formal skills, domestic workers were often subjected to cruel treatment and lack of labour law protection. This means their employment could be terminated without notice, their wages would be reduced by their employers at will, in some instances the food they ate and other expenses a person incurs in their normal day-to-day living would be inhumanly deducted from their wages and they were never considered as actual employees to begin with.[4] Domestic workers, like the enslaved, were forced to live in their master's backyards as they were not allowed and could not afford to live in the same area or reasonably close to where their employers lived, hence the dehumanising and unreasonable deduction of their already inhumane salaries.[5]

In an attempt to analyse this phenomenon in a great detail, this chapter examines the precedent setting case of *Mahlangu and Another v Minister of Labour* [6]. This chapter engages in

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[1] D Gaitskell, J Kimble, M Maconachie and E Unterhalter "Class, race and gender: Domestic workers in South Africa" (1983) 27(28) *Review of African Political Economy* 86- at 86.
[2] R Ginsburg 'Come in the dark: Domestic workers and their rooms in apartheid-Era'. Johannesburg, South Africa" (2000) 8 *Perspectives in Vernacular Architecture* 83 at 83.
[3] K O Odeku 'Emancipating domestic workers: Challenges, interventions and prospects' (2014) 5(8) 672–677 p 672; see also P Bayane ''Sister-Madam': family members navigating hiring of relatives as domestic workers in Nkowankowa, Limpopo' (2021) *Community, Work & Family* 1–13 at 2.
[4] Ibid.
[5] Ibid.
[6] (2021) 42 ILJ 269 (CC).

a discussion of the methodology of intersectional rights being used by the Constitutional Court to find this exclusion to be invalid. This chapter engages in critical thinking as it indirectly highlights how jurists should look at the law in an attempt to decolonise the field of labour law. The chapter concludes by discussing what the court did correctly in this matter and perhaps what it could also have done to enhance its argument.

The chapter shows how the intersectionality of this form of oppression necessitates the intersectional analyses of rights and in the broader sense, the law, in order to achieve a decolonial perspective on this issue. As Gaitskell, Kimble, Maconachie and Unterhalter put it, these three points of oppression should not be examined individually, but rather, they should be analysed as a collective because they bring out a clear picture of gender-based prejudice of a wage labourer in a racist society.[7] Generally, the oppression of women differs according to class and race. This study is concerned with the often poor African woman who labours as a domestic worker.[8] Although this study is limited to the South African perspective, it must be understood that from a class perspective, the conditions of domestic workers is the same, they have no trade unions, their labour and often themselves are considered as being invincible, they are unwisely considered to be unskilled and therefore the misguided justification of their low wages by their employers, people who are critics of capitalism would label as wage thieves.[9]

For the African woman, the oldest form of means to obtain wages was through domestic work. This was due to their attempt to escape the poverty created by the colonial government and formalised by the apartheid government in the form of bantustans and the denial of education for African people and African women, in particular.[10] It is not secret that domestic work is often reserved for women, the tasks that are associated with it such as cooking and nursing children have in the past and in the present and due to prejudice, been "naturally" associated with women.[11] Furthermore, such prejudice dictates that these chores be done in the household which is a woman's natural habitat and it associates women as being wives by nature.[12] Specifically in

[7] D Gaitskell, J Kimble, M Maconachie and E Unterhalter op cit note 1 at 86.
[8] Ibid.
[9] Ibid at 87.
[10] S Flint 'The protection of domestic workers in South Africa: A comparative study' (1988) 9 *ILJ* 187 at 190.
[11] Ibid; see also H Bradley *Men's Work. Women's Work* ed 1989 Cambridge at 8–9.
[12] Ibid.

South Africa, domestic work has a racial element in that it is performed by the "inferior" group, which according to sexism and racism, is African women.[13]

This prejudice came hand in hand with powerlessness due to marginalisation, exploitation as a result of the lack of labour law protection.[14] This lack of labour law protection stemmed from the colonial and apartheid times where women had no legal capacity, meaning they had no legally enforceable rights before a court of law and this for African women impacted their employment as well.[15] The few rights they did have were from common law, thus, ensuring their continued vulnerability to exploitation.[16] The few rights they had included the common law right not to render services if they had not received the previous month's remuneration, the domestic worker could also send their own relatives to perform duties for the employer should the domestic worker not be available and, their work generally could not be delegated to another employee unless the employer explicitly required so and this in turn ensured job security.[17] The first form of protection domestic workers received was from the Basic Conditions of Employment Act of 1993. Another form of protection came with the promulgation of the Domestic Sectoral Determination which directed that the contract of the parties be in writing, it created the minimum wage and made domestic workers to be part of the unemployment insurance fund.[18]

However, it must be understood that what the law was on paper did not translate to the practical and tangible protection of the vulnerable African women workers.[19] The recurring theme in the discrimination and lack of labour protection for domestic workers was that they were poor, African, women, often a reflection of the broader social issues.[20] Domestic workers were defined in the Basic Conditions of Employment Act (BCEA) 75 of 1997 as "anyone who is employed by a household such as a gardener, a maid or a person who looks after children, old

[13] Ibid at 88.
[14] FM Donald and L Mahlatji 'Domestic workers and oppression in South Africa' (2006*) 2 Journal of Psychology in Africa* 205-214 at 205; see also E Delport *The Legal Position of Domestic Workers in South Africa* (LLM Theses, University of South Africa, 1995) at 4.
[15] Ibid.
[16] Ibid at 206.
[17] Delport op cit note 14 at 134.
[18] Ibid.
[19] Ibid.
[20] Ibid; see also D du Toit 'Extending the frontiers of employment regulation: The case of domestic employment in South Africa' (2010) 14 *Law, Democracy and Development* 205 at 206.

people or a disabled person".[21] The underlying factor here is, a domestic worker is a person who is employed in a private household, such a person who performs work such as, but not limited to cleaning, cooking, washing and taking care of the old or the young.[22]

II FACTS

This *Mahlangu* matter concerned the omission of domestic workers from the protection provided by the Compensation for Occupational Injuries and Diseases Act[23] (COIDA). The fact of the case are as follows: Ms Maria Mahlangu was employed by the same family, the De Clercq family, for 22 years in Faerie Glen, Pretoria, Gauteng Province where she worked as a domestic worker. Unfortunately, she drowned to her death in her employer's pool whilst performing her duties on 31 March 2012. She was partially blind and could not swim, which is the alleged cause of her drowning. Her employer was present at the home at the time of the incident but heard no sound of struggle and she was found dead, floating on the pool.[24]

Her daughter was financially dependent on Ms Mahlangu.[25] The daughter then approached the Department of Labour (Department) regarding the compensation she was allegedly entitled to for her mother's untimely passing. The Department informed her that she could not get compensation under COIDA, nor could she get unemployment insurance benefits for her loss. The daughter was then assisted by a well-known advocate for women's rights, SADSAWU, to launch an application in the Pretoria High Court to have s 1(xix)(v) of COIDA judged to be unconstitutional because, according to them, it excluded domestic workers working in private homes from the definition of the word 'employee'.

The High Court, without reason, passed a judgment which declared s 1(xix)(v) of COIDA as being invalid because it side-lined domestic workers from the definition of the word 'employee' and this denied them compensation when they meet their death in the workplace whilst performing their duties. The High Court accordingly made a second order finding that the invalidity should apply with immediate effect, retrospectively in order to provide some form of

[21] Ibid at 205.
[22] Ibid.
[23] 130 of 1993.
[24] *Mahlangu* supra 6 para 7.
[25] Ibid para 8 to 10.

relief to domestic workers who had died at work prior to this declaration being made an order of court.[26]

(a) Issue before the court

The Constitutional Court, in this case, was asked to confirm the declaration of the constitutional invalidity of section 1(xix)(v) of COIDA.[27]

(b) Contentions of the applicant in the Constitutional Court

The applicants advanced the argument that the omission of domestic workers as employees in the relevant section of COIDA amounted and impaired the dignity of domestic workers and resulted in their unfair discrimination.[28] The applicants further argued that since domestic workers are commonly African, women, this translated to oppressing them due to their race, gender and class. The applicants described the impact of the unjustified discrimination against domestic workers as a result of an impairment of their rights to dignity and equality on basis of race, class and gender. The applicant expressed the argument that the lack of access to education and patriarchal norms (or to the contrary, patriarchal abnormalities) has equally had an impact on the lived experiences and rights of these women. The applicant argued further that the appropriate methodology applicable in this matter should be an intersectional framework because it leads to socio-legal and contextual considerations when interpreting COIDA. This discrimination, they argued, enhances the severity of domestic workers in a society that already marginalises them on using race and class.

The applicants further argued that domestic workers suffer past and present disadvantages on the grounds of their occupation not being taken seriously, which leads them to being more vulnerable groups in our society.[29] Domestic workers being outright and unjustly deprived of the benefits of social insurance secured by COIDA is a perfect example of the injustice they face. The workers protected by COIDA are granted a remedy in instances of injury and harm, irrespective of fault and independent means of their employer. The exclusion of domestic workers on the other hand means that the only remedy that was available to them was a common law delictual claim for damages which was fault-based. This then denies these

[26] Ibid para 11.
[27] Ibid para 12.
[28] Ibid paras 18 to 19.
[29] Ibid paras 19 and 20.

vulnerable and already exploited domestic workers social security protection. According to the applicants, this exclusion could not be justified under the Constitution's limitation clause in section 36[30], thus, they were of the view that this unfortunate exclusion of domestic workers from COIDA was not rationally connected to the objectives of COIDA. These objectives are to afford social insurance to workers who pass on in the course and scope of their employment.

Furthermore:

'The Women's Legal Centre Trust submits that women who are employed as domestic workers are also often the financial heads of their families. These families, within an African context, often include extended family, where domestic workers provide for the financial needs of their children. They also provide for the financial needs of their grandchildren, as well as the children of other relatives within the broader family unit. Cycles of generational poverty are difficult to break. Women have long been viewed as matriarchs, whose indomitable strength ensures that both their immediate and extended families are able to respond to hardships. Ms Mahlangu is an example of such a woman.'[31]

The applicants saw the impact of South Africa's apartheid history on Black women as being relevant.

The applicants submitted that the work of domestic workers, historically, had been stigmatised. Such stigma thrives even in modern times, the fact that domestic workers were considered as being unworthy of receiving this social protection in their place of employment, whilst this remaining unchanged, is a perfect example this stigma continuing to thrive in our constitutional democracy.

III THE CONSTITUTIONAL COURT'S ANALYSIS OF THE RIGHT TO SOCIAL SECURITY

In this matter (*Mahlangu*), the Constitutional Court noted that s 27(1)(c) and (2) of the Constitution provides for social security for those who are in need of sustenance due to the death of a breadwinner as a result of such injury they suffered in the workplace.[32] S 27(1)(c) of the

[30] S 36 of the Constitution.
[31] *Mahlangu* supra 6 para 20.
[32] Ibid.

Constitution provides that everyone has an inherent right to social security if they lack the means and the state under ss 2 in turn has a duty to provide such assistance to its citizens that are in need of it. The court went further noting that although COIDA came into effect before our Constitution, this may steer it away from social security as provided for in s 27 of the Constitution.[33] Social security cannot be separated with the right to equality and dignity. In essence, the violation of the protection of domestic workers is a direct violation of their dignity as workers and people and it also means they are generally not regarded as being equal to other workers. Schedule 6 of the Constitution subjects the older statutes such as COIDA to conform to being consistent with the Constitution of the Republic. The court went further stating that the Bill of Rights was and still is the means through which COIDA must be interpreted in order to bring into effect the basic values of human dignity, equality and freedom.[34] To simply see COIDA as a small part of the vast common law would, without a doubt, constrain the goals and purpose of the Constitution, and this would have unwanted results.

The court went further to engage in a discussion about whether COIDA was a social security statute as provided by s 27(1)(c) of the Constitution. Using *Jooste v Score Supermarket Trading (Pty) Ltd*[35] *(Minister of Labour Intervening),* the court noted that COIDA is indeed an important social legislation.[36] In its analysis the court stated that:

'In circumstances such as these, where a breadwinner has died or cannot work due to injury or illness, her dependents may be left destitute and unable to support themselves. Evidently in these circumstances, the benefits provided to those dependents by COIDA serve a similar purpose to the social grants which are provided in terms of the now Social Assistance Act insofar as they intend to ameliorate the circumstances of those who would otherwise be condemned to living in abject poverty. To regard COIDA only as a statutory mechanism to address former common law claims between employers and employees is, in my view, unduly restrictive. To divorce COIDA from social security because it amounts to "compensation" misses the wide net of social security, which section 27 provides for and seeks to address. For the

[33] Ibid; to see where the Constitutional Court has also subjected a statute to s 27 of the constitution, see also *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).
[34] Ibid para 49.
[35] 1999 (2) SA 1 (CC).
[36] *Mahlangu* supra 6 para 51.

reasons that follow, COIDA must now be read and understood within the constitutional framework of section 27 and its objective to achieve substantive equality.'[37]

When dealing with socio-economic rights, it is vital to give life to the transformative nature of our Constitution which aspires to redress the injustices caused by and the horrific effects of colonialism and apartheid.[38] The inability to sustain oneself as a result of the loss of support by dependents due to the death of a breadwinner subjects those dependents of the deceased to a life of untold indignity and poverty. Furthermore, the exclusion of domestic workers from COIDA's protection traps both them and their dependents in a never ending cycle of poverty. This unjust cycle is a direct legacy of colonisation and apartheid. The Constitution of the Republic then seeks to undo this unfortunate race and gender-based poverty. The Constitutional Court then found that assistance under social security in terms of COIDA is a subset of the right provided for by s 27(1)(c) of the Constitution.[39]

IV THE CONSTITUTIONAL COURT'S DEALING WITH COIDA EXCLUDING DOMESTIC WORKERS AS EMPLOYEES

The court then engaged in a discussion about whether it was reasonable for COIDA to exclude domestic workers from its definition of the word employee.[40] Social security was meant to be a remedy against the country's unfortunate past which delegated poverty strictly based on gender and race. In this matter, the court found that the exclusion of domestic workers from COIDA served no legitimate purpose. This exclusion rather advances the already existing stigma of disadvantage attributed to a certain race, class and gender. These domestic workers continue to face these challenges, which are part of their lived experiences, the majority of them being African women. These African women are the most vulnerable members of our society and their vulnerability had its roots from oppression which is attributed to specific groups of people, based on their race, gender and class. To then exclude such vulnerable people from the protection provided by COIDA was unreasonable. Through this logic, there is then an obligation to ensure the inclusion of domestic workers in the protection provided by COIDA and if this is not done, it will constitute an infringement of the above mentioned s 27(1)(c) of the Constitution.

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[37] Ibid para 51.
[38] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), as cited by the Constitutional Court in Mahlangu.
[39] *Mahlangu* supra 6 para 59.
[40] Ibid paras 60 to 65.

V THE QUALITY CHALLENGE BY THE CONSTITUTIONAL COURT

The court looked at s 9(1) of the Constitution which provides for everyone to be equal before the law, irrespective of their race and gender. The court then found it correct to not differentiate between other employees and marginalised domestic workers.[41] The court engaged in this discussion because the applicant had submitted that the exclusion of domestic workers from the protection of COIDA constituted unequal treatment and it was in breach of section 9(1). Using *Harksen v Lane N.O,*[42] the court applied the Harsken test which determines whether the provision in question differentiates between categories of people and if this is the case, whether such a differentiation is made to advance legitimate government purpose, if not, this violates s 9(1) of the Constitution. The Constitutional Court went on to find that the differentiation made under COIDA between domestic workers and other groups of workers is inconsistent with the right to everyone for equal protection of the law provided by s 9(1). Accordingly, COIDA would not even pass the first stage of the Harksen test and would be constitutionally invalid.[43]

Due to the applicants submitting that the discrimination of domestic workers was based on the grounds of race and gender, the court was forced to examine s 9(3) of the Constitution. The court had to analyse the concept of intersectionality. Victor AJ cited Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[44], that grounds of unfair discrimination can intersect, thus a study must then be done not on one, but both rights being infringed.

Intersectionality is where a person or group of people are discriminated for being, for example, African people, being poor people and women at the same time.[45] Intersectionality is where a person is marginalised because of fitting into two or more identities at the same time, thus facing more than one form of discrimination and multiplying the prejudice.[46] This methodology, according to the Constitutional Court is desirable as it leads to the protection of the

[41] Ibid para 70.
[42] 1998 (1) SA 300 (CC).
[43] *Mahlangu* supra 6 para 72.
[44] 1999 (1) SA 6 (CC).
[45] For a further discussion of intersectionality, see *Hassam v Jacobs N.O* 2009 (5) SA 572 (CC); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC*); Brink v Kitshoff N.O.* 1996 (4) SA 197 (CC); *S v Tshabalala* 2020 (5) SA 1 (CC); *Centre for Child Law v Media 24 Ltd* 2020 (4) SA 319 (CC).
[46] B Smith 'Intersectional discrimination and substantive equality: A comparative and theoretical perspective' (2016) *The Equal Rights Review* 73–102.

right to equality. The court stated that applying intersectionality as a tool of analysis allowed the courts to understand the social structures that shape the lived experience of oppressed and marginalised groups of people.[47]

The court noted that both sides of the argument agree that domestic workers who were predominantly African women, experience discrimination on intersecting grounds. Such discrimination, happening at the same time, multiplies the misfortune and burden placed on an already disadvantaged group of people.[48] This concept of intersectionality engages how overlapping forms of oppression based on connected identities result in specific groups of people being subject to compounded forms of discrimination.[49] The court stated that domestic workers face the harsh reality of racism, gender inequality and classist discrimination. This expanded when we consider that domestic work is a category of work that is undervalued because of a misinformed society's patriarchal norms.[50]

The Constitutional Court disagreed with the approach that since COIDA only excludes certain groups of workers such as domestic workers, such an exclusion does not amount to unfair discrimination as provided in s 9(3), but rather, it amounts only to an irrational differentiation.[51] Victor AJ strictly disagreed with this notion because according to the court, under the s9(3) enquiry, there is no substantial difference between direct or indirect discrimination. 'Once indirect discrimination on a listed ground has been established, then the law or conduct in question is presumed to be unfair.'[52] The court found that evidence points to the fact that the majority of domestic workers are women, specifically Black women.[53] Such an exclusion therefore indirectly discriminates against these women, black women, on grounds of race and gender identities.

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[47] *Mahlangu* supra 6 para 79.
[48] Ibid para 89.
[49] Ibid; Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241; McCall 'The complexity of intersectionality' signs *Journal of Women in Culture and Society* (2005) 30, as cited by the Constitutional Court.
[50] Ibid; Mantouvalou 'Human rights for precarious workers: The legislative precariousness of domestic labour' (2012) 34 *comparative labour law & policy journal* 133 as cited by the Constitutional Court.
[51] Ibid para 92.
[52] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).
[53] *Mahlangu* supra 6 paras 93 and 94.

VI THE CONSTITUTIONAL COURT'S ENGAGEMENT ON THE CONCEPT OF INTERSECTIONALITY

The court engaged in a historical and holistic discussion of the oppression of African women in the employment space. The race-based social hierarchy established by colonial masters and later on apartheid authorities placed African women at the bottom of the social ladder, thus being double oppressed.[54] These women were then at the mercy of the colonial masters who were white men, they had to follow the whims of white men who they worked for. Under their customary arrangements, these Black women were subject to the patriarchy of black men.[55] Black women being at the bottom of this social construct ladder meant that they were forced to do the least skilled and by default, the lowest paying insecure jobs, no different to slavery. These women, specifically domestic workers who had it worse, were as a result of this prejudicial employment policies denied a family life.

The migrant labour system made Black women dependent on their sons and husbands whilst experiencing extreme poverty.[56] In para 102, the court notes that the marginalisation of Black women in general faced during apartheid has unfortunately found its way into the employment spaces of present-day South Africa. The court correctly pointed out that it took the passing of Ms Mahlangu for the rights of these working-class black women to be recognised as prior to this, they were invisible and their lived experiences were all but ignored. Domestic workers, as a direct result of them being black and women, remain overburdened by poverty. The salaries they earn are low and unfortunately not even close to being enough for them to take care of their families, let alone all their daily needs. Furthermore, the court found that the State, without any legitimate purpose, violated the right to equality of these unfortunate black women. If this violation of the right to equality discussed through intersectional eyes with all the multi-layered forms of indirect discrimination is analysed, this methodology can have the impact of achieving proper structural and systemic change.

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[54] J Nolde 'South African women under apartheid: Employment rights with particular focus on domestic service and forms of resistance to promote change' (1991) *Third World Legal Studies* 203; Wing and de Carvalho 'Black South African women: Toward equal rights' (1995) 8 *Harvard Human Rights Journal* 57.

[55] *Mahlangu* supra 6 paras 96 to 99.

[56] Ibid; Poinsette 'Black women under apartheid: An introduction' (1985) 8 *Harvard Women's Law Journal* 93; Andrews 'From gender apartheid to non-sexism: The pursuit of women's rights in South Africa' (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 693 as cited by the Constitutional Court.

VII AN ANALYSIS OF THE RIGHT TO DIGNITY BY THE CONSTITUTIONAL COURT

According to the court, the undesired and prejudicial historical undervaluation of domestic workers has its roots primarily from the racialised and gendered nature of the people who have traditionally done this work. This work has specifically been reserved for African women. First, this labour has traditionally been viewed and reserved as work done by an already oppressed race of people.[57] Secondly, this labour has been viewed as having no economic value, thus, through a misguided perspective, justifying it being work suitable for women.

The court also correctly points out that this labour not being given the respect and dignity it deserves shows the patriarchal values which society uses to decide what must be considered as real work.[58] This exploitative relationship between poor black women and their white masters shines light into how domestic workers have been used as objects to meet an end and thus commodified. Fortunately, our Constitution has always been progressive enough to prevent the idea that people are objects.[59] The court concluded on this issue that the exclusion of the protection of domestic workers from COIDA was a violation of their dignity.[60]

(a) Order in the majority judgment

The majority ordered that the exclusion of domestic workers from the definition of employee under COIDA be declared constitutionally invalid.[61]

VIII AN ANALYSIS OF THE MINORITY JUDGMENT

Jafta J, writing for the minority, agreed with the majority that the exclusionary provision in COIDA is inconsistent with our Constitution; however, he cited different reasons from those of the majority judgement. Jafta J was of the view that the provision of COIDA in question does not meet the rationality test as it is not linked to a legitimate government purpose and it is then inconsistent with s 9(1) of the Constitution. For this reason alone, it should be regarded as being

[57] Shah and Seville 'Domestic worker organizing: Building a contemporary movement for the dignity and power' (2011) *Albany Law Review* 413, as cited by the Constitutional Court.
[58] *Mahlangu* supra 6 para 111.
[59] Ibid; R Steinmann 'The core meaning of human dignity' (2016) 19 *PELJ* at 1.
[60] Ibid para 115.
[61] Ibid para 13.

invalid.[62] Jafta J went further to explain that domestic workers are not the only group of workers excluded by COIDA. This omission also applies to members of the South African National Defence Force and members of the South African Police Service across racial lines.

When dealing with the right to dignity, the Justice noted that the dignity of domestic workers is not tied to their labour. If that labour is not recognised as real work, it does not then follow that the dignity of those labourers is undervalued. The exclusion of the protection of domestic workers does not target them based on their human attributes. They are rather excluded based on their occupation.

IX COMMENTS ON THE JUDGMENTS

As highlighted in Chapter 1 of the study, labour law occupies a unique role in our society, compared to other areas of law.[63] This is because labour law must be analysed through a non-legal methodology, using political, social and cultural processes.[64] The Constitutional Court in this matter, clearly used this socio-legal approach. Victor AJ was correct in discussing the issue of the matter through the lens of the intersectionality of rights. In essence, saying domestic workers were excluded from the protection of COIDA, which was provided to other categories of workers, simply because they were African, they were poor and they were also women. The Justice correctly analysed the issue through the intersectionality of race, gender and class.

The court highlighting the unfortunate reality of colonial and apartheid social structures finding their way into our constitutional dispensation necessitated another brief discussion of decolonisation. As previously stated in Chapter 2 of this thesis, decolonisation concerns moving away from a Eurocentric understanding of the law, connected to legal structures which traditionally stem from colonialism.[65] This concept of decolonisation entails drawing from various sources of law to promote the transformative capability of the law in achieving more social and economic factors.[66] Decolonisation goes beyond what the law is, it concerns itself

[62] Ibid para 15.
[63] MM Botha and E Fourie 'Decolonising the labour law curriculum in the new world of work' 2019 (82) THRHR.
[64] see also P Benjamin and J Theron 'Costing, comparing and competing: The World Bank's Doing Business Survey and the benchmarking of labour regulation' (2009) *ActJur* 207–208.
[65] C Himonga 'The constitutional court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law' (2017) *Acta Juridica.*
[66] C Himonga and F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) PER 5 at 5.

with how these laws are used in society.[67] This researcher of this study submits that through this definition of decolonisation, Victor AJ was correct, indirectly and perhaps succeeded in her attempt to decolonise employment law when she adopted a class-based and pro-Africa approach to the problem, using the Constitution's social justice aspirations as the base of her methodology. The Justice proved that the law does not and should not exist in a vacuum.

Respectfully, the researcher also submits that Jafta J's approach above in its instance is contrary to the transformation and decolonisation agenda in that it tries to justify non protection of these working class African women from COIDA by simply saying, but others are excluded as well, therefore this exclusion is not race or class based. This is precisely what Victor AJ sought to avoid and labour law should also avoid. It is important to understand that judgments and laws that do not consider the lived experiences of the people cannot lead to substantive equality our young democracy aspires to.[68] However, as previously highlighted in Chapter 2 of this thesis, it must be understood that there is no fixed definition of decolonisation, thus, this is just one definition suiting this particular context.

The majority judgment also has a limitation. It depicts African men as being the primary enforcers of the oppression of African women, alongside the white masters. This is simply an incorrect perspective. While it is true that African women suffer additional disabilities compared to African men, this must be put in context.[69] The study submits that the court, on this point, should have highlighted the position of African men in relation to the white master and the African woman. Nolde submitted that the racial and gender prejudice in question was established by a system developed through parliamentary supremacy and common law, a product of colonial masters, whilst African people were collectively subjugated.

Furthermore, the distorted customary law the judgment makes mention of was improperly codified and distorted by colonial powers to reflect their own views and impose their own norms on African societies.[70] The study agrees with Nolde in that these purported customary

[67] Ibid.
[68] TR Jeewa and J Bhima 'Discriminatory language: A remnant of colonial oppression' (2021) 11 *Constitutional Court Rev* 323–339.
[69] Nolde op cit note 54.
[70] NL Morundi *The indiginisation of customary law: Creating an indigenous legal pluralism'* (LLM thesis, University of Pretoria, 2019); C Himonga and T Nhlapo eds *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 8.

arrangements were the views of the then apartheid government concerning the African women. The employer has and always had complete control and discretionary power over the labour of all African people. This argument should not be misconstrued as arguing that African men are innocent bystanders, it simply proposes that the issue be viewed in a holistic way.

Another limitation of the majority judgment is that while it seems to apply certain aspects of critical race theory (CRT), it does not make mention of it. The importance of CRT specifically in this matter is that it challenges existing theories of society in that without an understanding of race and racism, there can be no true understanding of power relations. This is because CRT challenges the role of the law in the black diaspora.[71]

Victor AJ's judgment has undeniably positive social implications. It provides protection to stigmatised poor African women and their descendants, to be able to sustain their lives when the breadwinner is unable to work due to an injury or death. The court must be commended for departing from the norm highlighted by Crenshaw in 'Demarginalising the Intersection of Race and Sex' when she argues that often, the discussion is reserved to expressing the lived experiences of the privileged group in the marginalised overall race. This is because the court clearly gives life to the voice of the vulnerable group within that oppressed group of people.

X CONCLUSION

It is concluded in this chapter that the Constitutional Court's judgment is a well-written and reasoned judgment. The court was able to justify and use rigorous research into race, class and gender to substantiate its position. Particularly, the intersectionality methodology provided a clear, easily understandable methodology into obtaining a holistic view of the oppression of the vulnerable and poor African women. This approach is clearly in line with the decolonisation of the law agenda in the legal community. However, the court perhaps should have briefly engaged

[71] TR Jeewa and J Bhima op cit note 68; for a discussion on CRT, as cited by TR Jeewa and J Bhima see R Delgado & J Stefancic 'Critical race theory: Past, present, and future' (1998) 51(1) Current Legal Problems 467; R Delgado and J Stefancic *Critical Race Theory: An Introduction* (2012) 2nd Ed 9; R Delgado & J Stefancic 'Critical race theory and criminal justice' (2007) 31(2–3) Humanity and Society 133; C Hallinan and S Coram 'Critical race theory and the orthodoxy of race neutrality: examining the denigration of Australian indigenous athlete Adam Goodes' (2017) Australian Aboriginal Studies 99; CI Harris 'Whiteness as property' in K Crenshaw, N Gotanda, G Peller and K Thomas (eds) *Critical Race Theory: The Key Writings That Formed the Movement* (1995) 276; JSM Modiri 'The grey line in-between the rainbow: (Re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse' (2011) 26 South African Public Libraries, 183.

in a discussion of CRT as this theoretical framework is relevant in that it engages race and a primary tool of understanding power relations.

Furthermore, as highlighted in Chapter 2 of this thesis, domestic workers have also received a national minimum wage. This assists these vulnerable African women to have their wages regulated by the government, which means unlike in the colonial and apartheid regimes, their employers can no longer decrease their wages at will or begin to inhumanly deduct their day-to-day living as part of the expense to be deducted from their employment.[72] In essence, the study submits that it seems the law is making progress in protecting the rights of vulnerable African women workers, even though delayed.

This chapter does have a limitation. The chapter could have been broadened to include a discussion of sexual harassment, an important element considering South Africa's fight against the pandemic of GBV which has found its way from the social setting into the workplace as well. However, due to the nature of the study, sexual harassment has not been explored as the study is primarily concerned with the issue of race in the labour law perspective and only explored gender in relation to race (as discussed in this chapter), not gender in the broader perspective. The study submits that there is still a need for other scholars to engage in detail in this issue of GBV as Kubjana[73] suggests we do not yet have a fixed definition of the concept of sexual harassment and further questions if our statutes are suited to effectively address this issue.

[72] T D Thobjeane 'Becoming a domestic worker: The case of Mpumalanga Province, South Africa' (2019) 12(3) *OIDA International Journal of Sustainable Development* 27 at 28.
[73] LL Kubjana 'Understanding the law on sexual harassment in the workplace (through a case law lens): A classic fool's errand' (2020) Obiter 88–105.

CHAPTER 5
LABOUR AS A COMMODITY TO BE BOUGHT, SOLD AND TRANSFERRED

I INTRODUCTION

This chapter deals with the question of whether human labour is or is not a commodity considering the history of colonial and apartheid South Africa. This question is important because labour historians themselves have not been paying detailed attention to the process of the commodification of human labour.[1] The researcher of this study argues that this is more so in South Africa, meaning labour is indeed a commodity in our country. This perspective is supported by Maddison[2] who observes that the phrase of labour law as a commodity is 'generally absent in approaches to the history national and historical contexts.' The lack of questions around this topic by the broader academic community stems from the fact that our modern society has become accustomed to what it perceives as being the natural state of labour to the extent that it has not proceeded to question the status quo.[3] In essence, what was originally viewed as strange (the commodification of workers by capitalism) has been normalised to the extent that its questioning and examination has evaded society.[4]The questioning of labour commodification evading society simply means that our society has become comfortable with the commodification of workers' labour that it no longer questions this practice and rather sees it as being some form of 'normality'.

The researcher has attempted to answer the question raised above by engaging in a theoretical side and the reality of what workers encounter in practice in the Republic. In this chapter, a brief historical account is presented of what the condition of black and African workers was like during colonial and apartheid times in order to better understand the arguments that are provided. In answering the questions posed above, the study, by using the socio-legal methodology, used intersectionality as means of analyses and to provide the solution as the workers do not only face a race issue but also a class issue.

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[1] B Maddison 'Labour commodification and classification: An illustrative case study of the New South Wales boilermaking trades, 1860–1920' (2008) 53(2) *International Review of Social History* 235 at 235.
[2] Ibid at 236.
[3] Ibid at 237.
[4] Ibid.

As previously stated in Chapter 1, the International Labour Organization (ILO) in the Declaration of Philadelphia of 1944 states that labour is not a commodity.[5] The ILO is of the view that people should not be treated like commodities, simple means of production or resources. At its simplest, one side of the debate regarding the commodification of labour takes the position that labour is not a commodity because labour law was designed to protect workers against the attempt by capitalism to commodify labour.[6] In simple terms, this view is that labour is not a commodity because labour law says so.[7]

On the other side of this argument, the contrary position is argued. Critics of capitalism view the labour force as a simple means of value.[8] The argument is that labour creates wealth, the value of a worker is determined by the number of hours they work and this makes their labour is inseparable from their bodies.[9] As a result, the more hours workers work in order to take care of their family, the more value they create in the eyes of capitalism.

It is in the context of these opposing views that this chapter focuses on the question of whether labour is a commodity or not. Once the theoretical arguments have been considered, the practical realities facing South African workers are contextualised and recommendations made on how to not commodify labour should it be established that labour is a commodity in practical terms. However, it is first necessary to set a brief historical background within which this question must be understood in the South African context (Is labour a commodity?).

(a) The colonisation of South Africa

Since this chapter presents a brief historical perspective of South African labour, it is necessary to include a general history of the colonisation South Africa. In 1602, the Dutch established a private company called the Vereenigde Oostindische Compagnie (VOC), which is commonly

[5]International Labour Organisation, the Declaration of Philadelphia of 1944 Chapter One www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf accessed 20 September 2022.

[6] MM Botha 'The different worlds of labour and company law: Truth of myth' 2014 17(5) *PER* 2042 at 2050; for a detailed discussion on the argument of why labour law may not be a commodity, see also B Langille 'Labour law is not commodity' (1998) 19(5) *Industrial Law Journal* 1002; P O'Higgins 'Labour is not commodity an Irish contribution to international labour law' (1997) 26(3) *Industrial Law Journal* 225.

[7] International Labour Organisation op cit note 5.

[8] Marx, *Capital, Volume I* (1954); for arguments that labour is a commodity see also L Goodstadt 'Labour - Just another commodity for sale' (1979) 8(3) *Anglo-American Law Review* 160.

[9] Kurz 'Marx and the law of value: A critical Appraisal of on the occasion of his 200th birthday' (2018) 77(304), abril-junio de at 47.

referred to as the Dutch East India Company.[10] This entity was used to trade spices in India, Malaysia and Indonesia and the best way to reach these spice rich nations of the east, the VOC had to travel by sea.[11] Due to the long journey east, these Dutch sailors needed a halfway point for refreshments, this station was established by the directors of the VOC in 1650 at the Table Bay, which was also referred to as the Cape of Good Hope, modern day Cape Town.[12] In 1652, the leader of this settlement was the commander of the VOC named Jan van Riebeeck, a corrupt thief that had been relocated from Japan to the Cape after being transferred due to his misconduct.[13] Soon thereafter, this settlement started expanding, with it corruption and exploitation of the natives of the continent into a Colony.[14]

In 1795, the VOC went bankrupt and the Cape being a strategic point for sea voyages to the east was captured by the British.[15] In 1806, it was 'given' back to the Dutch through a peace treaty; however, with the outbreak of the Napoleonic Wars, the British again took control over the Cape to protect its British East India routes.[16] The descendants of these two colonial settler nations moved inland from the Cape to establish more colonies over the centuries. This study suggests to the reader that the colonisation of South Africa was not linear, as will be shown below, it consisted of various laws being passed and applied simultaneously and involving two colonial powers, each with their own colonies. As a result, it becomes difficult to simply reduce it to the British and Boer era or set out an analysis of these statutes chronologically.

II A BRIEF HISTORICAL CONTEXT OF LABOUR AS A COMMODITY IN SOUTH AFRICA

This section of the chapter provides a brief historical discussion on the context of labour in our country. This is not meant to make the study to be based on a specific period in time, but rather,

[10] E Oliver and WH Oliver 2017 'The colonisation of South Africa: A unique case' (2017) 73(3) *HTS Teologiese Studies/ Theological Studies* 1 at 4; see also J Fourie, A Jansen and K Siebrits 'Public finances under private company rule: The Dutch Cape Colony (1652–1795)' (2013) 68 *New Countree* 51 at 51; J Fourie 'The remarkable wealth of the Dutch Cape Colony: measurements from eighteenth century probate inventories' (2013) 66(2) *The Economic History Review* 419 at 420.
[11] Ibid.
[12] Ibid; see also CH van Zyl 'The Batavian and the Cape Plakaten - An historical narrative' (1908) 25(1) *South African Law Journal* 4 at 6.
[13] Ibid.
[14] Ibid.
[15] Ibid at 5.
[16] Ibid.

it is merely an attempt to set the tone of understanding the labour history of South Africa, and the continent of Africa as a whole.

From the moment the Dutch colonial settlers settled in the Cape in 1652, they engaged in slavery.[17] The definition of slavery remains in dispute; however, the study accepts that "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[18] From this definition, the researcher is of the view that this means slavery is the possession of a human being by another person, to whom norms of ownership as property apply.[19] Jan van Riebeeck, the commander of the Dutch East India Company was amongst the first people to request the importation of enslaved people in 1652 to meet the demands of cheap labour in the Dutch settlement of the Cape.[20] These enslaved people came from the regions of Angola and Guinea around 1658.[21] In order to keep Africans in perpetual slavery, the Dutch colonial settlers determined the status of a person based on that of their mother, that is if a mother was enslaved, the child too would be enslaved.[22] Needless to say, these enslaved African people were considered to be the property of their white masters, to be bought and sold at their master's will and their labour was considered to be a simple commodity.[23]

The enslavement of African people reduced them from being regarded as human beings with natural rights to being regarded as possessions, goods, basic commodities.[24] In order to make money through the commodification of the enslaved person's labour, the enslaver forced the enslaved to labour or the enslaver would engage in the buying and selling of enslaved people.[25] In any event, enslaved people were no longer regarded as human beings with rights, they were now regarded as commodities to have themselves or their labour exchanged, bought and sold. Rinehart states 'they were capital as well as labour.'[26] It is crucial to understand that these enslaved Africans were considered by their colonial settler enslavers to be no different

[17] BC Graham 'Slavery at the Cape' (1933) 50(1) *South African Law Journal* 4 at 5.
[18] J Allain and K Bales 'Slavery and its definition' (2012) 14(2) *Global Dialog* 1 at 2.
[19] Ibid.
[20] Graham op cit note 17 at 5.
[21] Ibid.
[22] Ibid.
[23] Ibid at 5.
[24] NT Rinehart 'The man that was a thing: Reconsidering human commodification in slavery' (2016) 50(1) *Journal of Social History* 28 at 29.
[25] Ibid.
[26] Ibid.

from other goods like spices, hence they were sold for their labour.[27] This is evidenced by the fact that the colonial settlers would refer to the enslaved people as being 'pieces' and the British in particular, arranged them and numbered them in the order they were bought.[28]

Even when the descendants of the colonial settlers migrated inland, they still engaged in the enslavement of African people who were driven from their own land through violence.[29] This was all done to meet the labour demands of plantation labour, livestock labour, producing sheep-soap for boers and trekboers. These enslaved Africans were also traded for guns and horses.[30] It is not until the British government passed the Slave Trade Act of 1807 that the import of enslaved people into British colonies was outlawed.[31] This statute didn't outlaw the trading of enslaved people in the colonies, only their import. What finally ended the trading of enslaved people in British colonies was the Slave Emancipation Act of 1834.[32]

After the British had banned slavery in its colonies, the Boers were in constant need of the supply of cheap labour due to their growing commercial farms and there was also the gold rush in the Witwatersrand that resulted in the Randlords also needing cheap labour.[33] The Boers were disgruntled by the banning of the enslavement of people and started to steal African women and children 'orphaned' during raids and wars.[34] These children were stolen with the intention that they were to labour for the Boers, and at times they were even bought and sold as one would a simple commodity.[35]

Before further discussing the stolen African children turned child labour it is important to understand that it wasn't just the Boers that engaged in inhumane practices with regards to black people used as simple commodities, the British colonial settlers too had a hand despite earlier

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[27] Ibid at 30.
[28] Ibid at 32.
[29] F Morton 'Slavery in the South African interior During the 19th century' (2018) *Oxford Research Encyclopaedia, African History* 1 at 3.
[30] Ibid.
[31] I Martins 'An act for the abolition of the slave trade: the effects of the import ban on Cape Colony Slave Holders' (2019) 43 *The African Economic History Network* 1 at 2.
[32] Ibid.
[33] D van der Merwe 'Not slavery but a gentle stimulus: Labour-inducing legislation in the South African Republic' (1989) 3 *Journal of South African Law* 353 at 354.
[34] L Maqutu *The postcoloniality of labour law: a South African perspective* (Unpublished PhD thesis, University of KwaZulu Natal, 2020) at 77.
[35] Ibid; see also P Delius and S Trapido 'Inboekselings and Oorlans: The creation and transformation of a servile class' (1982) 8 *Journal of Southern African Studies* 214 at 214.

banning the importation of enslaved people. As Maqutu[36] notes, Proclamation 1 of 1809 (hereafter, the Caledon Code) created a situation where an African worker was given to a white master and the worker was forced to work the full term of the contract, failing which they would be severely punished through imprisonment or withholding of wages.[37] It is precisely this Code that introduced serfdom in South Africa, which was an old European practice of making workers, no different to enslaved persons, the property of their masters.[38] This Code bound African workers to their master, workers could not go anywhere without the permission of their master in a form of a pass obtained from regional authorities.[39] In essence, the relationship between African workers and their white colonial settler employers was that between a master and property, the African person was viewed as the commodity in this instance.[40]

After the Caledon Code mentioned above, there was the Proclamation of 23 April 1812 (Apprentice Proclamation) which formalised the bondage of African children from the age of eight for a period of at least ten years.[41] Maqutu states that these British colonial proclamations caused African people to become 'a race of servants'.[42] This means that the British had the intention of making all African people be their servants.

As stated above, the boers were adversely affected by the ban on the enslavement of people. In an attempt to loosely follow the British, Piet Retief (boer Leader) on behalf of the Voortrekkers published a manifesto which banned the trading in enslaved people in the boer Republic.[43] However, it must be noted that the boers believed that African people were inherently subordinate to them, as white people, and that they were destined to serve them.[44] In an attempt to keep this social and racial hierarchy, the boers had two methods to sustain their world view. The first was to engage in the stealing of children (kidnapping), the second was, they would 'provide protection' to African people who had been displaced in wars of the time and Africans in return had to labour for them and in the alternative to pay taxes to them for this

[36] L Maqutu 'The concept of labour in South African law' (2020) 26(1) *Fundamina* 42 at 49.
[37] Ibid.
[38] Ibid at 50.
[39] Ibid at 51.
[40] JS Bergh 'White farmers and African labourers in the pre-industrial Transvaal' (2010) 55(1) *Historia* 18 at 19
[41] Maqutu op cit note 36 at 49.
[42] Ibid at 52.
[43] Van der Merwe op cit note 33 at 356.
[44] Ibid.

'protection'.[45] They also used the Christian religion to promote the notion that the only appropriate economic involvement of Africans in the economy was not as owners of the means of production, but rather as basic servants.[46]

This period of boer exploitation of cheap African labour was the mid-1800s. During this time, the boers practised child stealing of African children who were stolen and brutally used in a way no better than an enslaved person would be and it was not an 'apprenticeship'.[47] As stated above, the boers were not the originators of this practice, the British had used it in the Cape in the form of the Apprenticeship Law of 1812.[48] Under the law applied by the boers in 1851, instead of calling it child enslavement, they simply structured it in a way that it was a situation where an orphaned African child was taken in by a white family as a gift and this child had to be registered with the local magistrate.[49] These children were to labour for their white families until the age of twenty five, should the white master die or be unable to 'take care' of them before then, they would simply be 'transferred for a fee' to another family.[50]

It is important to understand that these children were 'acquired' through sale. These children came to be the 'possession' of boers when their parents were killed during commando raids and wars, they were not 'gifts' as often portrayed and this practice masqueraded as a form of involuntary apprenticeship.[51] Maqutu notes that this cruelty was done under the guise of civilising these African children through integrating them into white households.[52] MW Pretorius, the then president of the South African Republic (from 1857 to 1860), stated that these captured women and children were not to be enslaved, but rather, they were to be rescued from starvation.[53] Needless to say, this was a false narrative for the stealing and trading in innocent human lives. This practice was called *inboekselings* (meaning indentured people) and at a certain point in time, specifically in the 1850s and 1860s, a vast percentage of the labour force (with 10 per cent of the migrating boers) was dominated by the stolen African children bound to boer

[45] Ibid at 355.
[46] Ibid.
[47] Maqutu op cit note 34; see also F Morton 'Slave-raiding and slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99 at 100.
[48] Van der Merwe op cit note 21 at 356.
[49] Ibid at 357.
[50] Ibid.
[51] Maqutu op cit note 34 at 77.
[52] Ibid; see also P Delius and S Trapido op cit note 35.
[53] JS Bergh op cit note 40 at 22.

families,[54] who were viewed as commodities to be bought and sold.[55] This inhumane practice was ended by the British colonisers through the Proclamation on 24 March 1858. After the British colonisers had annexed the boer republics, this inhumanity was applied on a larger scale, it was taken a step further. Rather than have a single child as a commodity, whole black families were taken as indentured labour for periods of five years at a time.[56] These people became known as the *Oorlams* people, they were referred to as the 'civilised k….'.[57]

In the then colony of Natal, by the 1860s, Zulu people still had some form of self-sustenance as they refused to be cheap labour to the white colonial settlers.[58] Then came the enslavement of people from India through a system the British introduced in the 1860s referred to as indentured labour. Naidoo[59] provides that 'Their Anglo-Natalian predecessors welcomed them as an industrial asset of immeasurable worth.' The enslaved people from India were to make up for the abolition of slavery, the expansion of British colonial ambitions which came hand in hand with capitalism and the demand for labour to produce profits for the colonial settlers and their empire.[60] These workers were to work in sugar plantations and were treated in a demeaning manner.[61]

Then came the Native Act of 1870 of which the primary objective was to force African people into labour through the imposition of unreasonably high taxes.[62] Article 17 of this statute taxed African people who were not workers at ten shillings per year, those who were workers for white farmers but did not live on those farms were taxed at five shillings per year and those who worked and lived on white farms were only taxed at two shillings and six pence per annum.[63] This was not legitimate tax by a legitimate State, rather it was corruption by colonial settlers to

[54] P Delius and S Trapido op cit note 35 at 227.
[55] Ibid at 78; see also K Breckenridge 'Power without knowledge: Three 19th century colonialisms in South Africa' (2008) *Journal of Natal and Zulu Studies* 3 at 24.
[56] P Delius and S Trapido op cit note 35 at 237.
[57] Ibid at 238.
[58] T Naidoo 'Proselytism within South Africa's Hindu community' (2000) 14(2) *Emory International Law Review* 1121 at 1121.
[59] Ibid.
[60] Ibid at 112
[61] Ibid.
[62] JS Bergh 'To make them serve': The 1871 Transvaal Commission on African Labour as a Source for Agrarian History' (2002) 29 *History in Africa* 39 at 54.
[63] Ibid at 55.

make African people, as Maqutu put it above, 'a race of servants'.[64] In simple terms, African people had to provide cheap labour on white farms in order to avoid tax.

This, however, created uncertainly and two schools of thought emerged regarding the position of African people after paying this tax in question. Magistrate van Staden interpreted Article 17 of the Native Act, 1970 as meaning that those Africans who had already paid the tax of ten shillings for not working would then be exempt from forced labour.[65] On the other hand, Commandant Paul Kruger held a contrary view. He was of the opinion that even after the African workers had paid the tax of ten shillings, they would still need to be forced into labour.[66] These two schools of thought both had one thing in common, both held racist opinions. They both held the view of African workers as being lazy, needing to be treated harshly so they would be able to perform their jobs, and took the position that African people should not only serve a master but also live on that master's land.[67]

What was applied simultaneously with the tax laws was the Pass Law 3 of 1872 which required African men to have a pass at the cost of one pound, to be renewed yearly.[68] Since most Africans could not afford this pass, they were forced to resort to look to white farms for employment.[69] This law was inescapable as to travel outside of the then colonies and Republics, Africans needed a pass, so one way or another, Africans had no choice but to labour for the pass.

What was happening concurrently with child stealing due to the end of formal slavery in 1834 was the introduction of the migrant labour system in South Africa, the great killing of cattle by the Xhosa people and poll tax in Natal. All these systems were due to the shortage and huge demand for cheap labour fuelled by mining companies, the ban on enslaving people and rise in farming. Ngcukaitobi[70] narrates that in 1854 the Xhosa people were informed by a young prophet woman named Nonqawushe, on the instructions of two suspicious men in a vision she saw, when she was near a river, that they (Xhosa people) should kill all their livestock, primarily their cattle. In addition to this, these African people were told not to plough and to destroy all

[64] Maqutu op cit note 34.
[65] JS Bergh op cit note 62.
[66] Ibid.
[67] Ibid at 58.
[68] Van der merwe op cit note 33 at 359.
[69] Ibid.
[70] T Ngcukaitobi *The Land is Ours* (2018) at 16.

food in their possession. If they obeyed this instruction, white people would then return to where they had come from. Desperate to rid themselves of colonial settlers, the Xhosa people obliged. Needless to say, this resulted in a large number of deaths due to starvation, leading to a huge population decrease and forced the remaining dispossessed people to avail themselves as cheap wage labour at the Cape colony.[71]

Migrant labour was recruited from Mozambique and other Southern Africa countries on the instructions of the Chamber of Mines.[72] This system was set up to recruit a large number of Africans so as to prevent competition in the mines. The logic behind this was that the more workers there were, the less mining companies had to compete with each other to pay workers as there was an abundance of labour force.[73] In addition to this African migrant labour, South African people were also coerced to work in the mines.[74] One such way of forcing African people to provide cheap labour was through the poll tax of 1906 in Natal. This tax forced unmarried African men of every African household in South Africa to pay tax.[75] The result of this was that those who could not afford to pay this tax were forced to provide cheap labour in the mines.[76] The above can be summarised in the following way 'In the colonial and apartheid years of gold mining, worker consent on South African gold mines was secured through racial and coercive labour practices.'[77]

The important thing about the demand for labour post the abolition of slavery was that African people were forced by colonial tactics such as the ones highlighted above to became cheap wage labour. As discussed in Chapter 2, the African workers' labour during this period was regarded as a simple commodity in that they were flogged and imprisoned if they did not work according to the demands of their employers. These workers could not form trade unions or strike, making them, like commodities, subject to the will of their employers, to be exploited for cheap labour and dismissed once cheaper labour was obtained.

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[71] Ibid at 19.
[72] RM Prothero 'Foreign migrant labour for South Africa' (1074) 8(3) *International Migration Review* 383 at 384.
[73] Ibid.
[74] TS Phakathi 'Worker agency in colonial, apartheid and post-apartheid gold mining workplace regimes' (2012) 39 (132) *Review of African Political Economy* 279 at 281; for a detailed discussion on migrant labour in Africa, see also T Soper 'Labour Migration in Africa' (1959) 11(2) *Journal of African Administration* 93–99.
[75] S Redding 'A blood-stained tax: Poll tax and the Bambatha rebellion in South Africa' (2000) 43(2) *African Studies Review* 29 at 31.
[76] Ibid.
[77] TS Phakathi op cit note 74 at 281.

The study submits that it is in this context that the commodification of workers must be understood, where their labour (the workers labour) was inseparable from their bodies, them being owned by their masters, making their labour a simple commodity. Whilst formally owning people had ended, the colonial laws still ensured the continuation of the ownership of people as simple commodities to be bought and sold. Again, this section of the thesis is not meant to be exhaustive in highlighting the number of laws and practices that made workers commodities, it is merely meant to be a brief engagement that sets the background and context of the South African labour force.

III THE THEORETICAL AND PRACTICAL ARGUMENTS REGARDING WHETHER LABOUR IS OR IS NOT A COMMODITY

(a) The theoretical arguments

This section of the chapter deals with the perspective of Marxist-aligned scholars on the issue of labour being a commodity. The section further deals with the views of those who argued against the opinion of labour being a commodity, in favour of a more liberal view of labour not being a commodity. As a starting point, the chapter analyses the opposing theoretical arguments.

Edmund Burke in 1795 stated that labour is an article of trade and as such, it is fitting to describe it as a commodity since, like other commodities, it is subject to the labour market and it rises or falls based on this demand.[78] The world renowned communist, Friedrich Engels, argued that due to the competitive nature of capitalism, the price of a commodity is subject to the cost of its production and labour too is based on the cost of producing that commodity.[79] Marx took this idea a step further by suggesting that what the employer employs is not the worker him/herself, but rather, the employer is purchasing the labour power of the worker.[80] However, this study concurs with Evju[81] in that the labourer's working power is the same as his work since the two cannot be separated and as a result, labour power is still the worker him/herself. Laycock[82] also uses the idea of labour power when arguing that in order to sustain themselves, workers must indeed alienate this labour power. However, it is important to state that Marx had argued that

[78] S Evju 'Labour is not a commodity: Reappraising the origins of the maxim' (2013) 4(3) *European Labour Law Journal* 222 at 223.
[79] Ibid at 224 where the author cites Friedrich Engels, *The Principles of Communism* (first published 1847).
[80] Ibid.
[81] Ibid.
[82] H Laycock 'Exploitation via labour power in Marx' (1999) 3(2) *The Journal of Ethics* 121 at 121.

labour is a commodity only if the worker sells it as such.[83] That is to say, labour is a commodity if the worker 'willingly' sells his work to the willing buyer. This point by Marx is unnecessary in that the precise reason why the 'worker' is a 'worker' is to exchange their labour to the capitalist for remuneration because as stated above, workers often have to sustain themselves and their families.

John O'Nelson[84] roughly defines a commodity as something that a person can buy and sell, and in our modern structure, it becomes normal to view human labour as being no more than a simple commodity that can be bought and sold. First, when people view the way they pay the worker for their work, they make a simple transaction of them viewing the labour of that worker as a commodity in itself.[85] This is a capitalist way of thinking where a worker can be offset against 'the overall cost of a capitalist's product'.[86] That capitalist can then consider the net profit or loss of products they are selling, the worker's labour included in that. In simple terms, if A works for B and A services C, whether B makes a profit or a loss will be determined by the work A puts in. This system makes it easy for capitalists to capture their business financial information of profits and losses this way.[87]

John O'Nelson argues further that capitalism confirms Karl Marx's negative views on wage labour as it reduces the worker to a position no better than that of an enslaved person and in certain instances, below that of such an enslaved person.[88] This condition is placed upon the worker by the capitalist due to competition as the capitalist seeks to reduce costs while maximising profits.[89] Secondly, a labourer's work cannot be separated from themselves, which is precisely what makes their labour a commodity. For example, the work domestic workers and miners do, in particular rock drillers, cannot be distinguished from the people that perform it in that one cannot buy the services they provide without buying the workers themselves, that is to confirm the above that the work of the worker and the worker themselves are inseparable.[90] In essence, their ability to make a living is attached not only to their skills, knowledge and

[83] Ibid citing Karl Marx *Capital Volume One* Moscow: Progress Publishers 165.
[84] JO Nelson 'That a worker's labour cannot be a commodity' (1995) 70 (272) *Cambridge University Press* 157 at 157.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid at 157.
[89] Ibid.
[90] Ibid.

experience, but to their bodies as well (it is important to remember that when Marxism was formed, labour came in the form of physical labour). John Nelson asks a crucial question to understand this argument 'Where outside of his flesh, could he be? Surely he too is swallowed up in our purchase of his flesh.'[91] It is exactly this buying and selling of their labour that reduces the worker to a slave.

Guy Robinson[92] went on to publish a paper in response to the arguments of John Nelson. Robinson also uses the Marxist understanding of labour power where the worker surrenders control of themselves to another person and agrees for a specific period of time to labour in the direction of the person with whom they have contracted. Robinson explains when a worker puts their skills under the control of someone else, they sell their abilities as the worker contracts to for the other party to have control over those skills for definite period. The worker gets compensation in return.[93] Robinson's argument is simple: a worker is a commodity because they sell their work (which as discussed above cannot be separated from themselves) to another, for a period of time in exchange for a wage. Whilst a person can be tempted to think of this as a circumstance of rent, this argument fails because once the employer has made use of the worker's labour for that contracted period of time, the employer cannot and does not return that labour back to the worker as it is gone.[94] Even the fruits of that labour belong to the employer and not the worker as they are precisely why the employer 'employed' the worker.[95]

Robinson further argues that the idea that the worker sells themselves as a commodity is tricky in that usually when there is a sale, there is an exchange of possession of that good.[96] However, in this instance, one cannot pinpoint exactly what is being sold and changes hands. Nelson[97] also raises an argument with regards to rent; however, as can be seen above, the rent argument falls away. The rent argument is that wages describe payment for labour, therefore, wages are a form of special rent when the labour is hired. However, the rent cannot actually be capitalised as people can no longer be sold.

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[91] Ibid.
[92] G Robinson 'Labour as commodity' (1996) 71 (275) *Cambridge University Press* 129 at 130.
[93] Ibid.
[94] Ibid at 131.
[95] Ibid.
[96] Ibid.
[97] Nelson op cit note 84 at 159 and 160.

Nelson argues further that 'This is precisely what occurs, however, under a regime of slavery.' As far as it goes, this reasoning of Rothbard's may indeed seem to show one way in which, though taking the worker's labour to be a commodity, we can see that capitalism's wage system does not conclude in 'wage slavery'; we allow the purchase of units of service or units of labour but not the purchase of the worker himself.

Another argument Nelson[98] raises is that the reason why labour is not a commodity is that it changes its form when it changes hands. This means that if a person is employed as a housekeeper, their next employer can utilise them as a gardener person, for example. This change of labour makes it difficult to categorise labour as a commodity as goods remain the same before and after the 'sale'. As an example, if one sells an apple, it will be an apple after the sale. However, with labour, this change in form disqualifies it from being a commodity.

(b) The practical arguments

As stated above, the notion that labour is not a commodity stems from the ILO's Philadelphia Declaration of 1994, making this an international standpoint. This notion of labour not being a commodity is also given life by the United Nations Universal Declaration of Human Rights under paragraph 3 of article 23 which gives the worker the right to be fairly paid for their work.[99] One of the principles that underlines this is that what the worker charges for their services should not be solely determined by the labour market, the worker must be paid a fair and reasonable wage that allows them to sustain their families.[100] The worker should not be passed from one employer to the next like goods without the employers obtaining the worker's approval.[101] In South Africa, this principle is given life by s 197 of the Labour Relations Act[102] which deals with the transfer of a business as a going concern. Linked to this argument is also the prevention of trafficking of human beings as means of cheap labour.[103]

The researcher is of the view that the above argument is simply what the law says, in essence an illusion, not what actually happens in reality. In reality, the South African company

[98] Ibid at 161.
[99] United Nations Universal Declaration of Human Rights https://www.un.org/en/about-us/universal-declaration-of-human-rights [Accessed 1 February 2023]; see also N Smit 'Labour is not a commodity: Social perspectives on flexibility and market requirements within a global world' (2006) 1 *Journal of South African Law* 152 at 154.
[100] Ibid.
[101] Ibid.
[102] Act 66 of 1995.
[103] Smit op cit note 99

law and by extension, employment relations, are governed by the contractual model.[104] That is to say, South African common law recognises the independence of parties to enter into a contract by themselves without the need for State intervention.[105] This model puts the interests of the shareholders above those of anyone else, the best interests of shareholders being what matters the most.[106] Whilst companies follow the stakeholder theory which enjoins them to accommodate the interest of their employees, in reality they appear to prioritise the interest of their shareholders .[107] An example of how this model does not concern itself with the interests of the workers would be how companies easily use replacement labour as means of sustaining profits during industrial actions.[108] Tenza notes the conflicting views during the negotiations of the formation of the LRA where employers argued in favour of replacement labour to maintain profits and the trade unions on the other hand considered replacement labour as being self-defeating as the point of industrial action is to put pressure on the employer to succumb to the workers' demands.[109] The study submits that, replacement labour as a concept, promotes the commodification of workers' labour as shown above, it attaches the value of the workers to their bodies, making their work inseparable from their bodies. In essence, it allows employers to utilise workers' labour, but as soon as there is a slight inconvenience, the workers are disposed of in favour of other convenient bodies. This concept is counterproductive to the protection of the rights of workers as it puts employers in a better economic position while the workers are subjected to the 'no work, no pay' principle.[110]

Another issue facing South African workers in the so called 'post-apartheid' Republic is labour brokers. Labour brokers are given a more legalese term by the Labour Relations Act 66 of 1995 as being temporary employment.[111] The LRA under s 198(1) and (2) states the following:

[104] Ibid at 158.
[105] Ibid.
[106] Ibid; see also J Dine 'Company law developments in the European Union and the United Kingdom: Confronting diversity' (1998) 1(2) *TSAR* 248.
[107] D Botha 'Confusion in the King Report' (1996) *SA Merc LJ* 26 at 33.
[108] S 76 of the LRA; see also Dine op cit note 106 248.
[109] M Tenza 'The link between replacement labour and eruption of violence during industrial action' 2016 *Obiter* 106 at 107.
[110] Ibid.
[111] Section 198(1); see also A Botes 'A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments' (2015) 132(1) *South African Law Journal* 100-121 for a detailed discussion of amendments to the LRA concerning labour brokers.

'Temporary Employment Services (1) In this section, "temporary employment service" means any person who, for reward, procures for or provides to a client other persons- (a) who render services to, or perform work for, the client; and (b) who are remunerated by the temporary employment service. (2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.'

From the above, it can be deducted that labour brokerage is when the broker agency enters into a contract of employment with the worker, then the broker allows the worker to render services to the third party who is the client of the broker.[112] In essence, the worker works under the control of the third party yet the third party pays the broker for the broker to pay the salary to the worker.[113] The essence of this relation is, the third party who would ordinarily be the employer outsources the hiring, dismissal and other employer-related functions to the broker.[114]

The uniqueness of labour brokerage is that the disputes between the third party and the worker are not resolved through ordinary labour law tribunals such as the CCMA or the Labour Court.[115] Equally, the disputes between the third party and the broker are contractual in nature and therefore out of the ambit of the CCMA and Labour Court.[116]

This arrangement is for as long as the third party requires the labour power of the worker.[117] It is a tripartite arrangement which reduces but does not eliminate the liability of the third party towards the worker.[118] When the third party decides that they no longer need the

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[112] AM Koradia 'Labour broking: Modern slavery or capitalist necessity' (2013) 1(6) *Arabian Journal of Business and Management Review* (Nigerian Chapter) 20 at 20.

[113] This seems to go against S200A of the LRA which regards the employer as being the person who the controls the worker; this is also allowed by common law see *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) and *South African Broadcasting Corporation v McKenzie* 1999 *ILJ* 585 (LAC).

[114] P Benjamin 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845.

[115] *Mandla v LAD Brokers (Pty) Ltd* 2000 BLLR 1047 (LC); *Vilane v SITA (Pty) Ltd* 2008 BALR 486 (CCMA).

[116] A Schoeman *An analysis of Temporary Employment Services and the new laws regulating them in South Africa* (Unpublished LLM Theses, University of KwaZulu Natal, 2014) at 14.

[117] J Theron 'Employment is not what it used to be' (2003) *ILJ* 1247-1282; see also J Theron 'Intermediary or employer? Labour brokers and the triangular employment relationship' (2005) *ILJ* 618-649; J Theron 'The shift to services and triangular employment: Implications for labour market reform' (2008) *ILJ* 1-21.

[118] BPS van Eck 'Temporary Employment Services (Labour Brokers) in South Africa and Namibia' (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 108; see also *April v Workforce Group Holdings (Pty) Ltd t/a The*

labour power of the worker, such a termination of the contract is between the third party and the broker and this is not regarded as being a dismissal.[119]

The researcher is of the view that what makes this arrangement the commodification of the worker's labour power is, the worker has no control over when and how the third party terminates their services, the worker as discussed above becomes no different to the enslaved person who has no control over having themselves and their labour power exchanged between parties. This can be likened to the Roman law referred to as the *locatio conductio operarum* where the enslaver could simply rent out their slave to render services for a third party.[120]

A free person in a capitalist world is expected to offer their skill in the form of a service to a willing employer who then remunerates the worker for their time, experience and skill.[121] In this relationship, the worker and the employers are ideally equals engaging in the basic economics of supply and demand with neither party being bought and sold.[122] However, due to the expansion of colonialism, and racism with it, this has not always been the case and even in the 'post' colonial world, remnants of the injustices are still very much alive. The capitalist system expands through this form of unfree labour.[123] This unfree labour, considered by modern laws and economic models to be free labour, however, due to the dispossession of black people globally, these labourers are forced to offer their labour as the only means of survival not just for them, but for their families as well.[124] Since these workers are often black people and poor people, they are coerced by poverty and this historical dispossession to then have their labour bought and sold.[125] The moment the worker is in an economically vulnerable position, often the case for most black people, it is this inequality that leaves the worker open to being a simple

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Workforce Group 2005 *ILJ* 2224 (CCMA)*; National Union of Metalworkers of SA v SA Five Engineering (Pty) Ltd* 2007 *ILJ* 1290 (LC); see also *Walljee & others v Capacity Outsourcing* (2012) 33 *ILJ* 1744 (LC) for the discussion of joint liability.

[119] *Mavata v Afrox Home Health Care* 1998 *ILJ* 931 (CCMA); C Bosch 'Contract as barrier to 'dismissal': The plight of the labour broker's employee' 2008 *ILJ* 831-840*; Sindane v Prestige Cleaning Services* 2009 BLLR 1249 (LC),

[120] Van Eck op cit note 118 at 114; see also R le Roux 'The evolution of the contract of employment in South Africa' (2010) 39(2) *Industrial Law Journal* 139 at 152; see also *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC); *South African Post Office v TAS Appointment and Management Services CC* [2012] 6 BLLR 621 (LC); *Sindane v Prestige Cleaning Services* [2009] 12 BLLR 1249 (LC).

[121] T Mahmud 'Cheaper than a slave: Indentured labor, colonialism, and capitalism' (2013) 34(2) *Whittier Law Review* 215 at 216.

[122] Ibid.

[123] Ibid at 217.

[124] Ibid.

[125] Ibid.

commodity to be bought and sold, violating the golden rule of parties being free people offering services not their labour for sale.

As Mahmud[126] suggests, it is colonisation, capitalism and coercive laws highlighted above that turned the free worker into a wage labour, unfree labour who is a commodity. The study concurs with Mahmud[127] that when capitalism destroyed the natives of its colonies, it created a disposed group of people. These people, unfortunately, were not all absorbed into the economic system of the colonial powers and as a result of this, they became surplus. It is this exact surplus as potential labourers that makes them become unfree labour when they start to work in that they are forced by the effects of colonialism to provide themselves as cheap labour.[128]

(c) The solution from an African and decolonial perspective

The study submits that what South Africa can use to liberate workers from the commodification of their labour is not a liberal adoption of the law, it is not Marxist thinking, but rather, in line with the decolonial concept of the study, it is Ujaama. This principle and way of life is the projection of Julius Nyerere's thinking, a form of African socialism that was briefly discussed in Chapter 2. Ibhawo and Dibua[129] suggest that in this African socialism 'there must be equality, because only on that basis will men work cooperatively. There must be freedom, because the individual is not served by society unless it is his. And there must be unity, because only when society is unified can its members live and work in peace, security and well being.'

The study submits that a way in which South Africa can practically combat the commodification of the workers' labour is by doing away with hand selecting a few black elites to be beneficiaries of affirmative action. Rather, the country should focus more on giving workers their fair share of ownership in the companies they work in and in the broader context, the industries they work in. This can be done through making use of the already existing s

[126] Ibid at 219.
[127] Ibid.
[128] Ibid.
[129] B Ibhawoh and TJ Dibua 'Deconstructing Ujamaa: The legacy of Julius Nyerere in the quest for social and economic development in Africa' (2003) 8(1) *African Journal of Political Science* 59 at 62.

95(1)(c) of the Companies Act[130] which provides for the employee share scheme. This employee share scheme is:

'a scheme established by a company, whether by means of a trust or otherwise, for the purpose of offering participation therein solely to employees, officers and other persons closely involved in the business of the company or a subsidiary of the company, either by means of the issue of shares in the company, or by the grant of options for shares in the company.'

While Nyerere[131] championed the idea of people living in villages based on communal ownership, the researcher of this study is of the view that instead, it is communal ownership of industries and companies by the workers themselves that would liberate them from the commodification of their own labour. Nyerere[132] had observed that people develop more when they have better control of their lives, in our context this would translate to a production increase by workers who have control over the industries they work in, bringing back the lost dignity and sense of freedom for the worker that has been turned to a commodity no better than an enslaved person.

In brief, the study suggests that through s 95(1)(c) of the Companies Act 71 of 2008, before a company can raise capital from external parties, it must look within its own employees by means of an employee share scheme and this in industries such as mining, should be a mandatory policy. This thinking, in addition to being in line with African Socialism, is also a reflection of the stakeholder model. This means that when decisions are made by the employer, consideration must be given to the workers.[133] The significance of this suggestion is, since workers will no longer be mere labourers and will now be owners of their labour in the real sense of the term, their demands will be taken seriously and their interest will be protected. This will also create a sense of loyalty and trust from employees as they will regard themselves as part of the organisation rather than as mere assets meant to advance the interests of the employer. They

[130] Act 71 of 2008.
[131] JK Nyerere 'Progress comes with production' (1973) 3(4) *The African Review: A Journal of African Politics, Development and International Affairs* 519 at 528; see also IS Sanga and R Pagnuco 'Julius Nyerere's understanding of African socialism, human rights and equality' (2020) 4(2) *The Journal of Social Encounters* 15.
[132] Ibid.
[133] Botha op cit note 107; see also J Bone 'Legal perspectives on corporate responsibility: Contractarian or communitarian thought?' 2011 *CJLJ* 277 at 288.

will also protect the property of the business as they will know that they will also be affected if it is destroyed.

The researcher is of the view that if the State was to make these schemes mandatory in industries like mining where African bodies have for centuries been used as cheap labour, it would reduce poverty, inequality and the commodification of the labour of workers. The researcher is also of the view that workers themselves would be much more motivated to increase production rates. This is because there would be equality where one person's labour is not owned and controlled by another, the worker will see the company as their own and there would be unity in the labour force to increase production, as suggested above by Ujaama. [134] Furthermore, the use of this African Socialism would be a practical solution to the practical issue of the commodification of labour as it embraces common labour by workers.[135]

In addition to the above, the study recommends that what would also do away with the commodification of workers is the total removal and outlaw of labour brokerage from South African labour law by reason that the practice of labour brokerage goes against the LRA and previous cases.[136] S 200A of the LRA states that:

'Presumption as to who is an employee (1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present: (a) the manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person.'

[134] Ibhawoh and Dibua op cit note 129 at 62.
[135] Ibid.
[136] Other scholars have also suggested reforms to this area of labour law, see also S Harvey 'Labour brokers and workers' rights can they co-exist in South Africa?' (2011) 128 *SALJ* 100 at 101.

The Labour Court also weighs in this regard. In *Lewis & Another v Contract Interiors CC*[137] it found that the intention of at least one party to be in an employment relationship is all that is needed. The researcher interprets this to mean that should the worker regard the third party to be their employer and not the labour broker, that intention should suffice to hold the third party as the employer, not the labour broker.

In *White v Pan Palladium SA (Pty) Ltd,*[138] the Labour Court refused to limit the employment relationship to parties who had an employment contract, but rather, the court was of the view that this relationship of employment is extended to those who provide services to others in exchange for compensation for their services, irrespective of the nonexistence of a contract between the parties. The above ruling cemented the earlier decision of the same court in *Rumbles v Kwa Bat Marketing (Pty) Ltd*[139] where the court had stated that the relationship between the parties is what is crucial and not necessarily the contract between the parties. The LRA has also confirmed this position through the removal of the word "contract" and replaced it with "relationship" in section 186(1)(a). It is therefore clear from the above that labour brokerage is a violation of settled principles regarding employee definition by both statute and case law.

Furthermore, the researcher of this study is of the view that labour brokerage is contrary to the common law dominant impression test. This principle looks at the relationship between the parties as means of determining whether the parties are employer and employee.[140] The non-exhaustive characteristics of this test are as follows:

'The right to supervise and control, the extent to which employee depends on employer for the performance of his or her work, whether the employee is allowed to work for other persons, whether he has to perform his duties personally, whether the employee is allowed to delegate or perform tasks through others, whether he is paid by commission or a wage, whether

[137] (2001) 22 ILJ 466 (LC) para 18; see also Schoeman op cit note 97 19-20 for a discussion of the cases dealing with who an employee is.
[138] (2006) 27 *ILJ* 2721 (LC) at 391 B–C.
[139] (2003) 24 ILJ 1587 (LC) para 17; see also T Cohen 'Debunking the legal fiction - Dyokhwe v De Kock No & others' (2012) 33 *ILJ* 2318 at 2321–2322.
[140] *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A); see also SABC v McKenzie 1999 ILJ 585 (LAC)

he provides his own tools, right to discipline the worker and terminate contract and whether the employee is integrated into the organization.'[141]

This test is guided by the reality of the relationship between the concerned parties, with the dominant impression test being the main test applicable to determine if a worker is indeed an employee of the employer.[142] Without a need to go into further detail, it is clear that a worker who is 'employed by the labour broker' is in fact a worker for the third party, who is the 'real' employer in this instance. Talk about a need to amend the waiting period of three months before a worker supplied by a labour broker is deemed an employee of the client.

As stated above, the researcher is of the view that labour brokerage defeats the purpose of defining who an employee is as stated in s 200A of the LRA. The researcher is also of the view that the recognition of people as employees is essential in South Africa in light of the context of this chapter where African people were denied rights and treated as commodities, enabling labour brokerage to continue to blur the line of who an employee is, which goes against the strides the country has taken to protect the working class.

IV CONCLUSION

This chapter presented a discussion of whether labour is or is not a commodity. As stated above, this question is relevant in that experts on this section of law and history have not yet gone into greater detail on this topic, perhaps even due to it being the *status quo* of the law. The researcher largely borrowed from Marxist understanding of labour power in discussing the theoretical arguments in favour of this question and it also engaged in the practical side of South African labour law. As such, the researcher was persuaded that labour is indeed a commodity. This is more so as the researcher engaged in the reality of how South African legislation, specifically the LRA has 'dressed up' this commodification with legalese terminology of the 'business

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[141] TG Kasusa *The definition of an "employee" under labour legislation: An elusive concept* (Unpublished LLM Thesis, University of South Africa, 2014) at 18; see also *State of Information Technology Agency (Pty) Ltd v Commission for Conciliation Mediation & Arbitration and Others* (2008) 29 ILJ 2234 (LAC) at 5; *Ongevallekommisaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A); *Borcheds v CW Pearce and J Sherward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC); *Board Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC); for criticism of the test see E Mureinik 'The contract of service: An easy test for hard cases' (1980) 97 SALJ 246 at 258; M Brassey 'The nature of employment' (1990) 11 ILJ 889 at 919.

[142] *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC); *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers ("NUPSAW") and Others* [2018] 4 BLLR 399 (LC) at 30; see also C Bruce *Labour regulation in the on-demand economy: An "uberfication" of the status quo?* (Unpublished LLM Thesis, University of Cape Town, 2019) at 57.

transfer'[143] and 'temporary employment'.[144] The limitation of this chapter is, since it was a general approach to the topic, it leaves open to other scholars to engage further on this issue by going into greater detail regarding each and every provision of the LRA that commodifies or even attempts to not commodify the workers' labour. It is important to stress that this chapter is not a vilification of the LRA nor does it seek to discard this piece of legislation, rather it merely seeks to add to the analysis of this statute.

[143] S197 of the LRA.
[144] S198 of the LRA.

CHAPTER 6
THE CORRECT APPROACH TO RACISM IN THE WORKPLACE

I INTRODUCTION

Racism, unfortunately, is not a thing of the past, but rather, it is an animal that continues to show its ugly head in an attempt to disrupt the lives of black people.[1] The aim of this monstrous practice is to enforce a sense of superiority on the part of the perpetrator and install a sense of inferiority on part of the victim.[2] In recent years, there have been various instances of racism directed towards black people. One of the prominent examples is the 2016 incidence where Penny Sparrow called black people 'monkeys' in her Facebook post.[3] In the same year on 6 September, Vicki Momberg called black police officers the K-word 48 times.[4] In 2018, Adam Catzevalos whilst 'celebrating' the absence of black people on a beach called black people the K-word.[5] The people highlighted above are a few known racists that faced justice, but unfortunately, some incidents of this nature go unnoticed and others are not recorded or reported.[6]

The unfortunate thing about racism is that it has become even harder to address it head on as it has become even more institutionalised.[7] Racism does not stop in the street, it finds its way into the workplace and the way in which the workplace institutionalises it is by not dealing with it head on by way of appropriate sanctions to the perpetrator.[8] Khumalo[9] notes that when employers simply do nothing about this practice in the workplace, it renders them as accomplices that maintain the chain of perpetual oppression on the necks of black people. Racism also disrupts the peace that is expected at the workplace for employees to meet the economic interests

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[1] B Khumalo 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30(3) *South African Mercantile Law Journal* 377 at 377 and 378.
[2] Ibid; see also N Garson 'Smuts and the idea of race' (2007) 57(1) *South African Historical Journal* 153 at 153 to 178
[3] MM Botha 'Managing racism in the workplace' 2018 (81) *THRHR* 672 at 673.
[4] K B Mokoena 'The subtleties of racism in the South African workplace' (2020) 3(1) *International Journal of Critical Diversity Studies* 26 at 26.
[5] Ibid.
[6] Ibid.
[7] B Khumalo op cit note 1 at 377 and 378; see also Dlamini 'Racism in the workplace' (2015) 57 *South African Journal of Social and Economic Policy* 43.
[8] Ibid; see also AK Spears 'Institutionalized racism and the education of Blacks' (1978) 9(2) *Anthropology Education* Quarterly 127 at 129 to 130.
[9] Ibid.

of the employer.[10] This was confirmed in *Siemens Ltd v. NUMSA*[11] when the court stated that racism does not just affect the employee against whom it was directed, but rather, racism affects the entire workplace. This is more so especially when a large number of the workforce is black people as it disrupts the harmony in the workplace. It is racism in the workplace that requires the study to provide an analysis of the correct approach to dealing with racism in the workplace. This is more so when it is considered 'at this point that there is no code of good practice that guides employers on how to handle racially motivated disputes'.[12] What this means is, each individual employer has 'discretion' on how to deal with racism at this workplace and this in itself creates inconsistency.[13] However, as will be discussed in this chapter, the uniform approach to racism seems to be dismissal.

As stated above, this chapter provides a discussion concerning racism in the workplace. To do this, the chapter first examines what race and racism are. The chapter then briefly discusses some of the racial slurs that are used in South Africa. Further, the chapter discusses some of the statutes that have been enacted in the Republic of South Africa in the post-1994 era to combat racism. These statutes are the Employment Equity Act 55 of 1998 (EEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). This leads to the chapter also discussing the three schools of thought concerning the link between hate speech and unfair discrimination. The chapter also deals with the manner in which common law may be used to assist the employer to deal with racism in the workplace.

The study also presents an analysis of the various cases that have come before South African courts concerning racism in the workplace. In doing this analysis, the chapter considers three segments: (a) racism from a white person directed towards a black person, which is done through an analysis of the Constitutional Court case of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (1) SA 549 (CC); (b) alleged racism from an African person to a white person through an analysis of the Constitutional Court matter of *Duncanmec (Pty) Limited v Gaylard* 2018 (6) SA 335 (CC); and (c) alleged racism

[10] Ibid; see also M van Jaarsveld 'An employee's contractual obligation to promote harmonious relationships in the workplace – When are the stakes too high? Some pointers from the judiciary' (2007) 19(2) *SA Merc LJ* 204 at 215-216.
[11] 11 *ILJ* 610 (ARB) (CCMA 1990).
[12] Mokoena op cit note 4 at 26.
[13] Ibid; see also T Thabane and A Rycroft 'Racism in the workplace' (2008) 29 (1) *Industrial Law Journal* 43.

from a black person towards another black person through an analysis of the case of *Makhanya v St Gobain* [2019] 7 BALR 720 (NBCCI). Put plainly, can an African person be racist towards a white person and how should the employer deal with such an instance? Can a black person be racist towards another black person and how should the employer deal with such an instance? Before any of the above can be addressed, chapter provides a brief discussion concerning the concept of race, racism and hate speech in the new constitutional dispensation.

II RACE AND RACISM

As previously stated in the introduction of Chapter 2, the study concurs with Wing[14] that race is not a biological reality, rather, race is a social construct that is fluid and flexible. This means that what a society considered to be 'race' in the past may have changed now and may be different to what may be considered as 'race' in the future and this too differs from society to society. This makes it difficult to define the concept as a social category.[15] This difficulty arises in that a person who may be considered as being black in the United States of America can be classified as a so-called coloured person in the Republic of South Africa or even white in Brazil or Jamaica.[16] This is because the colonies of the European colonial masters each had their own concept of race.[17] However, at face value, race can be seen as including but not limited to the 'difference' in people's skin pigmentation, the texture of their hair, the structure of their nose. This is in line with what the apartheid regime used to classify people into four racial groups, those being white, Indian, coloured and black.[18] However, the researcher of this study concurs with Hirschman[19] that these classifications described above are merely superficial features.

In reality, the researcher is of the view that race is a social construct. This social construct is used to not only divide people through asserting certain categories but also to grant certain privileges to one group to the detriment of other groups based on the social hierarchy of this

[14] A K Wing 'Is there a future for critical race theory?' (2016) 66(1) *Journal of Legal Education* 44 at 48.
[15] C Hirschman 'The origins and demise of the concept of race' (2004) 30(3) *Population and Development* 385 at 385.
[16] Wing op cit note 14 at 48.
[17] Ibid.
[18] Population Registration Act 30 of 1950; see also K Breckenridge 'The Book of Life: The South African Population Register and the Invention of Racial Descent, 1950–1980' (2014) 40 *Kronos: Southern African Histories* 225 at 226
[19] Hirschman op cit note 15 at 385.

division.[20] To this abstract idea of race is attached the lived reality of racism. Hirschman[21] traces the origins of racism to three events in history: (a) the start of the enslavement of African people; (b) the expansion of European colonial ambitions; and (c) Europeans embracing the idea of Darwinism. These ideas are dealt with below.

(a) The enslavement of African people

The enslavement of African people by western superpowers created a strong foundation for racism in that those who did the enslavement saw themselves as being different and superior to the enslaved people.[22] This was further enforced by the idea that the enslaved people were the property of the enslaver.[23] This differentiation according to the enslaver was based on race and culture, thus, creating white supremacy to the people the enslaver deemed as being inferior.[24]

(b) Social Darwinism and the expansion of European colonial ambitions

Darwinism was based on the work published by the world-renowned scientist Charles Darwin in his 1895 book titled *The Origin of Species*.[25] Darwinism was about the evolution of the human species, that is to say, the ancestors of modern human beings were not that intelligent, and over the years, human beings evolved to be more intelligent.[26] Those who evolved survived and those who did not, perished, as Herbet Spencer put it, 'the survival of the fittest'.[27] Spencer, as noted by Dennis,[28] used Darwinism to deduce that those human beings that were less adapted to modern societies should be exterminated and pave the way for the more adapted people.[29] It is clear that 'Spencer's alarm over the potential threat of these inferior varieties to Western civilization was a logical consequence of his desire to promote a society of intellectually superior

[20] T Mfete 'Neoliberalism and Inequality in Post-Apartheid South Africa' (2020) 14(2) *Pretoria Student Law Review* 270 at 282.
[21] Hirschman op cit note 15 at 392.
[22] Ibid at 394.
[23] J Allain and K Bales 'Slavery and its definition' (2012) 14(2) *Global Dialog* 1 at 2; see also BC Graham 'Slavery at the Cape' (1933) 50(1) *South African Law Journal* 4 at 5; NT Rinehart 'The man that was a thing: Reconsidering human commodification in slavery' (2016) 50(1) *Journal of Social History* 28 at 29.
[24] Hirschman op cit note 15 at 394.
[25] C Darwin *Origin of Species by Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life* (1859) John Murray, London; see also RM Dennis 'Social Darwinism, Scientific Racism, and the Metaphysics of Race' (1995) 64(3) *The Journal of Negro Education* 243 at 243.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.

citizens.'[30] The study notes that the idea of social Darwinism was then used to justify the colonisation of the people considered to be 'inferior races' by the western society.

The expansion of European colonial ambitions, as discussed in Chapter 5, was also fuelled by capitalism, in an attempt to maximise profits. This capitalism reduced the colonised 'inferior' people (black people in the South African context) into wage labourers, often treated no different to the enslaved due to their 'inferior race'.[31] Karl Pearson and Benjamin Kidd advocated for the expansion of European colonial ambitions to the territories of the 'inferior races' as the English supremacy would be bringing civilisation to the 'uncivilised races'.[32] In South Africa, during the 1800s, colonial settlers started to adopt the ideology of Social Darwinism in that they believed that due to natural selection, European colonial settlers were more superior to the native people due to the 'natural biological hierarchy'.[33] In simpler terms, that is to say colonial settlers used social Darwinism to advance the idea that they were superior to African people due to the 'different races' being biologically different to each other, and with them as Europeans being the most superior of the races by way of natural selection.[34]

The study concurs with Robert Shanafeldt[35] who noted that whilst Charles Darwin neither promoted nor opposed the use of his hypothesis of natural selection, he nonetheless should have been alive to the racist ideology of the time and the potential use of his idea as means of promoting racism.

(i) Racial slurs used in South Africa

It is in this context of colonial settler ideology of literal white supremacy that the racial slur of the K-word in South Africa was developed. This word is derived from an Islamic word used to

[30] Ibid.
[31] L Maqutu 'The concept of labour in South African law' (2020) 26(1) *Fundamina* 42 at 49; see also T Ngcukaitobi *The land is Ours* (2019) at 16.
[32] Ibid.
[33] SD Johnson 'Darwin's legacy in South African evolutionary biology' (2009) *105 South African Journal of Science* 403 at 404; see also S Dubow 'Racial Irredentism, Ethnogenesis, and White Supremacy in High-Apartheid South Africa' (2015) 41 *Kronos* 236–264.
[34] AA Mazrui 'From Social Darwinism to Current Theories of Modernization: A Tradition of Analysis' (1968) 21 *World Politics* 69 at 70.
[35] R Shanafelt R. (2003). 'How Charles Darwin got emotional expression out of South Africa (and the people who helped him)' (2003) 45 *Comp Stud Soc Hist* 815–842.

identify non-believers.[36] The word had been originally brought to Southern Africa during the fifteenth and sixteenth centuries by Arab Muslim traders.[37] However, the English and Dutch colonial settlers used the term to refer to all people of African descent as a racial slur towards Africans because they considered them to be racially inferior and subhuman.[38]

Along with the K-word was the derogatory word which was used by the colonial settlers to refer to Indian people, the word being 'coolie'.[39] This term had also originated around the nineteenth and twentieth centuries in reference to the Asian indentured labourers and was 'legitimised' by the then government through the 'Coolie Law 14 of 1859'.[40] This Act was responsible for the introduction of Indian indentured labour in the Natal Colony.[41] Indian indentured labour was originally believed to have recruited people of the lower class in India's cast system; however, this derogatory term was later extended to all people of Indian descent, including merchants.[42] The use of the term portrayed that the colonial settlers held the view that Indian indentured labourers were not human beings, rather, they were mere labourers, part of the bigger colonial capitalist machine.[43]

The use of racial slurs such as the ones provided above are political means of enforcing dominance with the goal of reducing people to the 'groups' they belong to, in a derogatory manner.[44] Racists use these slurs knowing very well the historical context of the words on oppressed people with the goal of maintaining unjust power over the oppressed.[45] These slurs are

[36] S Mbowa 'Exploring the use of South African ethnic and racial slurs on social media' (2020) 3(1) *International Journal of Critical Diversity Studies* 54 at 54.
[37] Ibid.
[38] Ibid; see also JS Arndt 'What's in a word? Historicising the term 'Caffre' in European discourses about Southern Africa between 1500 and 1800' (2018) 44(1) *Journal of Southern African Studies* 59–75.
[39] Coolie Law 14 of 1859.
[40] Mbowa op cit note 36 at 54.
[41] K Pillay '"The coolies here": Exploring the construction of an Indian "Race" in South Africa' (2017) 34(1) *Journal of Global South Studies* 22 at 29.
[42] Ibid.
[43] Ibid.
[44] S Mbowa op cit note 36 at 55; see also A Croom (2008) 'Racial epithets: What we say and mean by them' (2008) 51 *Dialogu* 34–45; A Croom 'How to do things with slurs: Studies in the way of derogatory words' (2013) 33(3) *Language & Communication* 177–204.
[45] Ibid.

meant to impose an inferiority complex over the oppressed, and reduce the oppressed from being human beings to subhuman beings with animalistic behaviour.[46]

III LEGISLATION THAT ADDRESSES RACISM IN THE DEMOCRATIC ERA

(a) The Constitution

On paper, the starting point of addressing racism is the Constitution as it is meant to be the highest living document in the land that addresses the discrimination of the past regimes which oppressed people based on race.[47] Not only does this document demand that everyone in the Republic of South Africa be equal before the law,[48] it also demands for the extermination of unfair discrimination based on race.[49] In addition, it requires that the lawmakers enact national legislation that does away with such unfair discrimination.[50]

(b) The Employment Equity Act

The national legislation that the Constitution in South Africa proposes has taken the form of the Employment Equity Act 55 of 1998 which prohibits unfair discrimination, including discrimination on the ground of race.[51] This statute does not provide for the definition of hate speech as it is meant to be a vehicle of addressing unfair discrimination in the workplace.[52] S 188 of the EEA allows the employer to dismiss the employee for their conduct, subject to fair procedure. The use of racial slurs in the workplace can be a dismissible offence[53] subject to the employer proving that the dismissal was fair and there was a breakdown of the relationship between the parties due to such racism.[54] S 60 of the EEA requires that when an employee conducts themselves in a manner that violates the EEA, such conduct must be reported to the employer.[55] The employer then has an obligation to address such conduct, and in the event that

[46] Ibid; see also V de Klerk (2011). 'A nigger in the woodpile? A racist incident on a South African university campus' (2011) 2(3) *Journal of Languages and Culture* 39–49; J Rahman (2015) 'Missing the target: Group practices that launch and deflect slurs' (2015) 52 *Language Sciences* 70–81.
[47] J Geldenhuys and M Kelly-Louw 'Hate speech and racist slurs in the South African context: Where to start?' (2020) 23 *PELJ* 1 at 5.
[48] Section 9(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution).
[49] Section 9(3) of the Constitution.
[50] Section 9(4) of the Constitution.
[51] S 6(1) of the EEA.
[52] J Geldenhuys and M Kelly-Louw op cit note 45 at 8.
[53] Crown Chickens and City of Cape Town v Freddie (2016) 37 ILJ 1364 (LAC).
[54] Edcon Ltd v Pillemer NO (Reddy) (2009) 30 ILJ 2642 (SCA) para 5.
[55] Ntsabo v Real Security CC (2003) 4 ILJ 2341 (LC).

they do not address such conduct, they risk being ordered to compensate the victim for the racism.[56]

(c) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)

South Africa in the current constitutional dispensation also enacted the PEPUDA. One of the objectives of this statute is to eliminate hate speech through giving life to the equality provision of our Constitution, s 9.[57] The preamble of PEPUDA states as follows:

> 'The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people; Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy; The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;… Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality; This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences.'

Section 10(1)[58] of this statute states as follows:

> 'Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to- (a) be hurtful; (b) be harmful or incite harm; and (c) promote or propagate hatred.'

Section 12 goes further to state that:

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[56] *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd* [2006] 8 BLLR 737 (LC) para 45; see also *Ntsabo v Real Security CC* (2003) 4 ILJ 2341 (LC); *Shoprite Checkers (Pty) Ltd v Samka* (2018) 39 ILJ 2347 (LC).
[57] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; for more on hate speech see also A Brown 'What is hate speech? Part 1: The myth of hate speech' (2017) 36 *Law and Philosophy* 491; A Brown 'What is hate speech? Part 2: Family resemblances' (2017) 36 *Law and Philosophy* 561.
[58] To be read in line with s16(2) of the Constitution.

> 'No person may- (a) disseminate or broadcast any information; and (b) publish or display any advertisement or notice that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person. Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution is not precluded by this section.'

However, this provision is to be updated due to the Constitutional Court's finding in *Qwelane v South African Human Rights Commission*.[59] In this Qwelane matter, it was stated that 'It is declared that section 10(1) of the Equality Act is inconsistent with section 1(c) of the Constitution and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word "hurtful" in the prohibition against hate speech.'

The constitutional court stated that during the period of suspension of the above statute, s 10 shall be read as follows:

> '(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred. (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.'[60]

From this, it is clear that there is a removal of provision (a) which had previously provided for words to be hate speech if they were considered to be hurtful and the victim will also be allowed to refer the matter for the criminal prosecution of the offender. The researcher notes that the effect of this on racism is that victims of racial hatred can bring the criminal prosecution of the perpetrator using this provision of PEPUDA.

[59] 2021 (6) SA 579 (CC); see also *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA).
[60] Ibid, order of the court.

(d) The different schools of thought on hate speech and unfair discrimination

It is important to note that currently, there is also a debate whether the EEA and PEPUDA should be regarded as two different statutes addressing two separate issues or whether hate speech is included as part of unfair discrimination.[61] On the one hand, the first school of thought suggests that unfair discrimination and hate speech are two separate principles.[62] PEPUDA deals with racist utterances outside the workplace and the EEA deals with racism in the workplace.[63] Moreover, hate speech requires that the racist utterance must incite some form of harm whereas unfair discrimination deals with a two-stage test, one for discrimination, the second for fairness.[64] In essence, with PEPUDA, fairness is not a consideration while with the EEA, fairness plays a crucial role to determine if the utterance was indeed racist.[65] This is to say, as it stands, discrimination under the EEA is not disallowed, it is only prohibited when it is unfair, while with PEPUDA discrimination is prohibited altogether.

In addition, this school of thought argues that:

> 'the test for discrimination focuses on the effect of the discriminatory conduct as opposed to the perpetrator's intent, whereas the test for hate speech requires that the words used demonstrate a clear intention to be hurtful, harmful or to incite hatred… The authors warn that if the requirements for discrimination are applied in cases of hate speech, the Act's aims (promoting human dignity and reconciliation) will be undermined.'[66]

On the other hand, the second school of thought puts a question as to 'why it was necessary to enact a categorical hate speech prohibition instead of merely pursuing hate speech claims under section 6' of the EEA[67] This school of thought argues that hate speech too forms part of s 6 of the EEA.[68] This is because s 10 of PEPUDA must be interpreted in light of s 9 of

[61] JC Botha and A Govindjee 'Hate speech provisions and provisos: A response to Marais and Pretorius and proposals for reform' (2017) (20) *PELJ* 1 at 7.
[62] J Geldenhuys and M Kelly-Louw op cit note 52 at 9; see also JC Botha and A Govindjee 'The Regulation of Racially Derogatory Speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' 2016 *SAJHR* 293–320.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] JC Botha and A Govindjee (2017) op cit note 61 at 7.
[67] ME Marais and JL Pretorius 'A Contextual Analysis of the Hate Speech Provisions of the Equality Act' (2015) 18(4) *PELJ* 903 at 906; see also A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature-driven societal transformation?' (2008) *Stell LR* 122–142.
[68] Ibid.

the Constitution and this interpretation enables s 10 to take into account the harm that discrimination may cause. In essence, they argue that this provision of PEPUDA 'condemns systematic discrimination' caused by racist utterances.[69] Therefore, both the EEA and PEPUDA are intended to promote equality.

The third school of thought is neutral, it is of the view that the answer lies in the middle.[70] This perspective concedes that hate speech and unfair discrimination are two different principles although they are not too remote from each other.[71] The way in which they link is that hate speech promotes the unfair discrimination of the most vulnerable groups of our society.[72] In essence, hate speech harbours unfair discrimination in that it promotes the stereotyping of the vulnerable groups.[73] As a result, the purpose of regulation of both unfair discrimination and hate speech is to ensure the protection of equality in our society and ousting systematic and unjust discrimination.[74]

IV COMMON LAW AS A MEANS OF ADDRESSING RACISM IN THE WORKPLACE

In common law, employees owe a duty of good faith to their employer which means the workers must protect and promote their employer's business interests.[75] Botha[76] notes that the relationship between the parties is of a fiduciary nature. This means the party that is placed in confidence, being the employee, cannot place themselves in a position where their interest conflicts with those of the employer.[77] Since the relationship between the employer and the employee is based on trust and confidence, when there is inconsistency which prejudices the would be innocent party, such an innocent party may then cancel the agreement.[78] Racism is misconduct in itself, it follows then that the employer can and should dismiss the employee for

[69] Ibid.
[70] JC Botha and A Govindjee (2017) op cit note 61 at 8.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Botha op cit note 3 at 675.
[76] Ibid.
[77] Ibid; see also *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177; *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2009) 6 SA 531 (SCA).
[78] Ibid; see also *Council for Scientific & Industrial Research v Fijen* [1996] 6 BLLR 685 (A) at 691; *SA Maritime Safety Authority v McKenzie* [2010] 5 BLLR 488 (SCA); *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA).

racism after the disciplinary proceedings.[79] Even if the employee made racist remarks outside of the workplace, the employer is well within their rights to dismiss the employee as racism places a risk on the business interests of the employer.[80] This is because such conduct causes tension in the workplace between the workers themselves, irrespective of whether it took place inside or outside of the workplace.

V THE RELEVANCE OF CONTEXT

This section of the chapter discusses the relevance of context concerning race-based utterances in the workplace, which must not be confused with the application of PEPUDA which only applies outside the workplace as noted earlier in this chapter. The relevant case in this regards is the Labour Court decision in *Modikwa Platinum Mine (Pty) Ltd v Commission for Conciliation Mediation and Arbitration*.[81] In a meeting on 4 August 2009, Ramaepadi uttered an alleged racial slur towards his white colleagues.[82] There was an issue with access to certain offices by certain employees and Ramaepadi uttered the following words: "the problem has to with concentration, we need to get rid of the whites."[83] The employer had a zero-tolerance policy on racism. After disciplinary proceedings, Ramapaedi was found guilty and dismissed.[84]

The Labour Court then engaged on the relevance or irrelevance of the context of the racial slur utterance. This court noted that a large number of the racism cases often involved racism by white people directed towards black people and in such matters, context is always important.[85] In particular, what is of relevance to the courts is often the political, historical and social context of the racial slur uttered. This court expressed that it had no doubt that the context is most relevant when the slur is the K-word.[86]

The court then noted that covert racism on the other may even be more offensive than explicit racism in that it too achieves the effect of racism albeit indirectly.[87] The court then

[79] Ibid.
[80] Ibid
[81] (2012) 33 *ILJ* 1733 (LC).
[82] *Modikwa Platinum Mine (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* (2012) 33 ILJ 1733 (LC) para 2–4.
[83] Ibid para 7.
[84] Ibid.
[85] Ibid para 23.
[86] Ibid para 26.
[87] Ibid para 27.

refused to look at the context of the words uttered by Ramapaedi as it stated that his utterance was simple racism and the words uttered spoke for themselves.[88] The court stated 'It is my view that the terms used by Ramaepadi, on their own and out of context - 'we need to get rid of the whites' – constitute words that are clear, unequivocal and overtly racist in nature.'[89]

The researcher is of the view that the court was incorrect to label this as racism, especially after refusing to look into the context of the utterance. The relevance of the context would have pointed the court to understanding that in South Africa, racial descriptions, as inappropriate as they may be in the workplace, remain the reality of identity politics and occur inadvertently in day-to-day conversations.[90]

The study also questions whether the term used by Ramapaedi in light of the history of the power dynamics between white people and black people is in fact a slur to begin with. The study draws from Lynne Tirrell[91] who defines a slur as a word or words uttered in a negative light to show contempt for the 'other' and with the aim of abusing the person against whom it is directed. The researcher is of the view that there has not been a point in time in the history of South Africa or the continent of Africa in the broader sense where the term 'whites' has been used in a negative light and with the aim of degrading white people.[92] The study concurs with Vice[93] that South Africa needs honest conversations regarding power relations and the politics of race. However, where this argument falls short is, the utterance of Ramapaedi clearly links to the identity of the victims as a group, which in a sense makes it more than a mere utterance.[94]

[88] Ibid para 28.
[89] Ibid.
[90] *SAEWA obo Bester v Rustenburg Platinum Mine* (2017) 38 *Industrial Law Journal* 1779 (LAC) para 29; see also J Botha 'Swartman': Racial Descriptor or Racial Slur? Rustenburg Platinum Mine v SAEWA obo Bester [2018] ZACC 13; 2018 (5) SA 78 (CC)' (2020) 10 *Constitutional Court Review* 353 at 358.
[91] L Tirrell 'Genocidal Language Games' (2012) *Speech and Harm: Controversies over Free Speech* 174 at 175
[92] J Modiri 'Towards a "(post-)apartheid" critical race jurisprudence: "Divining our racial themes"' (2012) *Southern African Public Law* 232.
[93] Ibid; see also Vice 'How do I live in this strange place?' (2010) *Journal of Social Philosophy* 323.
[94]J Botha op cit note 90 at 370; see also J Botha 'The selection of victim groups in hate crime legislation' (2019) 136 *South African Law Journal* 781.

VI CASE LAW ON RACISM

(a) A discussion of South African Revenue Service v Commission for Conciliation, Mediation and Arbitration 2017 (1) SA 549 (CC)

This matter in the broader sense deals with racism from a white person directed towards a black person. On 27 July and 2 August 2007, Mr Kruger, an employee of SARS had an altercation with his senior, Mr Mboweni.[95] In this altercation, Kruger called Mboweni the K-word. Charge 1 was for the following words: "I cannot understand how k… think." And charge two for this follow up utterance: "A k… must not tell me what to do."[96] Kruger pleaded guilty to these charges and the chairperson of the disciplinary enquiry gave Kruger a final written warning, ordered Kruger to undergo counselling and ten days suspension without pay.[97] Without giving Kruger a chance to explain himself, the Commissioner of SARS changed the chairperson's order and opted to dismiss Kruger.[98] Kruger maintained that this substitution by the Commissioner was unfair to him, procedurally and substantively.[99]

When the matter was referred to the CCMA, the arbitrator had to decide whether this substitution was allowed.[100] The finding of the arbitrator was that this conduct of the Commissioner of SARS was not permissible.[101] The arbitrator ordered that the Commissioner reinstate Kruger.[102] The matter was then litigated all the way from the Labour Court, Labour Appeal Court and then to the Constitutional Court.

In the Constitutional Court, Mogoeng CJ noted that 'The central feature of this case is the mother of all historical and stubbornly persistent problems in our country: undisguised racism.'[103] When granting leave to appeal, the court stated:

> 'Undoubtedly, this matter raises important issues that go beyond the interests of the parties before us. Some of those issues are how employers should deal with racism in the workplace and how

[95] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (1) SA 549 (CC) para 15.
[96] Ibid.
[97] Ibid para 16.
[98] Ibid para 17.
[99] Ibid para 18.
[100] Ibid para 19.
[101] Ibid para 20.
[102] Ibid para 21.
[103] Ibid para 29.

> CCMA arbitrators are to handle the possible reinstatement of an employee who is guilty of crass racism but does not acknowledge or apologise for it. Also to be considered is the approach courts should adopt in matters involving racism so that they can contribute to its elimination in the workplace and broader society.'[104]

The issue before this Court was the appropriateness of the reinstatement of Kruger.[105] The court noted that the LRA in s193(1) allows for remedies to be granted to workers that were dismissed unfairly.[106] These remedies being either reinstatement (reemployment) or compensation. S 193(2) then deals with when the reinstatement can be granted and when it cannot be granted.[107] SARS contended that Kruger cannot be reinstated for two reasons. His racism is a serious misconduct and him being allowed to continue with his employment would be intolerable.[108] On the other hand, Kruger contended that SARS had failed to prove that the employment relationship between himself and SARS had irretrievably broken down.[109] According to Kruger, the failure by SARS to show that him calling his colleague a K…means that SARS failed to prove a breakdown in their employment relationship and as such, his reinstatement is warranted.[110]

The Constitutional Court used SARS' evidence in its affidavit before the previous court which stated:

> "At the CCMA arbitration, the applicant led evidence to show that there had been a breakdown in the relationship of trust and confidence between it and the employee because of the nature of the offence. It stood undisputed before the arbitrator that the conduct of the employee was racist. . . . The applicant as an organ of state is also bound to eradicate racism at the workplace. The use of racist language (and in particular the use of the 'k' word) against fellow employees and supervisors strikes at the heart of the employment relationship at an employer such as the applicant. Evidence was led before the arbitrator that conduct such as that admitted by the employee, is intolerable and the continued employment of such an employee, intolerable."

[104] Ibid para 31.
[105] Ibid para 34.
[106] Ibid para 37.
[107] Ibid.
[108] Ibid para 39.
[109] Ibid para 40.
[110] Ibid.

To find in favour of SARS' contention that the continued employment of Kruger in this instance would not be tolerable,[111] the court reasoned further that this matter does not involve a single isolated incidence, rather, the matter involves two utterances of the K-word.[112] The use of this word was not simply directed at Mboweni, it was also directed to all African workers. Kruger was in essence expressing that African workers are intellectually unsound, incompetent and as such, none of them can exercise authority over him.[113] The Constitutional Court noted further that this alone is enough to prove that reinstatement would not be an option in this matter.[114]

The Constitutional Court however issued a warning. This court explained that the use of the K-word in the workplace may not always warrant the dismissal of the perpetrator employee.[115] According to the court, exceptional circumstances can arise which will still make the employment relationship between the parties tolerable.[116]

Concerning the intolerability of the reinstatement of Kruger, the Constitutional Court explained as follows:

> '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 or at best for Mr Kruger desperation of the highest order. Where such injurious disregard for human dignity and racial hatred is spewed by an employee against his colleagues in a workplace, that ordinarily renders the relationship between the employee and the employer intolerable.'[117]

Furthermore, what caused the intolerability of the reinstatement of Kruger was that the other African workers of SARS knew what Kruger had said, they knew that he considered them as his inferiors solely based on their 'race'.[118] This must be understood in light of previous labour jurisprudence where labour unrest took place due to employees discovering that there was

[111] Ibid para 41.
[112] Ibid para 42.
[113] Ibid.
[114] Ibid.
[115] Ibid para 43.
[116] Ibid.
[117] Ibid para 46.
[118] Ibid para 47.

a racist employee in their midst.[119] Allowing Kruger to be kept by SARS as an employee would be nothing but 'recklessly leaving a ticking time-bomb unattended to'.

The Constitutional Court also pointed out that the arbitrator should have been alert to the harm that racism causes to our communities, she should also have considered that SARS is a state organ and as such it has a role to eliminate racism.[120] The arbitrator in ordering the reinstatement of Kruger acted unreasonably because no reasonable arbitrator would have ordered reinstatement in this instance in light of s193(2) which would require that reinstatement not follow in this matter.[121] Accordingly, the Constitutional Court set aside the decision of the arbitrator with regards to reinstatement.

The researcher of this study concurs with the Constitutional Courts approach in this matter to refuse the reinstatement of Kruger and the court's analysis of the historical context within which the K-word must be understood. However, the researcher does not agree with the Constitutional Court's warning regarding racism not always warranting dismissal.[122] The researcher cannot fathom a circumstance which would be exceptional enough to allow a victim of racism to share a workplace with a racist person. The study draws from Botha that in instances where the dismissal was procedurally fair, the employer should always be entitled to dismiss the perpetrating worker. Contrary to what the court had stated in its warning,[123] the researcher is of the view that a more rigid and inflexible approach would send a strong warning to perpetrators of racism.

(b) A discussion of Duncanmec (Pty) Limited v Gaylard 2018 (6) SA 335 (CC)

This matter concerns the alleged racism from an African person directed to a white person. On 30 April 2013, Duncanmec workers who were members of NUMSA engaged in an unprotected strike.[124] In the course of that strike, workers sang a struggle song with the lyrics "Climb on top

[119] Ibid; see also *Crown Chickens* supra 51; *Old Mutual* supra 54; *Modikwa Mining Personnel Services v Commission for Conciliation Mediation and Arbitration* [2012] ZALCJHB 61; *Biggar v City of Johannesburg, Emergency Management Services* [2011] ZALCJHB 5; (2011) 32 ILJ 1665 (LC); *Ceppwawu obo Evans v Poly Oak* 2003 (12) BALR 1324.
[120] Ibid para 48.
[121] Ibid para 49.
[122] Ibid para 43.
[123] Ibid.
[124] *Duncanmec (Pty) Limited v Gaylard* 2018 (6) SA 335 (CC) para 10.

of the roof and tell them that my mother is rejoicing when we hit the boer."[125] When workers refused to end the unprotected strike, charges of misconduct were brought against them for refusing to go back to work and gross misconduct for singing a racially motivated song.[126] The disciplinary proceedings were chaired by Mr Joubert who was not an employee of Duncanmec. Mr Joubert found the employees as being guilty on both charges.[127] Joubert not only found that the singing of the song by the workers amounted to racism, he went a step further and found as guilty all the other employees that were singing and dancing to the song even though they were not singing.[128] According to him, the offence of racism was so severe so as to warrant a dismissal despite the workplace disciplinary code not providing for such on issues of racism.[129] His reasoning was:

> "To thus sing out loud that the 'blacks' would be happy when 'beating' the whites/boere, amounts to hatred speech towards the 'white' race and this would undoubtedly affect relationships between 'blacks' and 'whites'."

When the matter was referred to the Bargaining Council, the arbitrator found that the signing of the song was indeed inappropriate however, it was not racism.[130] The reasoning of the arbitrator was that the song is a struggle song, it has a history to it and therefore in light of this context, the song can be offensive but a line is drawn with referring to it as racism.[131] Further to this, the arbitrator was of the view that since the strike was short, nonviolent and peaceful, the relationship between the parties had not been broken to a point of no return.[132] The arbitrator whilst disapproving of the singing of the song ordered the reinstatement of the workers.[133]

The matter was taken on review to the Labour Court because the Duncanmec was of the view that the arbitrator had failed to reach a decision that a reasonable arbitrator would have, on law and on the facts.[134] NUMSA on the other hand argued that the singing of the song did not

[125] Ibid.
[126] Ibid para 11.
[127] Ibid para 13.
[128] Ibid para 14.
[129] Ibid para 15.
[130] Ibid para 17.
[131] Ibid.
[132] Ibid para 18.
[133] Ibid para 20.
[134] Ibid para 23.

constitute hate speech nor was it inciting violence against white people.[135] According to NUMSA this song was simply a struggle song that was sang during the apartheid regime and in the context of their strike, it was sang in order to defy the authority of the employer.[136] NUMSA was also of the view that the song was still relevant under this constitutional dispensation, although it was more suited to the past regime, as workers still face the effects of apartheid in modern times. This is so as black workers are still at the bottom of the economic structure with white workers occupying management.[137] The Labour Court found that the arbitrator did not act unreasonably because during strikes, workers sing songs to support their demands.[138]

The Constitutional Court identified two issues in this matter, whether the workers were guilty of racism and the reasonableness of the award of the arbitrator.[139] The Constitutional Court started off by explicitly stating that the word 'boer' is not a racial slur, depending on the context it may mean either a white person or it may refer to a farmer.[140] This was even conceded by Duncanmec, where they differ is that they argue that the context within which the term was used rendered the singing of the song a racist act.

With regards to the reasonableness of the award, the Constitutional Court held that there was no substance to Duncanmec's contention that the arbitrator had failed to consider factors such as the breakdown of the trust relationship, the employer's disciplinary code and other factors.[141] When the arbitrator stated that the evidence did not point to the breakdown of the trust relationship, this shows that she did in fact consider this factor.[142] This court also found that Duncanmec wanted the arbitrator to consider factors that were irrelevant. An example of such irrelevant factors is that dishonesty plays no role in racist misconduct.[143] The arbitrator also made it clear that the employer's disciplinary code did not outlaw the singing of struggle songs and so the charges were not for violating the employer's code. On the allegation that the arbitrator was soft on racism, this court stated that this was a mistaken premise because the

[135] Ibid para 24.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid para 36.
[140] Ibid para 37; see also *September v CMI Business Enterprise CC* 2018 (39) *ILJ* 987 (CC).
[141] Ibid para 44 and 45.
[142] Ibid.
[143] Ibid para 46.

arbitrator did not find that the singing of the song was racist conduct in the first place and even if this was the case, dismissal was not automatic.[144]

In support of the Constitutional Courts decision above, it is relevant to draw from the recent Equality Court hate speech case of *Afriforum v Economic Freedom Fighters and Others.*[145] This matter concerned the singing of a struggle song 'Kiss the Boer'. The study in particular draws the evidence of Mr Malema in that the word 'boer' refers to a system of oppression and not people.[146] The researcher is of the view that the singing of struggle songs in and outside the workplace, as Mr Malema noted, should not be taken literally,[147] it is this attempt to interpret the songs literally that leads to the misguided belief that the songs are racist.

In addition to this, the researcher of this study issues a warning to contentions like those of Duncanmec in referring to the singing of struggle songs that contain a racial undertone as being racist conduct. The study draws from Modiri's[148] critique of the decision of the Equality Court in *Afriforum v Malema* 2011 (6) SA 240 (EqC). In his decision, Lamont J found the singing of the song '*dhubula ibhuni*' as being hate speech.[149] Modiri using critical legal studies found that the judge (the study finds a similarity to the allegations of Duncanmec), engaged in false consciousness.[150] This is a prominent post-apartheid ideology of the law.[151]

In this ideology of the law, white people and black people are seen as equal members of society as governed by the post-apartheid agreement, the Constitution. Modiri[152] argues that in this abstract world, white people are seen as a vulnerable minority with black people being the violent majority that intends to harm white people. In such an abstract world, the historical context of the struggle songs are irrelevant.[153] In such a world, the social power held by white people, the inequality and poverty experienced by black people are not taken into account.[154] The

[144] Ibid para 47 and 48; see also *South African Revenue Service* supra 78.
[145] (EQ 04/2020) [2022] ZAGPJHC 599 (25 August 2022).
[146] Ibid para 71.
[147] Ibid,
[148] J Modiri 'Race, realism and critique: The politics of race and Afriforum v Malema in the (in)equality court' (2013) *South African Law Journal* 274.
[149] Ibid.
[150] Ibid at 284.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Ibid.

unequal power relations are also ignored as white people or whiteness is rather treated as individual people and not a 'dominant and privileged category of people.'[155]

In essence 'Even if racial discrimination against whites could be established, it simply lacks the systemic, historical, institutional and even legislated character of anti-black racism.'[156] Put plainly, black people cannot be racist towards white people because they do not have control of resources or systematic dominance.[157] This is because racism is not merely race-based offensive conduct or utterances, racism is rather about power backed by the historical enforcement of prejudices towards a targeted group using such power.[158] This is not to say black people cannot have prejudice against white people; however, even if that were to be the case, such would not be real power, as stated by Matilino.[159] This means that the act of racism doesn't simply affect the immediate victims, but rather, it affects the entire category of people.[160] This means the act or utterance of racism must be backed by a historical and social background to give effect to the behaviour of the perpetrator.[161]

Black people have not in the past or present implemented strategic systems of oppressing white people nor have they engaged in state-funded racist projects.[162] The researcher is of the view that black people simply do not possess enough economic, social and cultural privilege and dominance for them to be said to be racist towards white people.[163] Even in current times, the black race is generally considered to be the worst race in the racial hierarchy of South Africa a person can be classified into, with Africans in particular regularly portrayed as being lazy, ugly and corrupt.[164] The social, legal, and cultural structures of South Africa still portray this narrative.[165] However, the study also concedes that it is highly inappropriate to refer to people based on their 'race' in the workplace. The study concurs with the arbitrator that the singing of

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[155] Ibid 285.
[156] Ibid.
[157] A Roussell et al 'Impossibility of a "reverse racism" effect' (2017) *Criminology & Public Policy* 1 at 2.
[158] B Matolino '"There is a racist on my stoep and he is black": A philosophical analysis of black racism in post-apartheid South Africa' (2013) 20(1) *Alternation* 52 at 64.
[159] Ibid.
[160] Ibid at 65.
[161] Ibid.
[162] G Yancy 'No black people can't be racist' (2021) *Truthout* https://truthout.org/articles/no-black-people-cant-be-racists/ (Accessed 20 February 2022).
[163] Roussell et al op cit note 157 at 2.
[164] Matolino op cit note 158 at 66.
[165] Ibid.

race-based songs in the workplace whilst being inappropriate, is not the same as referring to someone with a racial slur.[166] It simply isn't racism.

(c) An analysis of Makhanya v St Gobain [2019] 7 BALR 720 (NBCCI)

This matter concerned an allegation of racism from a black person towards another black person. In this matter, a shop steward accused a foreman of 'running the workplace with an iron fist as if it was the time of the Boers.'[167] The presiding officer found that the applicant was guilty of misconduct because:

> 'The term "Boer" has similar pejorative connotation like the word "k*ffir". Both have a painful past and concerted efforts have been made to remove same hence the establishment of forums like the Equality Courts. The fact that the applicant used such pejorative words indicated some degree of racial intolerance which could have escalated to fomenting racial stereotypes and corollary racial disharmony.'[168]

The researcher of this study submits that this is simply incorrect. The researcher is of the view that there has not been a point in time where the word 'boer' had the same negative connotation and stereotype to it as the K-word. The study draws from the Constitutional Court decision in *Duncanmec*[169] that the word 'boer' is not a racial slur, it means a farmer or a white person. Modiri[170] also argued that the reference to white people in such instances is not as individuals, but rather, it is in reference to a system of oppression that has been in the necks of black people for the past five centuries. The researcher of this study warns that it would be misguided and presenting an untrue account of history to behave as though historically, there has been no oppression of black people by colonial European powers to the extent that when black people oppress other black people, they too are referred to as being part of the system of 'whiteness'.

To restate what was stated in Chapter 2 of this thesis in reference to whiteness, Modiri[171] suggests that whiteness is to be understood not merely as a matter of the pigmentation of the skin

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[166] *Duncanmec* supra 124 para 17
[167] *Makhanya v St Gobain* [2019] 7 BALR 720 (NBCCI) para 21.
[168] Ibid.
[169] *Duncanmec* supra 124 para 37; *CMI Business Enterprise CC* supra 140.
[170] Modiri op cit note 131 at 285.
[171] JM Modiri *The jurisprudence of Steve Biko: A study in race law, and power in the "afterlife" of colonial apartheid* (PhD thesis University of Pretoria 2017) at 9; see also J Modiri 'Azanian political thought and the

or ethno-racial identity but as more significantly signifying those who possess structural racial privilege, economic advantage and cultural dominance. Whiteness is the understanding that the way in which white people see the world is the way the world is. Whiteness thus involves white people and their perspectives being the centre of the world views. It would simply be 'false-consciousness'[172] to then state that reference to whiteness is racist or constitutes racism.

However, as argued above, the researcher here also maintains such statements are simply inappropriate at the workplace but they are not racism. The researcher is of the view that this particular incidence was not racism of a black person to another black person. However, further investigation is necessary to determine whether black people can be racist towards other black people.

VII CONCLUSION

This chapter examined race and racism in the workplace and the correct approach of addressing such. Prior to the above, the chapter dealt with race as being an abstract term not a biological one and racism being about making others feels superior at the expense of the oppressed.[173] In addition to this, South Africa has a history of racial slurs and racism within which racial relations and racial descriptors must be understood.[174] The researcher is of the view that the proper approach to dealing with racism by a white person towards a black person is dismissal.[175] However, with the allegation of racism by a black person towards a white person, in this instance, the historical context is of relevance in that it proves that black people generally do not have the means and historical narrative of enforcing prejudice. [176] Perhaps employers can also adopt preventative measures that go beyond dismissal.

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undoing of South African knowledges' (2021) 68(168) *Theoria* 42 at 47; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28(1) *Stellenbosch Law Review* 123 at 133 cites S Biko *I Write What I Like* (2004) at 67 who notes that South Africa is subject to the white power structure that oppresses black people physically, politically, and culturally. This white power structure constrains black people's reaction to it by limiting the emancipatory strategy to end segregation and usher in a new age of democratisation; and, most importantly, the end of a system and structures that divided the world into the dominant white world and the dominated black world.

[172] Modiri op cit note 148 at 284.

[173] A K Wing 'Is there a future for critical race theory?' (2016) 66(1) *Journal of Legal Education* 44.

[174] S Mbowa op cit note 36 at 54.

[175] *South African Revenue Service* supra 95 para 15

[176] *Duncanmec* supra 124

CHAPTER 7

THE LINK BETWEEN RACE, CLASS AND THE RIGHT TO STRIKE

I INTRODUCTION

Tom Langford[1] in his article titled Strikes and Class Consciousness states as follows:

> '… [the] working class will be an essential element in any successful anticapitalist movement. The proletariat has revolutionary potential by virtue of its numerical mass and concentration, strategic economic role, and common experiences of exploitation, injustice, and collective resistance.'

The researcher argues that this statement mimics the South African struggle for liberation in that it was primarily the black working class that played a part (amongst other classes? sectors of our society) in fighting the apartheid regime using their shared experience of exploitation and racism.

Within the South African perspective, the struggle for the emancipation of black people was linked to the class struggle which in turn was a fight for the liberation of all black people.[2] This is to say the struggle for the liberation of the working class was linked to the struggle of black people as they comprise the South African working class.[3] It was and still is this section of our society that suffers the harsh exploitation by capitalism which is also linked to racism, making class and race inseparable in South Africa, as discussed in Chapter 5.[4]

The South African working environment produces violent and coercive labour practices as previously pointed out in Chapter 5.[5] The chapter provides a discussion of how such practices of the exploitation of the black working class form the basis of radical industrial action by the black working class.

Racism is globally considered to be against the morals of all people; however, it is no secret that is still exists within the confines of certain industries and circles of our societies.

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[1] T Langford 'Strikes and class consciousness' (1994) 34 *Labour* 107 at 107.
[2] B Magubane 'The mounting class and national struggles in South Africa' review (1984) 8(2) Review *Fernand Braudel Center* 197 at 198.
[3] Ibid.
[4] Ibid at 199.
[5] Ibid

Racist white capitalism contradicts the needs and demands of the black working class.[6] This is because although South Africa subscribes to the economic system called capitalism, thus is a capitalist formation, such capitalism was to the exclusion of black people, African people in particular in that they could not 'sell' their labour freely nor could they have trade unions.[7] Black people instead of being 'free labourers' were coerced into being slave-like labourers as pointed out in Chapter 5 which then forced them to pursue means of emancipation through industrial action.[8]

In order to understand race, class and violent strikes, the chapter provides a historical overview of the issue (the issue being, is there a link between race, class and the right to strike?) which can be traced back to what is now referred to as the Rand Rebellion of 1922. The chapter then discusses the events of the strike of 1946 by African miners against the reduction in food rations and low wages. The chapter also discusses the Marikana Massacre of 2012. The chapter is strictly be limited to these three historical strikes and does not include other instances of industrial action. The researcher is of the view that these three events suffice in examining the link between race, class and the right to strike. It is also important for the chapter to present tactics that employers engage in in the democratic era to attempt to prevent their workers (largely the black working class) from exercising their right to strike.

II THE RIGHT TO STRIKE IN A PRE-DEMOCRACY SOUTH AFRICA

When the Union of South Africa was founded in 1910, it excluded African people from labour law protection.[9] It was strictly a white people country. The Union of SA not only discriminated against but it actively oppressed African people. Within the perspective of this chapter, the researcher is of the view that discrimination concerns treating people differently while oppression is actively enforcing harm to a certain group of people. Within the context of this chapter, the right to strike (in this specific regime and period in time) was strictly prohibited from being exercised by African people.[10] The statute responsible for this was the Native Labour Regulations Act 15 of 1911. Another disappointment for African workers came in 1924 in the

[6] Ibid.
[7] Ibid at 202.
[8] Ibid 204.
[9] See H Suchard 'Labour relations in South Africa: retrospect and prospect' (1982) 12(2) *Africa InSight* 89–97
[10] M Budeli-Nemakonde 'Workers' right to freedom of association and trade unionism in South Africa: An historical perspective' (2009) 15(2) *Fundamania* 57 at 60.

form of the Industrial Conciliation Act 11 of 1924. This statute excluded black workers from the definition of the word 'employee'.[11] As such, African workers could not enjoy its benefits such as having their own trade union and the effect of this being the denial of their right to strike.[12]

When the National Party came into power in 1948, it introduced the separate development policy, commonly referred to as apartheid. The apartheid system encouraged racism in the Republic. Apartheid was roughly a system of segregated practices that policed and regulated the conduct of white people, Indian people, African people and so-called coloured people, with the effects of these practices being worse for African people. This regime in addition to being racist was also capitalist. The apartheid regime passed the Suppression of Communism Act 44 of 1950 which also deprived African workers of any rights to collective bargaining or any other form of movements by African workers.[13] In brief, this meant that African people did not have the freedom to associate with any organisation or movement of their choice. However, this statute did allow African workers to engage in strikes, in exceptional circumstances and only if they were primary in nature.[14]

The apartheid regime repealed the Industrial Conciliation Act in 1956 to create the Industrial Conciliation Act 28 of 1956, this Act also excluded African workers from the definition of the word 'employee' as we know it today.[15] This statute prohibited all workers from striking in essential industries.

III THE RAND REBELLION OF 1922

The Rand Rebellion has to be one of South Africa's darkest moments, which although centred around racist policies of the time, it was also a class struggle. It is viewed here from the perspective of class solidarity while highlighting the contradictions in the class struggle. The contradiction being racism, with race taking precedent over class status. As discussed below, this rebellion was by poor and or working class white people fighting for their needs against the

[11] Ibid at 62.
[12] C Jordaan and WI Ukpere 'South African Industrial Conciliation Act of 1924 and current Affirmative Action: An analysis of labour economic history' (2011) 5(4) *African Journal of Business Management* 1093 at 1096.
[13] Ibid at 65.
[14] Ibid at 66.
[15] Ibid at 67; see also s 213 of the LRA which defines an employee as 'anyone, other than an independent contractor, who works for another person or who assists in conducting the business of an employer'.

exploitative employer while at the same time, the white workers themselves engaged in racism against people who shared their class issues, simply because those people were African people.

Baliard[16] provides a clear account of this incident. Towards the end of 1921, a sharp decrease in the price of gold 'forced' the mine owners to implement drastic measures which included the retrenchment of two thousand white miners out of twenty five thousand workers and the clampdown of the racial bar that had reserved skilled jobs for white miners and unskilled jobs for black miners.[17] That removal was meant to align white wages with black wages, saving the South African rand lords (South African mine owners) millions in the process.

2 January 1922, a strike began in the Witwatersrand.[18] When 9 January arrived, all white miners had stopped working.[19] These mine workers gathered their weapons and attacked police posts and seized power; however, this was short lived and the then government regained control.[20] After the killing of scores of civilians and strikers, the movement (we now consider as the rand rebellion) came to an end.

It is important to note that there was an attempt by the United Communist Party to show class solidarity by including African workers in the demand for higher wages.[21] This was turned down by white workers and they rather chose to work hand in hand with police to keep African workers in prison-like compounds.[22] By the end of this rebellion, white wages were lowered, while African workers still received the same low wages.[23]

(a) A critique of the Rand Rebellion

The study concurs with Breckenridge[24] who suggests that part of the revolt was caused by the white workers' need to defend their racial privilege. Breckenrudge[25] argues further that as part of

[16] Y A Béliard 'A "Labour War" in South Africa: the 1922 Rand Revolution in Sylvia Pankhurst's Workers' Dreadnought' (2016) 57 (1) *Labor History* 20–34.
[17] Mines and Works Act 12 of 1911 gave certificates of competency to white and so-called coloured workers, to the exclusion of African workers.
[18] Béliard op cit note 16.
[19] Ibid.
[20] Ibid.
[21] P MacRae 'Race and class in Southern Africa' (1974) 4(2) *The African Review: A Journal of African Politics, Development and International Affairs* 237 at 243.
[22] Ibid.
[23] Ibid.
[24] K Breckenridge 'Fighting for a White South Africa: White working-class racism and the 1922 rand revolt' (2007) 57 (1) *South African Historical Journal* 228–243.
[25] Ibid.

the revolt, scores of white men armed with weapons staked out the streets of the suburb of Vrededorp and started attacking any Africans they could find, including school children. Similar events took place in the suburb of Ferreirastown.[26]

The study notes that two arguments can be raised about this rebellion. The first argument notes that the rebellion shows the link between class and industrial action in that the working class can be cornered by the exploitative system of capitalism into industrial actions that can turn deadly. That is to say, capitalism forces the working class to fight for their liberation against their oppression by the employer by any means necessary. Such means adopted by workers when fighting for their needs is generally by strike action.

On the other hand, the second argument is that this rebellion has its foundation on racism. It highlights the unfortunate reality of white workers who were protecting their white privilege and not merely an issue of skilled white labour versus unskilled black labour or a class struggle. The point being that in class struggles taking the shape of strikes of note, in South Africa, the white population afterwards became allies of capital. As explained below, white people collectively became the owners of the means of production.[27]

The problem of the poor white population was solved through concentrating state power into the hands of the collective white population, thus, elevating white working class people into being elites at the expense of and to the exclusion of poor black people.[28] That is to say working class white people were reclassified from the average poor or working class person into being the associates of capital.[29] In such a society, racial interests took precedence over rational economic interests with white people of all classes having control over the economy, politics and culture.[30] In short, white culture, morality and value system become the default norm. Simply put, white people irrespective of class, directly or indirectly, became the exploiters and African people, who are the poor, remained the exploited.[31]

In this society, white people who were collectively the elite, irrespective of skill, experience or know-how, played the unproductive and often duplicate supervisory roles to

[26] Ibid.
[27] B Mugabane op cit note 2 at 202.
[28] Ibid.
[29] P MacRae op cit note 21 at 237.
[30] Ibid.
[31] Ibid at 243.

African labourers.[32] The economic loss created by this unproductive managerial sector of labour was made up for by the inhumane and extremely low wages African workers received.[33]

With white workers being elevated in their economic status and African people remaining the exploited poor workers, this led to the second phase of this study's argument, the link of strikes with race and class.

IV THE STRIKE OF 1946

Another significant moment in the development of South Africa's instances of industrial actions is the strike of 1946.[34] This strike is significant in that it was a fight by African miners against their exploitation by whites employers. The miners were paid low wages, they lived in inhumane single sex and bachelor compounds.[35]

One of the factors that contributed to this strike was the issue of food supply. African miners were fed in compound dining halls, they were usually fed maize porridge with a small portion of meat.[36] The mine owners, in attempt to cut costs started to advocate for the reduction in portion sizes, despite food supply only amounting to less than 3 per cent of the costs of a mine.[37] The pruning of food rations went hand in hand with the poor harvest by farmers of maize, the staple food of African miners in the prison-like compounds.[38] There was also a decline in meat supply, which the mine owners attempted to restore by importing canned meats from East Africa; however, that too failed.[39] By 1942 and 1943 the food rations had been reduced, the mine owners justifying it by using the shortage of food suppliers in the country.[40] The Department of Native Affairs started to put posters in the compounds 'raising awareness' of the national food shortage.[41]

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[32] Ibid.
[33] Ibid at 245.
[34] For more on this strike see TD Moodie 'The moral economy of the Black Miners' Strike of 1946' (1986) 13(1) *Journal of Southern African Studies* 1-35; see also M Beittel 'Labor unrest in South Africa, 1870-1990' (1995) 18(1) *Review (Fernand Braudel Center)* 87–104.
[35] W James 'Grounds for a strike: South African Gold Mining in the 1940s' (1987) 16 *African Economic History* 1 at 1.
[36] Ibid at 10.
[37] Ibid.
[38] Ibid at 12.
[39] Ibid.
[40] Ibid.
[41] Ibid.

The first riot led to the strike of 1946 occurred on 9 February 1945 at Marievale, Gauteng (then the Transvaal), the same month in which Africans in other mines started to riot.[42] These food riots continued to occur in Grootvlei, Government Gold Mining Company, and Van Ryn Estate in February 1945.[43] In particular, on 6 March at Modderfontein East, two African miners were killed in food riots.[44]

In the years leading up to 1946, the gold prices remained stable, meaning any increase in the costs of the mine had to be absorbed by the mine as the mines could not increase prices for the consumers.[45] At the same time, there was a sharp rise in the wages of white miners while the wages of African miners remained inhumanely low.[46] There was also a rise in food prices, and African miners watched as their already low wages were affected by the decline in buying power.[47]

Finally, by this stage the African miners had reached their boiling point with the African Miners Workers Union (AMWU) coming to their aid.

> 'Armed with the demand for higher wages and a different system of food delivery, grievances generated by the political economy of gold mining in the 1940s, the AMWU took about 80,000 miners into a strike on August 12, 1946, and probably double the number in sympathizers. The strike lasted for five days.'[48]

This strike shows a link between African workers, who were also the poor/working class people being exploited and having no choice but to strike in order to voice their demands. Like the white workers in the Rand Rebellion of 1922, these poor and exploited African workers saw the need to voice their struggles by way of a strike. These workers were poor, they were African people and as such, through the concept of intersectionality, the study notes a link between, race, class and strikes.

[42] Ibid.
[43] Ibid.
[44] Ibid at 13.
[45] Ibid at 15.
[46] Ibid.
[47] Ibid.
[48] Ibid at 18.

V THE RIGHT TO STRIKE IN A POST-APARTHEID SOUTH AFRICA

In the democratic era, workers are guaranteed labour rights such as the right to strike by s23 of the Constitution.[49] The right to strike is further entrenched in Chapter 4 of the South African Labour Relations Act 66 of 1995 (LRA).[50]

Briefly, for the industrial action to be considered as a strike, it must have a purpose. In South Africa, simply stopping work is not a strike,[51] the stoppage must go hand in hand with a reason and demand by workers.[52] The demand of the workers must also be lawful.[53] This was confirmed by the Labour Court in two cases in *Floraline v SASTU*[54] and *FAWU v Rainbow Chicken Farms*[55] when the Labour Court found that there was no strike despite there being a stoppage of work. The problem was, the stoppage was not accompanied by a demand and a purpose.

In addition to the above, s213 of the LRA provides that the purpose of a strike must be to 'remedy a grievance or resolve a dispute in respect of any matter of mutual interest between employer and employee'.[56]

South Africa makes provision for both a primary and a secondary strike. A primary strike is where the workers 'have a material interest in the outcome of the dispute.'[57] Unlike in a primary strike, in secondary strikes, the employees in question do not have a material interest in the outcome of the strike, they are simply showing solidarity with the primary strike.[58] Section 66(1) defines a secondary strike as

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[49] MA Chicktay 'Defining the right to strike: A comparative analyses of International Labour Organisation Standards and South African Law' (2012) 33(2) *Obiter* 260 at 261.
[50] Ibid.
[51] Ibid; a strike is defined in s213 of the Labour Relations Act 66 of 1995 (LRA) as 'the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.'
[52] Ibid, see also M Finnemore Introduction to Labour Relations in South Africa (1999) at 224.
[53] *City of Johannesburg Metropolitan Municipality v SAMWU* (2009) 5 BLLR 431 (LC).
[54] 1997 (9) BLLR 1223 (LC).
[55] (2000) 21 *ILJ* 515 (LC).
[56] See also *SATAWU v Coin Reactions* (2005) 26 ILJ 1507 (LC); *City of Johannesburg Metropolitan Municipality v SAMWU* (2011) 7 BLLR 63 (LC).
[57] Chicktay op cit note 47 at 263.
[58] Ibid.

> 'a strike or conduct in contemplation or furtherance of a strike that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees employed within the registered scope of the council have a material interest in the demand.'

Workers who are on strike are not partaking in a secondary strike, but a primary strike if they are striking against the same employer.'[59] In essence, it becomes a secondary strike when employees strike against another employer, not their own employer. There are different forms a strike may take. Chicktay[60] notes that:

> 'Industrial action may take various forms including complete strikes, goslows, work-to-rule, grasshopper strikes and sit-ins. In the case of a complete strike, employees cease doing all the work that is required of them. In a grasshopper strike employees call a strike, temporarily suspend it, and later resume it. In work-to-rule strike employees do their work strictly in accordance with their contracts and do no more than the minimum. In a goslow employees do their work at a reduced pace. In the case of sit-ins employees refuse to do their work and occupy the premises of the employer.'

VI MARIKANA MASSACRE OF 2012

The Marikana Massacre is another shameful event in the history of the Republic of South Africa, more so as it happened in the democratic era. An era where workers are guaranteed the right to strike irrespective of race or class, as pointed out above.[61] As the Marikana Massacre has been analysed and discussed in many platforms, the researcher is of the view that it is important to analyse it within the context of linking race, class and the right to strike.

What is now referred to as the Marikana Massacre was an incident which occurred over multiple days with the last day being the day in which the lives of miners were lost. This incident started around 9 August 2012[62] when rock drill operators of Lonmin went on strike fighting for a wage increase from four thousand five hundred rands to twelve thousand five hundred rands and better working conditions.[63] Between the 12th and the 14th of August, ten people lost their lives

[59] Ibid; see also *Afrox Ltd v SACWU* (2) 1997(9) BLLR 375 (LC).
[60] Ibid at 268.
[61] S27 of the Constitution.
[62] B Mugabane op cit note 2 at 202.
[63] NSN Mnyandu *Circumventing another Marikana Massacre: A look into the provisions of the Labour Relations Amendment Act relating to the limitation on the right to strike* (UKZN unpublished LLM Theses, 2015) at 9.

due to incidences related to this strike.[64] Particularly on the 16th of August, 34 miners lost their lives with 78 wounded.[65]

(a) the causes of the massacre

What is of relevance to this study concerning this unfortunate massacre is revealed in Advocate Tembeka Ngcukaitobi's (Senior Counsel) analyses of the circumstances surrounding the massacre. At least 50 per cent of Lonmin's workers lived in informal settlements and with no access to basic services.[66] The reason for the workers' demand for a wage increase was for them to sustain their often large families which also consisted of unemployed members of their families.[67] This failure by the workers to sustain themselves and their families is linked to them hailing from poverty stricken areas of the former Bantustans such as Transkei, Ciskei, and Zululand, including from outside the country such as Lesotho etc.[68] That is to say, these workers were poor African people who had been subjected to a cycle of perpetual socio-economic challenges.

Ngcukaitobi characterises this strike as a racial issue. Ngcukaitobi argues that the strike was a racial issue, which was linked to the economic class of African people in our neo-apartheid country. This is structural violence that poor black workers face in South Africa.[69] Structural violence is an instance where institutions prevent people from gaining access to service delivery which can be based on race or class, amongst other factors.[70] Ngcukaitobi takes this argument further by suggesting that this massacre was based on 'structuralism'. This term is when people do not make rational decisions for themselves, they instead are forced to make decisions due to the effect of institutions that influence their socio-political conditions.[71] These social and political factors again are race and class. This conduct by the institutions (employers) is

[64] Ibid.
[65] Ibid; see also T Ngcukaitobi 'Strike law, structural violence and inequality in the Platinum Hills of Marikana' 2013 *ILJ* 836 at 837.
[66] Ibid Ngcukaitobi at 839.
[67] Ibid.
[68] Ibid at 840.
[69] Ibid.
[70] J Galtung 'Violence, Peace, and Peace Research' (1969) 6 (3) *Journal of Peace Research* 167 - 191
[71] Ngcukaitobi op cit note 65 at 840.

considered to be violence as it is also the avoidable refusal to allow poor African people to have access to resources.[72]

The researcher is of the view that the above discussion supports his argument in this study that it was racial and class challenges that drove workers to fight for their demands by way of a strike and in turn they were gunned down, allegedly by state police. That is to say, race and class do have a link to industrial action which often becomes violent and deadly.

Perhaps as a final critique of the event, it is important to consider the following words: 'You must kill the bastards if they threaten you or your community. You must not worry about the regulations. That is my responsibility.'[73] The researcher is of the view that the Marikana Massacre was police brutality doing the bidding of mine owners as is very evident by the words of a senior South African government official, the then Deputy Minister of Safety and Security. In hindsight, it is obvious that the police did not go to Marikana with the intention of breaking the strike without the use of force, they were in a mood for war.[74] It is more disheartening when considering that the South African Police Services was used as an army to fight poor African miners.[75] These miners went on strike as their last resort due to unreasonably low wages.[76] This event does not only mark the lengths law enforcers will go to in violating African and working class bodies but it is also a reflection of the violation of the LRA itself as nowhere does this statute indicate that the involvement of police is required, let alone the unnecessary use of brutal force.[77]

VI CONCLUSION

This chapter concerned the link between race, class and the right to strike. In this chapter, the study advanced the argument that it is often racial and class challenges that drive workers to fight for their demands. One such way that workers have used to fight for their demands is by way of a strike. It becomes unfortunate that in such strikes, workers end up being gunned down. In simple

[72] Ibid at 841.
[73] Deputy Minister of Safety and Security as cited in SP Makama and LLK Kubjana 'Collective bargaining misjudged: the Marikana massacre' (2021) 42(1) *Obiter* 39 at 41.
[74] Ibid at 43.
[75] Ibid.
[76] Ibid.
[77] Ibid.

terms, the researcher is of the view that race and class do have a link to industrial actions which often turn violent and deadly. However, the study was restricted to three major strike events.

CHAPTER 8
CONCLUSION AND RECOMMENDATIONS

I INTRODUCTION

This chapter brings the thesis to an end. The purpose of the chapter is to provide a summary and analysis of the research findings and recommendations. Firstly, the purpose of the study is discussed as well as the methodology that was used, including its significance and suitability to this study. The chapter then presents the different findings as well as the recommendations and limitations of the previous chapters. This is not intended to be a mere summary of all the chapters, but rather, it is meant to be a detailed examination of the research findings as spread across the different chapters. This main purpose of this chapter is to highlight the important points raised across the thesis.

II SUMMARY OF THE PURPOSE OF THE STUDY AND THE METHODOLOGY

The methodology used in this study was linked to the purpose of the study. The purpose of this study was to analyse labour law as more than just what the law is, at face value, but rather, to attempt to understand the law as being influenced by socio-political narratives. In order to understand these socio-political narratives that influence labour law, the study had to pose important questions concerning race, gender and economics of the law. These key questions were addressed during the course of the study and presented in the various chapters of this thesis. The researcher is of the view that all of the previously mentioned socio-political factors have been ignored social issues, which he considers to be collectively at the forefront to understanding decolonisation.

Due to the purpose of the investigation, quantitative research was adopted for this study, that is to say the desktop-based analyses of documents. Various tools were used to address the research questions mentioned in Chapter 1. The researcher primarily relied on journal articles, case law, statutes, textbooks and internet sources.

Specifically, the tool of analysis in this instance, for this study, was the socio-legal approach. Harris[1] is of the view that it is widely accepted that the socio-legal research approach

[1] DR Harris 'The development of socio-legal studies in the United Kingdom' (1983) 3 *Legal Studies* 315.

is still a developing theory, furthermore, the understanding of both the components of 'socio' and the 'legal' aspects are subject to continuing debates. Hence, the adoption of this tool of analyses for this study was in essence an advancement of this area of research. Thus, quantitative research, using socio-legal studies was the most suitable methodology for this research.

II CHAPTER 2 RESEARCH FINDINGS AND RECOMMENDATION FOR FUTURE RESEARCH

Chapter 2 dealt with decolonisation, critical race theory (CRT) and its links to labour law. Two key questions were posed in this chapter. The first key question was, what is decolonisation and how does it link to labour law? The second key question was, what is critical race theory and what role can it play in decolonising labour law?

The importance of the chapter was relating the adoption of the critical race theory as a tool of analyses. This was based on Modiri's[2] suggestion that as a legal philosophical discipline, CRT has yet to be formally adopted in mainstream South African legal scholarship. This is what necessitated the adoption of CRT in understanding the reality of the decolonisation of labour law in South Africa.

The chapter commenced by defining the terminology that was used in this study, with whiteness being defined first. The study adopted Modiri's[3] suggestion that whiteness is to be understood not merely as a matter of the pigmentation of the skin, but more importantly as signifying those who possess structural racial privilege, economic advantage and cultural dominance.

Secondly, the chapter defined who a black person is in the context of this study. To understand this definition, the study adopted the Black Consciousness Movement's understanding of black people or blackness. That is to say, being black or blackness as an attitude of the mind and a way of life and not merely as a matter of the pigmentation of the skin.[4]

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[2] J Modiri 'The colour of law, power and knowledge: Introducing critical race theory (CRT) in (post) apartheid South Africa' 2012 *SA Journal on Human Rights* 405 at 406.

[3] JM Modiri *The jurisprudence of Steve Biko: A study in race law, and power in the "afterlife" of colonial apartheid* (Phd thesis University of Pretoria 2017) at 9; see also J Modiri 'Azanian political thought and the undoing of South African knowledges' (2021) 68(168) *Theoria* 42 at 47; T Madlingozi 2017 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28(1) *Stellenbosch Law Review* 123–147.

[4] B Ndaba et al *The Black Consciousness Reader* (2017) Jacaranda Media.

Therefore, a person of Indian or Chinese or African ancestry is part of the concept of black person.

Thirdly, the chapter also defined who an African person is in the context of this study. For this, Pan Africanism was adopted which the researcher considered to be the solidarity amongst the children of Africa and their descendants, wherever they may be located. Thus, an African, according to this study, is a person of African ancestry, irrespective of the continent or country in which they reside or were enslaved in.[5]

Next, decolonisation was defined in the chapter after looking at what colonisation was. The significant part about this is the conclusion that colonisation was about not just the hatred of black people, but it was also about their exploitation in the labour sector. Also of significance in the chapter was the analysis of the exploitative ways of the labour industry, with our labour law having a shortfall in the protection of workers. This had its roots in the colonial and apartheid regime, that found its way into our current dispensation.

It is important to understand that the concept of decolonisation has not yet been clearly defined in South Africa.[6] At face value, decolonisation concerns the disruption of whiteness.[7] Decolonisation concerns moving away from a Eurocentric understanding of the law, connected to legal structures which traditionally stem from colonialism.[8] This concept of decolonisation entails drawing from various sources of law to promote the transformative capability of the law in achieving more social and economic justice.[9] Decolonisation goes beyond what the law is, it concerns itself with how these laws are used in society.[10]

One such exploitative practice linked to the colonial ways of the South African labour industry and its labour laws, which the study considered is necessary to decolonise, is the refusal

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[5] A Gearey 'WEB du Bois ambiguous politics of liberation: race, marxism and pan Africanism' (2012) 1(3) *Columbia Journal of Race and Law* 265 at 265.
[6] C Himonga 'The constitutional court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law' (2017) *Acta Juridica* 101.
[7] S Heleta 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa' (2016) 1(1) *Transformation in Higher Education* 1–8; A Thornton 'Decolonisation' (1963) 19(1) *International Journal* 7-29; KB Motshabi 'Decolonising the university: A law perspective' (2018) 40(1) *Strategic Review for Southern* 104–115.
[8] C Himonga op cit note 6.
[9] C Himonga and F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) *PER* 1–19 at 5.
[10] Ibid.

to recognise workers as 'employees', a recurring theme in the study. The study had to analyse the recent case of *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)*[11] where the prospective employer Uber SA (Uber SA being a local company, an extension of Uber BV the foreign parent company) sought to exclude the Uber drivers from the definition of the word 'employee'. The court in this matter decided that Uber drivers were not employees since they had no contractual agreement with the company Uber SA.

The study found that the court in this matter missed an opportunity to develop labour law in order to achieve social justice. The development of the common law is entrusted to the courts by s 39 of the Constitution. The researcher is of the view that one such way to go against the exploitation of workers and in a way 'decolonise' labour law is through the adoption of the corporate common law principle of piercing the corporate veil. In this study's context, an attempt to pierce the labour veil.

This principle provides for liability against people who hide behind a company, thus, piercing the veil metaphorically.[12] Using this principle, the court could have expanded on this already existing test in order to bypass the contractual relationship required by section 200A in order to achieve social justice and offer protection to the Uber drivers. That is to say, the court by piercing the veil could have seem that Uber SA was the 'real' employer of Uber drivers irrespective or any or lack thereof of a contractual agreement between the parties.

It is important to understand that in this instance, our courts have previously unravelled schemes where one company, usually an empty shell, undertakes the administrative tasks of an employer.[13] Without the establishment of Uber SA as a subsidiary company, Uber BV (the parent foreign company) would have experienced difficulties operating in South Africa, hence, the court should have sought to remove this complex scheme.[14] In essence, the study found that this was a simple case of the financial exploitation of workers to the benefit of the employer

[11] (2018) 39 *ILJ* 903.
[12] J Cohen Veil piercing a necessary evil? A critical study on the doctrines of limited liability and piercing the corporate veil (University of Cape Town, Unpublished LLM Thesis, 2006 UCT).
[13] (JR 1651/01) [2003] ZALC 113 (20 October 2003); *Footwear Trading CC v Mdlalose* [2005] 5 BLLR 452 (LAC).
[14] S van Eck and N Nemusimbori 'Uber drivers: Sad to say, but not employees of Uber SA' (2018) 81 *THRHR* at 473.

whilst simultaneously denying workers of the benefit of labour law by having them declared as 'employees', an old tactic of apartheid and colonial regimes.

The implications of the study's recommendation of the adoption of piercing the labour veil being that employers would not easily create schemes that deprive workers of their labour law protection. As a result, the researcher is of the view that decolonisation is linked to labour law as it can be used as a tool of addressing the injustices workers face, such as not being recognised as 'employees' even in our current constitutional dispensation.

The study poses a challenge for future research into the adoption of piercing the corporate veil, in the labour law perspective, in order to ensure the protection of workers. This would assist, as stated above, in preventing and avoiding the sham of foreign companies setting up local companies without contractual agreements with employees in order for such companies to bypass the labour protection of workers.

The above analysis was an attempt by the study to make a practical application of decolonising the clearly colonised labour law through attempting to transform this area of law to achieve such social justice.

Chapter 2 also included a discussion concerning critical race theory. CRT is the study of the link between race and power.[15] CRT is significant in that it disproves the idea of the colour blindness of the law. In essence, since our society makes up the people that form part of the government, law makers and judges, it is colour conscious. The law is and should be understood as being colour conscious as it is made and applied by people who are part of the colour conscious society.[16] As such, the study found that CRT plays a critical role in the decolonisation of labour law in that it advocates for the understanding of labour laws as not being neutral, but rather, they too being colour conscious (with Chapter 4 as an example of colour consciousness of labour law where women lacked its protection because they were African, women and poor).

The study found that the failure to understand the colour consciousness of labour law leads to a perpetual subjection of black people to injustices. This occurs as affirmative action

[15] J Stefancic and R Delgado *Critical Race Theory: An Introduction* (2010); also see DA Bell 'Who's afraid of critical race theory' (1995) 4 *University of Illinois Law Review* 893-910 at 89.
[16] AK Wing 'Is there a future for critical race theory?' (2016) 66(1) *Journal of Legal Education* 44 at 48.

becomes viewed as some form of 'reverse racism'[17] or 'handout' to black people. Hence the colour-blind approach to labour law it leads to the rejection of affirmative sction through its stigmatisation[18] which in turn means the lack of development of the disadvantaged sector of our society. As an example of this, the study pointed out the view of the court in in *South African Restructuring and Insolvency Practitioners Association (SARIPA) v Minister of Justice and Constitutional Development*; *In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development*.[19] The court was of the view that over reliance on race when giving effect to affirmative action was dangerous as it risked disadvantaging its beneficiaries by creating the impression that the beneficiaries are hired based on race and not merits. This is a clear misunderstanding and stigmatisation of affirmative action

CRT is important to and links with the decolonisation of labour law in that it provides a critique of the anti-affirmative action stigmatisation which assumes that people are on an equal footing irrespective of race, gender, class and disability.[20] CRT through viewing the law as colour conscious makes us understand that merit is not neutral, it too is based on privilege.[21] It states that colour blindness is an assumption that there are no privileged people in our society and people are where they are because of hard work, which is obviously false in light of our labour history.

The study found that the lack of and failure to use decolonial thought, critical race theory and taking into account the history of the treatment of African people and black people in general, can lead to decisions that reverse the progress of substantive equality, constitutionally unsound and undesirable decisions such as those laid by the Equality Court and the Supreme

[17] MB Abram 'Affirmative action: Fair shakers and social engineers' (1986) 99 *Harvard Law Review* 1312 at 564; also see VE Hamilton 'Reform, retrench, repeat: the campaign against critical race theory, through the lens of critical race theory' (2021) 28(1) *William & Mary Journal of Race, Gender, and Social Justice* 61–102.
[18] N Ramalekana 'A critique of the stigma argument against affirmative action in South Africa' (2022) 4 *University of Oxford Human Rights Hub Journal* 1 at 2.
[19] 2015 2 SA 430 WCC.
[20] Ramalekana op cit note 18 at 21.
[21] R Fallon 'To each according to his ability, from none according to his race: The concept of merit in the law of antidiscrimination' (1990) *Boston University Law Review* 815, 822; C McCrudden, 'Merit principles' (1998) *Oxford Journal of Legal Studies;* IM Young *Justice and the Politics of Difference* (1990) Princeton University Press 200.

Court of Appeal in *Kroukamp v The Minister of Justice and Constitutional Development*[22] and *Magistrates Commission and Others v Lawrence*,[23] as discussed in Chapter 2.

(a) Limitation of Chapter 2

The limitation of Chapter 2 is that it did not deal with the economic philosophy differences within the Black Consciousness movement. This is because this study was simply restricted to analysing labour law in particular and not the broader offshoots of politics. This would have entailed a discussion of how Marcus Garvey, respectfully, even though a stalwart of Pan Africanism, was a capitalist.[24] The importance of this is that the objective of the total emancipation of African people is not to adopt a Eurocentric economic system, which clearly oppresses the workers or the working class, rather, it is to obtain equality and unity for all workers of the world, specifically African workers in accordance with African socialism as provided for by Mwalimu Nyerere when he coined Ujaama.

III CHAPTER 3 RESEARCH FINDINGS AND RECOMMENDATION FOR FUTURE RESEARCH

This chapter comprised an analysis of the restrictions of access to justice of the poor and working-class people. The key question in this chapter was, has labour law advanced access to justice for the working class? To deal with this question, the chapter included an examination of a settled principle of law regarding costs orders. This was done through the discussion of the recent case of *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd.*[25] In civil litigation, it is a settled principle that costs orders follow the losing side. The Constitutional Court in this matter confirmed that in labour law this principle is not applicable, costs orders do not follow the result.[26]

The above finding of the court was indeed advancing access to justice for the working class. However, the study found that this judgment had a flaw and made a recommendation to address the flaw. The study recommends that courts, when discussing the way costs orders work

[22] (74236/2013) [2021] ZAGPPHC 526 (16 August 2021).
[23] 2022 (4) SA 107 (SCA) (2 December 2021).
[24] J Torok 'Freedom now race consciousness and the work of de-colonization today' (2004) 48(1) *Howard Law Journal*, 351-394 at 193–194.
[25] (2021) 42 I*LJ* 2371 (CC).
[26] Ibid.

in labour law must include a discussion of the equality of arms between the litigants. That is to say, generally, the employer has more resources than the employee, should the employer win in litigation, costs orders following the result would deter workers from institution actions against their employers.

The study concluded that blindly following the civil litigation principle would lead to an instance where workers no longer trust the judicial system and resort to violent strikes as means of voicing out their grievances.[27] In addition to this, it would create a twofold problem. First, the furthering of unequal arms (between employer and employee). Secondly, the reservation of access to justice to the 'haves' (employer) while side-lining the 'have nots' (employees).[28] Thus, this would affect the poor, often black, workers due to the expenses they would incur, should they lose.[29]

To further understand the limitation of access to justice of workers, the study had to discuss the attempt by trade unions to ignore their own constitutions through having members that are not in their industry as per their constitutions. This is a defence by employers in actions against them by employees. This was done through the examination of *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe).*[30] Although the court in this instance disallowed trade unions having members who are not in their industry, this issue is far from being settled. This is because there are now conflicting views by the courts. In *Multiquip (Pty) Ltd and Another v National Union of Metalworkers of South Africa*[31] the court confirmed the position of *McDonalds* that the contents of the trade unions constitution are irrelevant when the trade union is providing representation in the protection of the worker's right to be represented. As such, the study recommends that there has to be further research into this issue in order to have a settled principle and one voice by the courts.

[27] *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin NO* 2008 (29) ILJ 1707 (LAC) para 19.
[28] F Mabaso 'A much needed reaffirmation of a settled principle of law: Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others' (2021) 42 ILJ 2371 (CC) (2022) 43 ILJ 1522' (2022) 2 *ILJ* 1522 at 1528.
[29] D Holness 'Improving access to justice through law graduate poststudy community service in South Africa' (2020) 23 *PER/PELJ* 1 at 1.
[30] (2020) 41 (ILJ) 1846 (CC).
[31] D 477-20) [2021] ZALC 7 (17 August 2021).

IV RESEARCH FINDINGS OF CHAPTER 4

This chapter dealt with the delayed protection of domestic workers in South African Labour Law. The key question in Chapter 4 was, have our legal institutions made any strides towards protecting the most vulnerable people in labour law, the poor African women? To address this question, the study engaged in a discussion of the triple oppression of domestic workers. That is to say, their oppression was because they are African, because they are women and because they are poor. This discussion was to be understood within a specific historical context. The colonial and apartheid governments had restricted the education and jobs that were available to African people. The study noted that one of the jobs that was reserved for Africans was domestic work.[32] Since this work did not require formal skills, domestic workers were often subjected to cruel treatment and lack of labour law protection. This meant their employment could be terminated without notice, their wages would be reduced by their employers at will, in some instances the food they ate and other expenses a person incurs in their normal day-to-day living would be inhumanly deducted from their wages and they were never considered as actual employees to begin with.[33] The effects of not considering domestic workers as actual employees spilled over to our constitutional dispensation.

The chapter thus discussed the landmark case of *Mahlangu* v *Minister of Labour*.[34] In this matter, a domestic worker died by drowning in the premises of the employer. The issue connected to what is stated above regarding this group of poor African women not receiving any protection of labour laws. Section 1(xix)(v) of COIDA excluded domestic workers working in private households from the definition of the word 'employee' and this denied them compensation should they meet their death in the workplace whilst performing their duties. The Constitutional Court declared this provision of COIDA as being unconstitutional.[35] In essence, making a positive move towards protecting vulnerable African women.

Through adopting the concept of decolonisation, the study concluded that Victor AJ was correct and succeeded in decolonising employment law when she adopted a class based and pro

[32] KO Odeku 'Emancipating domestic workers: Challenges, interventions and prospects' (2014) 5(8) *Mediterranean Journal of Social Sciences* 672–677 at 672; see also P Bayane 'Sister-Madam': Family members navigating hiring of relatives as domestic workers in Nkowankowa, Limpopo' (2021) *Community, Work & Family* 1–13 at 2.
[33] Ibid.
[34] (2021) 42 *ILJ* 269 (CC).
[35] Ibid.

African approach to the problem, using the constitution's social justice aspirations as the base of her methodology as well as intersectionality of race, class and gender. The justice proved that the law does not and should not exist in a vacuum, that is to say, the social, political issues that poor African women face in the workplace must be understood as being intersectional in order for the law to be used effectively in establishing their protection.

However, the study found that the majority judgment had a flaw. In its discussion of the oppression of domestic workers within the context of their triple oppression, the judgment depicted African men as being the primary enforcers of the oppression of African women, alongside the white masters. This is simply an incorrect perspective. The researcher is of the view that the court, on this point, should have highlighted the position of African men in relation to the white master and the African women. This is more important in that the judgment seems to base the oppression by African men onto African women as being part of their customs. This too is false in that these customs were improperly codified and distorted by colonial powers to reflect their own views and impose their own norms on African societies.[36] These purported customary arrangements were the views of the then apartheid government onto the African women.

Jafta J, whilst also finding the provision of COIDA to be unconstitutional, was of the view that domestic workers were excluded from COIDA protection due to their occupation and not their race or gender as members of the SANDF were also excluded from such protection. To this minority judgment, the study found that Jafta J's approach went against the transformation and decolonisation agenda in that it tried to justify non protection of the poor African women (domestic workers) from COIDA by simply saying that others are excluded as well, and therefore this exclusion is not race or class based.

(a) Limitation of Chapter 4 and recommendation for future research

The researcher is of the view that the chapter could have been broadened to include a discussion of sexual harassment, an important element considering South Africa's fight against the pandemic of GBV which has found its way from the social setting into the workplace as well. However, due to the nature of the study, sexual harassment was not explored as the study was

[36] NL Morundi *The indiginisation of customary law: Creating an indigenous legal pluralism'* (LLM thesis, University of Pretoria, 2019); C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 8).

primarily concerned with the issue of race in the labour law perspective and only explored gender in relation to race in this chapter, not gender in the broader perspective. The chapter noted and recommended that there is a need for in-depth future research on this issue of GBV as Kubjana[37] suggests we do not yet have a fixed definition of the concept of sexual harassment and further questions if our statutes are suited to effectively address this issue.

VI RESEARCH FINDINGS OF CHAPTER 5

The key question in this chapter was, how can labour law be used to address the issue of commodifying employees? To engage with this, the sub-issue of the chapter was the question of whether labour is or is not a commodity to be bought and sold. The study largely borrowed from Marxist understanding of labour power in discussing the theoretical arguments in favour of this question and it also engaged in the practical side of South African labour law. As such, the study was persuaded that labour is indeed a commodity. The conclusion drawn by the study of labour being a commodity was due to the understanding that worker's labour is inseparable to themselves,[38] in essence making them slave-like despite receiving remuneration for services rendered.

The study found that the solution to combat this commodification of labour is through a decolonial perspective, that is the adoption of African socialism. This would be done through making employee share schemes mandatory in traditional businesses such as mining or farming. This would be effective when businesses are raising capital and attempting to transform the economy instead of looking to the black elite. This is so as this is already a scheme regulated by s 95(1)(c) Companies Act. The implications of this proposal by the study are that it could possibly lead to higher turnovers if workers are owners of the companies they work in. In essence, the study proposed that workers will be more motivated if they themselves are the owners of the means of production, not the commodity. The study recommends that future research should investigate this model proposed by the study.

Another issue the workers face in their commodification is labour brokerage. The study concluded that what makes this arrangement the commodification of the workers' labour power

[37] LL Kubjana 'Understanding the law on sexual harassment in the workplace (through a case law lens): A classic fool's errand' (2020) Obiter 88–105.
[38] H Laycock 'Exploitation via labour power in Marx' (1999) 3(2) *The Journal of Ethics* 121 at 121.

is, the worker has no control over when and how the third party terminates their services.[39] As such, the study recommends that what would assist in the move towards shutting down the commodification of workers is the total removal and outlaw of labour brokerage from South African labour law. This would be done through adopting already existing labour laws. The argument was that the practice of labour brokerage goes against S200A of the LRA with regards to who is presumed to be an employee. The implication of the recommendation of the study is that labour brokerage would be outlawed, getting rid of the 'middle person' and thus leading to the protection of the worker as any termination thereafter would be a dismissal, with labour law consequences and subject to the relevant labour laws.

(a) Limitation of Chapter 5

The limitation of this chapter is, since it was a general approach to the topic, it leaves it open to other scholars to engage further on this issue by going into greater detail regarding each and every provision of the LRA that commodifies or even attempts to not commodify the workers' labour.

VII RESEARCH FINDINGS OF CHAPTER 6

The key question of Chapter 6 was, what is the correct approach in dealing with racism in the workplace? This chapter comprised a discussion on the correct approach to racism in the workplace. South Africa has a history of racial slurs and racism within which racial relations and racial descriptors must be understood.[40] That is to say, historically the racial slur used to degrade African people is the K-word while Indian people are called the C-word.

The study concurred with the use of the common law means of addressing racism in the workplace. Common law provides for a trust relationship between employer and employee. This means the party that is placed in confidence, being the employee, cannot place themselves in a position where their interest conflicts with those of the employer.[41] When the employee conducts themselves in a racist manner, this violates the interests of the employer as the workplace

[39] *Mavata v Afrox Home Health Care* 1998 *ILJ* 931 (CCMA); C Bosch 'Contract as barrier to 'dismissal': The plight of the labour broker's employee' 2008 *ILJ* 831-840*; Sindane v Prestige Cleaning Services* 2009 BLLR 1249 (LC).
[40] S Mbowa 'Exploring the use of South African ethnic and racial slurs on social media' (2020) 3(1) *International Journal of Critical Diversity Studies* 54 at 54.
[41]MM Botha 'Managing racism in the workplace' 2018 (81) *THRHR* 672 at 675; see also *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177; *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2009) 6 SA 531 (SCA).

becomes toxic and unbearable to those on the receiving end.[42] Thus, forcing the employer to rid themselves of the employee with a misconduct by way of dismissal.

Another reason why the study concluded that racism should be met by the immediate dismissal of the perpetrator is that the researcher cannot fathom a circumstance which would be exceptional enough to allow a victim of racism to share a workplace with a racist person. If dismissal was procedurally fair, the employer should always be entitled to dismiss the perpetrating worker. The study further found that contrary to what the court had stated in its warning in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* regarding racism not always warranting dismissal,[43] the researcher is of the view that a more rigid and inflexible approach would send a strong warning to perpetrators of racism.

The chapter then discussed recent case law from the Constitutional Court.[44] The study found that in instances of alleged racism by a black person towards a white person, context is important. This is in light of the *Modikwa Platinum Mine (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* matter. The study stressed the importance of understanding that race-based identifications have no place in society let alone in the workplace. However, the researcher was of the view that in such instances, context is important in that it guides our society in understanding racial dynamics and power relations. That is to say, it is questionable to regard a historically and currently oppressed group of people who have no means of enforcing prejudice to be considered as the oppressor. That is not to say black people do not have prejudices, they simply lack the historical, cultural, social, cultural and economic means of enforcing such hypothetical prejudice. In simple terms, black people generally do not have the means and historical narrative of enforcing prejudice. [45]

The study also questions whether the term 'whites' as used by Ramapaedi in light of the history of the power dynamics between white people and black people is in fact a slur to begin with. The study drew from Lynne Tirrell[46] who defined a slur as an utterance uttered in a

[42] Ibid.
[43] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (1) SA 549 (CC) para 43.
[44] *Modikwa Platinum Mine (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* (2012) 33 ILJ 1733 (LC) para 2–4.
[45] *Duncanmec (Pty) Limited v Gaylard* 2018 (6) SA 335 (CC).
[46] L Tirrell 'Genocidal language games' (2012) in *Speech and Harm: Controversies over Free Speech* 174 at 175.

negative light to show contempt for the 'other' and with the aim of abusing the person against whom it is directed. The study concluded that there has not been a point in time in the history of South Africa or the continent of Africa in the broader sense where the term 'whites' has been used in negative light and with the aim of degrading white people.[47] The study concurred with Vice[48] that South Africa needs honest conversations regarding power relations and the politics of race.

However, with regards to the above argument, there is a limitation. The limitation being, the utterance of Ramapaedi clearly links to the identity of the victims as a group, which in a sense makes it more than a mere utterance.[49] Simply put, Ramapaedi was victimising a group of people not an individual. As such, the researcher is of the view that there must be further future investigation into this argument of alleged racism by a black person towards a white person.

With regards to the singing of race based struggle songs by employees whilst on the strike in *Duncanmec (Pty) Limited v Gaylard*[50] the study concluded as the arbitrator did in that the singing of race based songs in the workplace whilst being inappropriate, is not the same as referring to someone with a racial slur.[51] It simply isn't racism.

IX RESEARCH FINDINGS OF CHAPTER 7

The purpose of Chapter 7 was to discuss the link between race, class and the right to strike. The key question of this chapter was, is there a link between race, class and strikes? The study took a historical view and was only limited to three events that it considered as being major in shaping South African worker's history. The first event the study analysed was the Rand Rebellion of 1922. The study concluded that the event linked class to the right to strike in that it was poor white workers fighting against capitalism. With the contradiction of poor white miners oppressing African miners in the end result. The second event was the mine strike of 1946 which was caused by food shortages. This affected African miners the most and as such, they were forced to strike. The study concluded that this event linked race to strikes. Finally, what combined both race and class as being linked to strikes was the Marikana Massacre of 2012.

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[47] J Modiri 'Towards a "(post-)apartheid" critical race jurisprudence: "Divining our racial themes"' (2012) *Southern African Public Law* 232.
[48] Ibid; see also S Vice 'How do I live in this strange place?' (2010) *Journal of Social Philosophy* 323.
[49] J Botha 'The selection of victim groups in hate crime legislation' (2019) 136 *South African Law Journal* 781.
[50] 2018 (6) SA 335 (CC).
[51] Ibid para 17.

In summary, based this chapter the study concluded that it is often racial and class challenges that drive workers to fight for their demands. One such way used by workers of fighting for their demands is by way of a strike. It becomes unfortunate that in such strikes, workers end up being gunned down as was the case in Marikana. In simple terms, the researcher is of the view that race and class do have a link to industrial actions which often turn violent and deadly.

X RECOMMENDATIONS

The issue of decolonisation has been a topical in the Republic for a number of years now. The #fees must fall and Rhodes must fall were all indications that there is a need for the law to be changed to lean more towards African worker-friendly practices. The main theme for this study is whether there is a need to decolonise labour law and if so, how can one go about doing this. As expected in a desktop review research methodology, the study embarked on a marathon exercise to investigate this subject and present it through various chapters, from Chapter 1 to Chapter 7. To emphasise, the rationale for this study was to analyse labour law as more than just what the law is, at face value, but rather, to understand the law as being influenced by socio-political narratives. More so, labour law is the area of law the study deemed to be in need of a radical rethinking.[52] Hence, the topic of the thesis is 'The Reality of Decolonising Labour Law: A South African Perspective.' The topic denotes a need to engage with the reality of South African labour law and the need to decolonise it. This need to rethink labour law in a radical manner is based on the study's view of the current conceptualisation of this area of law as being flawed[53] in its lack of decolonial perspectives.[54] In an attempt to find solutions to this problem, the following research questions were posed in Chapter 1.

(a) What is decolonisation, and how does it link to labour law?
(b) What is critical race theory and what role can it play in the decolonisation of labour law?
(c) Has labour law advanced access to justice for the working class?

[52] MM Botha and E Fourie 'Decolonising the labour law curriculum in the new world of work' 2019 (82) *THRHR* 177 at 177.
[53] I Maqutu *The postcoloniality of labour law: A South African perspective* (Unpublished PhD thesis, University of KwaZulu-Natal, 2020) at 313.
[54] J Modiri 'The colour of law, power and knowledge: Introducing Critical Race Theory (CRT) in (Post) Apartheid South Africa' 2012 *SA Journal on Human Rights* 405 at 406.

(d) Have our legal institutions made any strides towards protecting the most vulnerable people in labour law, the poor African women?
(e) How can labour law be used to address the issue of commodifying employees?
(f) What is the correct approach in dealing with racism in the workplace?
(g) Is there a link between the race, class and the right to strike?

Informed by the discussions from Chapter 1 to the recommendations that follow here, it must be stated clearly that the recommendations proposed in this study may not be the final solutions but may assist as a start-up and highlighting a need to take the discussion forward.

The study suggests the use of critical race theory as one of the socio-political tools when examining labour law. CRT is generally regarded as a tool for examining the relationship between race and power,[55] in this study's context, it is a means of understanding the racial politics behind labour law. This is because the understanding of the social and political issues workers face and the socio-political issues that labour law is underpinned by,[56] go hand in hand with decolonisation and the use of critical race theory, as discussed below. All the key questions[57] addressed in the study were dealt with using these tools. The need for this recommendation is that South African legal institutions (the law, law makers and the courts) remain unchanged; as they are overridden with cultural chauvinism which is in favour of and unapologetically Eurocentric with a bias against African workers.[58] This is even more so in respect of women and the poor as discussed in Chapter 4.

If labour lawyers, scholars and other stakeholders want to effect positive change in this area of law, to obtain research findings that are to the protection of the vulnerable members of our society, they need to adopt decolonial thinking and CRT. The importance of this recommendation is that when scholars adopt an understanding of labour law that is rooted in decolonisation, they are able to enforce the transformative capability of this area of law.[59] An example where this is evident is in Chapter 2 where the *Uber South Africa*[60] case was discussed. Decolonisation was used in this study which led to the finding that piercing the labour law veil

[55] J Stefancic and R Delgado op cit note 15.
[56] G Davidov and B Langille *Labour Law After Labour: The Idea of Labour Law* (2011) at 16.
[57] See Chapter 1 and the beginning of each chapter summary in Chapter 8.
[58] Botha and Fourie op cit note 52.
[59] C Himonga op cit note 6.
[60] *Uber South Africa* supra 11.

would assist in protecting Uber drivers by having them regarded as being employees. This protection will be provided by piercing the sham of a 'separate' employer from the South African company.[61]

As a solution to the issue of access to justice for workers, the study recommends that the labour courts must consider issuing practice directives in their jurisdiction partially codifying the general rule that costs orders in labour matters do not follow the result. The worker does not have to pay costs orders if they lose their matter. This is a step that is necessary in the protection of the vulnerable worker who often does not have the same resources as the employer.

The researcher of this study is of the opinion that the court was correct in in the *Mahlangu*[62] case when it used a historical analysis of labour law and the South African society in its discussion of the events that led to the exclusion of domestic workers (poor, African, women) from the protection of labour law (COIDA). The study recommends that going forward, our courts must use the same strategy in offering protection to workers. The courts must discuss the history of the issue by having an understanding of the racial politics behind an issue and attempt to solve that issue through using the intersecting points of oppression of the worker. This is because often, the foundation of the problems workers face is racial, gender and class elements.

Concerning the commodification of workers and their labour, the study recommends that the solution to this problem would be the adoption of already existing laws, expanding them to the wider labour force. That is the adoption of s 95(1)(c) of the Companies Act which is a provision that regulates employee schemes. In traditional industries like mining, when employers are raising capital for their businesses, their starting point should be the workers, with the assistance of the relevant government ministry and trade unions the workers fall in, the workers must be partial owners of a business. This is a strategy that the study views as having the possibility of boosting the morality of the workers and maximising production outcomes while making workers own their labour, by owning the means of production.

[61] See discussion in Chapter 2 and Chapter 8.
[62] *Mahlangu* supra 34.

The issue of racism is a very difficult issue to deal with; it should be a thing of the past but it still affects our societies and it also finds its way to the workplace.[63] The study has suggested that to effectively deal with racism, there must be an inflexible approach which ensures that racism is always met with an immediate dismissal in the workplace.[64] That is to say, every employer must be mandated by the ministry of labour to have a zero tolerance policy on racism and must be mandated to have a written policy of dealing with racism in the workplace. On the contrary, due to the history of racism, racism being enforced by white people against black people,[65] going forward, the allegations of racism in a reverse scenario must be examined from a historical perspective.[66] That is based on the view that black people lack the historical, economic and social power to enforce racism whilst they can have prejudice.[67] Put plainly, black people cannot be racists towards white people because they do not have control over resources or systematic dominance.[68] To be clear, the researcher is of the view that the use of race and race-based undertones has no place in the workplace to begin with, irrespective of the 'race' of the alleged perpetrator.

XI CONCLUSION

This chapter performed the function of a synopsis. This chapter was a detailed summary of the thesis, engaging in the various findings and recommendations of the study. There were also limitations in the previous chapters that this chapter has highlighted. In theory, there is an infinite number of issues the study could have addressed regarding race and the offshoots of racial issues in the workplace. However, in reality, there was only a limited number of issues the study could address in order to be refined and focus on specific issues.

Perhaps the obvious limitation of the study is that it did not go into great detail regarding the concept of Africanisation. Makgoba[69] defines this concept as not being the exclusion of

[63] B Khumalo 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30(3) *South African Mercantile Law Journal* 377 at 377 and 378.
[64] See a different view provided in *South African Revenue Service* supra 43.
[65] See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (1) SA 549 (CC).
[66] For a reverse scenario, see *Duncanmec (Pty) Limited v Gaylard* 2018 (6) SA 335 (CC).
[67] J Modiri 'Race, realism and critique: The politics of race and Afriforum v Malema in the (in)equality court'(2013) *South African Law Journal* 274.
[68] A Roussell et al 'Impossibility of a "reverse racism" effect' (2017) *Criminology & Public Policy* 1 at 2.
[69] MW Makgoba *Mokoko: The Makgoba affair – a reflection on transformation* (1997) Florida: Vivlia.

Europeans and their culture, rather it is the inclusion of the way of life of African people. Louw[70] states that at this moment in time, in Africa, there is a sense amongst the continents' citizens that they no longer identify with the colonial masters of the global north, rather, with Africa in its own right.

The researcher is of the view that there is a need to further investigate further Africanisation and cases that deal with African culture. One such case is *Kievits Kroon Country Estate v Mmoledi*[71] were an employee was dismissed after she had told the manager that she needed to attend a traditional healer's course (*isangoma*) and she did furnish a certificate from her mentor. The reasoning behind her dismissal was that the traditional healer's certificate was not from a medical practitioner as provided for by the Basic Conditions of Employment Act.[72] Another example is the classic case of *Dlamini and Others v Green Four Security* [73] where security guards were prevented from having their natural hair in observation of their religion.

As such, the study poses a challenge to other scholars to further research not only the recommendations of future research proposed by the study, but also the limitations of the study.

[70] W Louw 'Africanisation: A rich environment for active learning on a global platform' (2010) 32(1) *Progressio* 42–54.
[71] (875/12) [2013] ZASCA 189
[72] Act 75 of 1997
[73] [2006] 11 BLLR 1074 (LC)

BIBLIOGRAPHY

Pre 1994 Statutes

Bantu Education Act 47 of 1953.

Bantu Laws Amendment Act 62 of 1964.

Basic Conditions of Employment Act 3 of 1983.

Black Education Act 47 of 1953.

Building Workers Act 27 of 1951.

Colonial Laws Validity Act 28 & 29 of 1865.

Industrial Conciliation Act 11 of 1924.

Industrial Conciliation Act 28 of 1956.

Labour Relations Act 28 of 1956.

Master and Servant Act 15 of 1856 (Cape) as amended by Acts 18 of 1873, 28 of 1874, 7 of 1875 and 30 of 1889.

Minimum Wages Act of 1925.

Mines & Works Act 12 of 1911.

Native Act of 1870.

Native Labour Regulations Act 15 of 1911.

Pass Law 3 of 1872.

Proclamation 1 of 1809.

Proclamation 24 of March 1858.

Proclamation of 23 April 1812.

Slave Emancipation Act of 1834.

Slave Trade Act of 1807.

Suppression of Communism Act 44 of 1950.

Wage Act 5 of 1957.

Post 1994 Statutes

Companies Act 71 of 2008.

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Constitution of the Republic of South Africa 1996.

Employment Equity Act 55 of 1998.

Labour Relations Act 66 of 1995.

National Minimum Wage Act 9 of 2018.

Government Gazettes

Government Gazette 45882, dated 07 February 2022.

United Nations Declarations and Conventions

United Nations Declaration on the Rights of Disabled Persons, 9 December 1975.

International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial, accessed 15 November 2022.

Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979 available at https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women, accessed 15 November 2022.

Conventions of the International Labour Organisation

Convention 11 of 1958 of the International Labour Organisation.

Case Law

AFGRI Operations limited v MacGregor (2013) 34 ILJ 2847 (LC).

Afriforum v Economic Freedom Fighters and Others (EQ 04/2020) [2022] ZAGPJHC 599

Afriforum v Malema 2011 (6) SA 240 (EqC).

Afrox Ltd v SACWU (2) 1997(9) BLLR 375 (LC).

Algoa Bus Company v SATAWU 2015 (36) ILJ 2292 (LC).

AMCU v Chamber of Mines of South Africa (2017) 38 *ILJ* 831 (CC).

April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group 2005 *ILJ* 2224 (CCMA).

Association for Mineworkers and Construction Union v Anglo Gold Ashanti Limited (2022) 43 *ILJ* 291 (CC).

Association of Mineworkers & Construction Union & others v Royal Bafokeng Platinum Ltd & others (2020) 41 ILJ 555 (CC).

Auf der Heyde v University of Cape Town (2000) 21 *ILJ* 1758 (LC).

Bapotrans (Pty) Ltd v Association of Mineworkers and Construction Union [2021] ZALCJHB 435.

Barnard in *Magistrates Commission and Others v Lawrence* [2022] 1 All SA 321 (SCA).

Bester v Small Enterprise Finance Agency SOC Ltd (2020) 41 *ILJ* 877 (LAC).

Bidvest Food Services (Pty) Ltd v National Union of Metalworkers of SA (2015) 36 ILJ 1292 (LC).

Biggar v City of Johannesburg, Emergency Management Services [2011] ZALCJHB 5.

Board Executors Ltd v McCafferty (1997) 18 *ILJ* 949.

Borcheds v CW Pearce and J Sherward t/a Lubrite Distributors (1993) 14 *ILJ* 1262 (LAC).

Brink v Kitshoff N.O. 1996 (4) SA 197 (CC).

Campbell Scientific Africa (Pty) Ltd v Simmers (CA 14/2014) [2015] ZALCCT 62 (23 October 2015).

Centre for Child Law v Media 24 Ltd 2020 (4) SA 319 (CC).

Ceppwawu obo Evans v Poly Oak 2003 (12) BALR 1324.

Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409 (CC).

City of Johannesburg Metropolitan Municipality v SAMWU (2009) 5 BLLR 431 (LC).

City of Johannesburg Metropolitan Municipality v SAMWU (2011) 7 BLLR 63 (LC).

Colonial Mutual Life Assurance v MacDonald 1931 AD 412.

Council for Scientific & Industrial Research v Fijen [1996] 6 BLLR 685 (A).

Crosnier v Easigas (Pty) Ltd (2016) 37 *ILJ* 1686 (LC).

Crotz v Worcester Transitional Local Council (2001) 22 *ILJ* 750 (CCMA).

Damons v City of Cape Town (CCT 278/20) [2022] ZACC 13.

Denel (Pty) Ltd v Gerber (2005) 26 *ILJ* 1256 (LAC).

Department of Correctional Services v Police and Prisons Civil Rights Union 2013 (4) SA 176 (SCA).

Dlamini and Others v Green Four Security (LD671/03, D671/2003) [2006] ZALC 4.

Dlamini and Others v Green Four Security [2006] 11 BLLR 1074 (LC).

Duncanmec (Pty) Limited v Gaylard 2018 (6) SA 335 (CC).

Du Preez v Minister of Justice and Constitutional Development 2006 (5) SA 592.

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).

Equity Aviation Services (Pty) Ltd v CCMA & others (2008) 29 ILJ 2507 (CC).

FAWU v Rainbow Chicken Farms (2000) 21 *ILJ* 515 (LC).

Floraline v SASTU 1997 (9) BLLR 1223 (LC).

Food and Allied Workers Union v Ferucci t/a Rosendal Poultry Farm (1992) 13 *ILJ* 1271 (LC).

Footwear Trading CC v Mdlalose (2005) 5 BLLR 452 (LAC).

Gaga v Anglo Platinum Ltd (2012) 33 *ILJ* 329 (LAC).

George v Liberty Life Association of Africa Ltd (1996) 17 *ILJ* 571 (IC).

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

Hamata and Another v Chairperson, Peninsula Technikon Internal disciplinary Committee and Other 2002 (5) SA 449 (SCA).

Harksen v Lane N.O 1998 (1) SA 300 (CC).

Hassam v Jacobs N.O 2009 (5) SA 572 (CC).

IMA WU v Greater Louis Trichardt Transitional Local Council (2000) 21 *ILJ* 1119 (LC).

Imatu v City of Cape Town 2005 26 *ILJ* 1404 (LC).

In2Food (Pty) Ltd v Food & Allied Workers Union (2013) 34 *ILJ* 2589 (LC).

J and JN Freeze Trust v The Statutory Council for the Squid and Related Fisheries of South Africa (2011) 32 ILJ 2966 (LC).

Jooste v Score Supermarket Trading (Pty) Ltd 1999 (2) SA 1 (CC).

Khosa v Minister of Social Development 2004 (6) SA 505 (CC).

Kievits Kroon Country Estate v Mmoledi (875/12) [2013] ZASCA 189.

Kroukamp and Another v The Minister of Justice and Constitutional Development (74236/2013) [2021] ZAGPPHC 526

Kroukamp v The Minister of Justice and Constitutional Development (74236/2013) [2021] ZAGPPHC 526

Lewis & Another v Contract Interiors CC (2001) 22 *ILJ* 466 (LC).

Liberty Life Association of Africa Ltd v Niselow (1996) 17 *ILJ* 673 (LAC).

Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo (2007) 28 *ILJ* 1100 (CC).

Long v SA Breweries (Pty) Ltd & others 2019 (40) *ILJ* 965 (CC).

Lufil Packaging (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd) v Commission for Conciliation, Mediation and Arbitration (2019) 40 *ILJ* 2306 (LAC).

Magistrates Commission and Others v Lawrence 2022 (4) SA 107 (SCA)

Mahlangu and Another v Minister of Labour and Others (2021) 42 *ILJ* 269 (CC).

Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC).

Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC).

Makhanya v St Gobain [2019] 7 BALR 720 (NBCCI).

Mandla v LAD Brokers (Pty) Ltd 2000 BLLR 1047 (LC).

Mangaung Local Municipality v SA Municipal Workers Union (2003) 24 *ILJ* 405 (LC).

Mavata v Afrox Home Health Care 1998 *ILJ* 931 (CCMA).

McDonalds Transportation Upington (Pty) Limited v Association of Mineworkers and Construction Union (2016) 37 ILJ 2593 (LAC).

McGregor v Public Health and Social Development Sectoral Bargaining Council (2021) 42 *ILJ* 1643 (CC).

MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani (2005) 2 All SA 479 (SCA).

MEC for Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC).

Medical Association of South Africa v Minister of Health (1997) 18 *ILJ* 528 (LC).

Member of the Executive Council for Finance: KwaZulu-Natal v Dorkin N.O [2008] 29 *ILJ* 1707 (LAC).

Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association 2018 (5) SA 349 (CC).

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC).

Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC).

Minister of Home Affairs v National Institute for Crime Prevention 2005 (3) SA 280 (CC).

Modikwa Mining Personnel Services v Commission for Conciliation Mediation and Arbitration and Others (JR1904/2010) [2012] ZALCJHB 61 (29 June 2012).

Modikwa Platinum Mine (Pty) Ltd v Commission for Conciliation Mediation and Arbitration (2012) 33 ILJ 1733 (LC).

Moresport (Pty) Limited v Commissioner for the South African Revenue Service (36853/2006) [2008] ZAGPHC 95 (27 March 2008).

Motala v University of Natal 1995 (3) BCLR 374 (D).

Multiquip (Pty) Ltd and Another v National Union of Metalworkers of South Africa (D 477-20) [2021] ZALC 7 (17 August 2021).

Nape v INTCS Corporate Solutions (Pty) Ltd [2010] 8 BLLR 852 (LC).

Naptosa v Minister of Education, Western Cape 2001 *ILJ* 889 (C) 897.

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

National Education Health & Allied Workers Union v Ramodise (2010) 31 ILJ 695 (LC);

National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) (2020) 41 (ILJ) 1846 (CC).

National Union of Metalworkers of SA v SA Five Engineering (Pty) Ltd 2007 *ILJ* 1290 (LC).

National Union of Metalworkers of South Africa & others v Bader Bop (Pty) Ltd 2003 (3) SA 513 (CC).

National Union of Mineworkers obo Mabote v Commission for Conciliation, Mediation and Arbitration (2013) 34 *ILJ* 3296 (LC).

National Union of Mineworkers obo Masha and Others v SAMANCOR Limited (Eastern Chromes Mines) (2021) 42 ILJ 1881 (CC).

National Union of Mineworkers v East Rand Gold & Uranium Co Ltd (1991) 12 *ILJ* 1221 (A).

Nestoil plc v National Union of Petroleum and Natural Gas Workers Suit No: NIC/LA/08/2010.

Ntsabo v Real Security CC (2003) 4 ILJ 2341 (LC).

NUM obo Mabote v Commission for Conciliation, Mediation and Arbitration (2013) 34 ILJ 3296 (LC).

Ongevallekommisaris v Onderlinge Versekeringsgenootskap AVBOB 1976 (4) SA 446 (A).

Qwelane v South African Human Rights Commission 2020 (2) SA 124 (SCA).

Pharmaco Distribution (Pty) Ltd v EWN (2017) 38 ILJ 2496 (LAC).

Phillips v Fieldstone Africa (Pty) Ltd [2004] 1 All SA 150 (SCA).

POPCRU v SACOSWU (2018) 39 *ILJ* 2646 (CC).

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC).

President of the Republic of South Africa and Others v Gauteng Lions Rugby Union 2002 (2) SA 64 (CC).

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC).

Pretoria City Council v Walker 1998 (2) SA 363 (CC).

Public Protector v SA Reserve Bank 2019 (6) SA 253 (CC)

Public Servants Association of SA v Minister of Justice (1997) 18 *ILJ* 241 (T).

Qwelane v South African Human Rights Commission 2021 (6) SA 579 (CC).

R v R 2018 (3) SA 507 (WCC).

R v AMCA Services Ltd 1954 (4) SA 208 (A).

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 (AD).

Rumbles v Kwa Bat Marketing (Pty) Ltd (2003) 24 *ILJ* 1587 (LC).

Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union (2001) 22 ILJ 2035 (LC).

S v Makwanyane 1995 (3) SA 391 (CC).

S v Tshabalala 2020 (5) SA 1 (CC).

SA Broadcasting Corporation Ltd v Grogan N.O (2006) 27 *ILJ* 1519 (LC).

SA Chemical Catering & Allied Workers Union v Check One (Pty) Ltd (2012) 33 ILJ 1922 (LC).

SA Commercial, Catering and Allied Workers Union & others v Woolworths (Pty) Ltd (2019) 40 ILJ 87 (CC).

SA Custodial Management (Pty) Ltd (2021) 42 ILJ 237.

SA Maritime Safety Authority v McKenzie [2010] 5 BLLR 488 (SCA).

SA Transport & Allied Workers Union of SA v PUTCO Ltd (2016) 37 ILJ 1091 (CC)

SAAP v SAA (SOC) Limited [2021] ZALCJHB 57.

SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd [2006] 8 BLLR 737 (LC).

SATAWU v Coin Reactions (2005) 26 *ILJ* 1507 (LC).

Security Services Employers Organisation v SA Transport & Allied Workers Union (SATAWU) (2012) 35 ILJ 1693 (CC).

September v CMI Business Enterprise CC 2018 (39) *ILJ* 987 (CC).

Shoprite Checkers (Pty) Ltd v Samka (2018) 39 ILJ 2347 (LC).

Siemens Ltd v. NUMSA 11 *ILJ* 610 (ARB) (CCMA 1990).

Sindane v Prestige Cleaning Services 2009 BLLR 1249 (LC).

Singh v Minister of Justice and Constitutional Development 2013 (3) SA 66.

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A).

Solidarity v Department of Correctional Services 2016 (5) SA 594 (CC).

South African Airways (Pty) Ltd v V and Another (2014) 35 *ILJ* 2774 (LAC).

South African Broadcasting Corporation v McKenzie 1999 *ILJ* 585 (LAC).

South African Municipal Workers Union obo Damons v City of Cape Town (2018) 39 *ILJ* 1812 (LC).

South African Police Service v Solidarity obo Barnard 2014 6 SA 123 (CC).

South African Police Service v Solidarity obo Barnard (2014) 35 ILJ 2981 (CC).

South African Post Office v TAS Appointment and Management Services CC [2012] 6 BLLR 621 (LC).

South African Restructuring and Insolvency Practitioners Association (SARIPA) v Minister of Justice and Constitutional Development; *In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development* 2015 2 SA 430 (WCC).

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

South African Transport and Allied Workers Union and Another v Garvas and Others (2012) 33 ILJ 1593 (CC).

Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration (2008) 29 *ILJ* 1239 (LC).

State of Information Technology Agency (Pty) Ltd v Commission for Conciliation Mediation & Arbitration and Others (2008) 29 *ILJ* 2234 (LAC).

Stoman v Minister of Safety and Security & others 2002 (3) SA 468 (T).

TDF Network Africa (Pty) Ltd v Faris (2019) 40 ILJ 326 (LAC).

Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467.

Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO (2007) 28 ILJ 1827 (LC).

Transport and General Workers Union and Others v Coin Security Group (Pty) Ltd (2001) 22 *ILJ* 968 (LC).

Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union (2012) 33 ILJ 998 (LC).

Turner v Jockey Club of SA 1974 (3) SA 633 (A).

Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers (2018) 39 ILJ 903.

Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others (2021) 42 ILJ 2371 (CC).

Universal Church of the Kingdom of God v Myeni (2015) 36 *ILJ* 2832 (LAC) (28 July 2015).

Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd [1997] 7 BLLR 906 (LC) 910.

Van Zyl v WCPA Department of Transport (2004) 25 *ILJ* 2060.

Vilane v SITA (Pty) Ltd 2008 BALR 486 (CCMA).

Volvo (Southern Africa) (Pty) Ltd v Yssel (2009) 6 SA 531 (SCA).

Walljee & others v Capacity Outsourcing (2012) 33 *ILJ* 1744 (LC).

White v Pan Palladium SA (Pty) Ltd (2006) 27 *ILJ* 2721 (LC).

Zungu v Premier of the Province of KwaZulu-Natal (2018) 39 *ILJ* 523 (CC).

Articles

Morris B Abram ‘Affirmative action: Fair shakers and social engineers’ (1986) 99 *Harv Law Rev* 1312–1346.

Catherine Albertyn ‘Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice’ (2018) *SAJHR* 441–468.

Catherine Albertyn & Janet Kentridge ‘Introducing the right to equality in the interim constitution’ (1994) *SAJHR* 149–178.

Catherine Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23:2 *SAJHR* 253–276.

Jean Allain & Kevin Bales ‘Slavery and its definition’ (2012) 14(2) *Global Dialog* 1–8.

Penelope Andrews ‘From gender apartheid to non-sexism: The pursuit of women’s rights in South Africa’ (2001) 26 *N.C. J Int Law Commer Regul* 693–722.

Mark Anstey ‘Marikana – and the push for a new South African pact’ (2013) *SAJLR* 133–145.

JS Arndt ‘What’s in a word? Historicising the term ‘Caffre’ in European discourses about Southern Africa between 1500 and 1800’ (2018) 44(1) *J South* 59–75.

Adrienne Asch ‘Critical race theory, feminism, and disability: Reflections on social justice and personal identity’ (2001) 62(391) *Ohio State Law J* 391–423.

Percyval Bayane ‘Sister-Madam’: Family members navigating hiring of relatives as domestic workers in Nkowankowa, Limpopo’ (2021) *Community Work Fam* 1–13.

Robin Barnes ‘Politics and passion: Theoretically a dangerous liaison’ (1992) 101 *Yale Law J* 1631–1659.

Mark Beittel ‘Labor unrest in South Africa, 1870–1990’ (1995) 18(1) *Rev Fernand Braudel Center* 87–104.

Derrick Bell ‘Who's afraid of critical race theory’ (1995) 4 *Univ Ill Law Rev* 893–910.

Derrick Bell ‘Xerces and the Affirmative Action Mystique’ (1989) 57(6) *George Wash Law Rev* 1595–1613.

Paul Benjamin ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845–872.

Paul Benjamin & Jan Theron ‘Costing, comparing and competing: The World Bank’s doing business survey and the benchmarking of labour regulation’ (2009) *ActJur* 207–208.

Yann Béliard ‘A “Labour war” in South Africa: The 1922 Rand Revolution in Sylvia Pankhurst’s Workers’ Dreadnought’ (2016) 57 (1) *Labor Hist* 20–34.

Johan S Bergh '"To make them serve": The 1871 Transvaal Commission on African Labour as a source for Agrarian history' (2002) 29 *History in Africa* 39–61.

Johan S Bergh 'White farmers and African labourers in the pre-industrial Transvaal' (2010) 55(1) *Historia* 18–31.

Sarah Blandy 'Socio-legal approaches to property law research' (2014) 3 (3) *Prop Law Rev* 166–175.

Jeffrey Bone 'Legal perspectives on corporate responsibility: Contractarian or communitarian thought?' 2011 *CJLJ* 277–304.

Craig Bosch 'Contract as barrier to 'dismissal': The plight of the labour broker's employee' 2008 *ILJ* 831–840.

Anri Botes 'Identifying sexual harassment in the workplace? Do not forget to remember the Code of Good Practice' (2015) 36 (3) *ILJ* 1719–1747.

Anri Botes 'A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments' (2015) 132(1) *S Afr Law J* 100–121.

Derek Botha 'Confusion in the King Report' 1996 *SA Merc LJ* 26–39.

Monray Marsellus Botha 'Managing racism in the workplace' (2018) 81 *THRHR* 671–681.

Monray Marsellus Botha 'The different worlds of labour and company law: Truth of myth' (2014) 17(5) *PER* 2042–2103.

Joanna Botha 'The selection of victim groups in hate crime legislation' (2019) 136 (4) *South African Law Journal* 781–810.

Joanna C Botha and Avinash Govindjee 'The Regulation of Racially Derogatory Speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' 2016 *SAJHR* 293–320.

Joanna C Botha & Avinash Govindjee 'Hate speech provisions and provisos: A response to Marais and Pretorius and proposals for reform' (2017) (20) *PELJ* 1–37.

Monray Marsellus Botha & Elmarie Fourie 'Decolonising the labour law curriculum in the new world of work' 2019 (82) *THRHR* 177–192.

Monray Marsellus Botha & Motsoane Lephoto ‘An employer's recourse to lock-out and replacement labour: An evaluation of recent case law’ 2017 *PER* 1–31.

Martin Brassey ‘The Employment Equity Act: Bad for employment and bad for equity’ 1998 *Ind Law J* 1359–1366.

Martin Brassey ‘The nature of employment’ (1990) 11 *Ind Law J* 889–936.

Keith Breckenridge ‘The book of life: The South African population register and the invention of racial descent, 1950–1980’ (2014) 40 *Kronos* 226–240.

Keith Breckenridge ‘Fighting for a White South Africa: White working-class racism and the 1922 rand revolt’ (2007) 57 (1) *S Afr Hist J* 228–243.

Keith Breckenridge ‘Power without knowledge: Three 19th century colonialisms in South Africa’ 2008 *J Natal Zulu Stud* 3–33.

Alfred L Brophy ‘Race, class, and the regulation of the legal profession in the progressive era: The case of the 1908 canons’ (2003) 12 *Cornell J Law Public Policy* 607–624.

Alexander Brown ‘What is hate speech? Part 1: The myth of hate speech’ (2017) 36 *Law Philos* 419–468.

Mpfariseni Budeli-Nemakonde 'Workers' right to freedom of association and trade unionism in South Africa: An historical perspective' (2009) 15(2) *Southern African Society of Legal Historians, Fundamina: A Journal of Legal History* 57–74.

Mpfariseni Budeli-Nemakonde ‘Understanding the right to freedom of association at the workplace: Components and scope’ 2010) *Obiter* 16–33.

Mpfariseni Budeli-Nemakonde ‘The protection of workers’ right to freedom of association in international and regional human rights systems’ (2009) 42(1) *De Jure* 136–138.

Robert Chang and Jerome McCristal Culp Jr ‘After Intersectionality’ University of *Missouri Kansas City Law Review* 2002 71(2) 486 – 492.

Mohamed Alli Chicktay ‘Defining the right to strike: A comparative analyses of International Labour Organisation Standards and South African Law’ (2012) 33(2) *Obiter* 260–277.

Zahid R Chaudhary ‘Subjects in difference: Walter Benjamin, Frantz Fanon, and Postcolonial Theory’ (2012) 23 (1) *A Journal of Feminist Cultural Studies* 151–183.

Tammy Cohen ‘Debunking the legal fiction – Dyokhwe v De Kock No & others’ (2012) 33 *ILJ* 2318–2328.

Kimberle W Crenshaw ‘Mapping the margins: Intersectionality, identity politics, and violence against women of color’ (1991) 43 *Stanford Law Rev* 1241.

Kimberle W Crenshaw ‘Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics’ 1989 *University of Chicago Legal* 139–168.

Kimberle W Crenshaw ‘The first decade: Critical reflections, or 'A foot in the closing door’ (2002) 49 *UCLA Law Rev* 1343–1373.

Adam Croom ‘How to do things with slurs: Studies in the way of derogatory words’ (2013) 33(3) *Lang Commun* 177–204.

Adam Croom (2008) ‘Racial epithets: What we say and mean by them’ (2008) 51 *Dialogu* 34–45.

Adrienne D Davis ‘Identity notes part one: Playing in the light’ (1996) 45 *Am Univ Law Rev* 695–705.

Vivian de Klerk (2011). ‘A nigger in the woodpile? A racist incident on a South African university campus’ (2011) 2(3) *J Lang Cult* 39–49.

Richard Delgado ‘Affirmative action as a majoritarian device: Or do you really want to be a role model?’ (1991) 89 *Mich Law Rev* 1222–1231.

Richard Delgado ‘Words that wound: Tort action for racial insults, epithets, and name-calling’ (1982) 17(1) *Harv Civ Rights-Civ Lib Law Rev* 133–182.

Richard Delgado & Jean Stefancic ‘Critical race theory: Past, present, and future’ (1998) 51(1*) Curr Leg Probl* 467–491.

Richard Delgado & Jean Stefancic ‘Critical race theory and criminal justice’ (2007) 31(2–3) *Humanity Soc* 133–145.

Janet Dine ‘Company law developments in the European Union and the United Kingdom: Confronting diversity’ (1998) 1(2) *TSAR* 248–259.

Ndumiso Dladla ‘Decolonising the university in South Africa -- A precondition for justice’ in AISA (ed) *Peace and Security for African Development* (2012) 160–174.

Peter Delius & Stanley Trapido ‘Inboekselings and Oorlans: The creation and transformation of a servile class’ (1982) 8 *J South Afr Stud* 214–242.

Pierre De Vos ‘Grootboom, the right of access to housing and substantive equality as contextual fairness’ (2001) 17(2) *SAJHR* 258–276.

Pierre De Vos ‘Substantive equality after Grootboom: The emergence of social and economic context as a guiding value in equality jurisprudence’ (2001) 52 *Acta Juridica* 52–69.

Fiona M Donald & Lerato Mahlatji ‘Domestic workers and oppression in South Africa’ (2006) *2 J Psychol Afr* 205–214.

S Dubow ‘Racial irredentism, ethnogenesis, and white supremacy in high-apartheid South Africa’ (2015) 41 *Kronos* 236–264.

Ockert Dupper ‘Affirmative action and substantive equality: The South African experience’ (2002) 14(2) *SAMJL* 275–292.

Ockert Dupper ‘In defence of affirmative action in South Africa’ (2004) 121 *S Afr Law J* 189–215.

John Dugard ‘International law and the South African Constitution’ (1997) 8 *Eur J Int Law* 77–92.

Jackie Dugard ‘Bringing Gender and Class into the Frame: An Intersectional Analysis of Decoloniality-as-race Critique of the Use of Law for Social Change’ (2021) 32(1) *Stellenbosch Law Review* 29.

Darcy du Toit ‘Extending the frontiers of employment regulation: The case of domestic employment in South Africa’ (2010) 14 *Law Democr Dev* 205–230.

Terry Eastland ‘The case against affirmative action’ 1992 *William & Mary Law Rev* 33–52.

Nancy Ehrenreich 2002 ‘Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems’ 2002 *University of Missouri Kansas City Law Review* 251.

Richard H Fallon ‘To each according to his ability, from none according to his race: The concept of merit in the Law of Antidiscrimination’ 1990 *Boston Univ Law Rev* 815–878.

Julio Faundez ‘Promoting affirmative action’ 1994 (11) 4 *S Afr Law J* 1187–1194.

Emma Fergus & Shane Godfrey ‘Organising and bargaining across sectors in South Africa: Recent developments and potential problems’ (2016) 37 *ILJ* 2211–2236.

Bianca Fisher, Mduduzi Biyase, Frederich Kirsten & September Rooderick ‘Gender wage discrimination in South Africa within the affirmative action framework’ 2020 EDWRG Working Paper Number 1–20.

S Flint 'The protection of domestic workers in South Africa: A comparative study' (1988) 9 *ILJ* 187–201.

Johan Fourie ‘The remarkable wealth of the Dutch Cape Colony: Measurements from eighteenth century probate inventories’ (2013) 66(2) *Econ Hist Rev* 419–448.

Johan Fourie, Ada Jansen & Krige Siebrits ‘Public finances under private company rule: The Dutch Cape Colony (1652–1795)’ (2013) 68 *New Countree* 51–71.

Sandra Fredman ‘Providing equality: Substantive equality and the positive duty to provide’ (2005) 21(2) *SAJHR* 163–190.

Sandra Fredman ‘Substantive equality revisited’ (2016) 14(3) *Int J Const Law* 712–738.

Sandra Fredman ‘Redistribution and recognition: Reconciling inequalities’ (2007) 23 *SAJHR* 214–234.

Deborah Gaitskell, Judy Kimble, Moira Maconachie & Elaine Unterhalter “Class, race and gender: Domestic workers in South Africa” (1983) 27(28) *ROAPE* 86–108.

Johan Galtung 'Violence, peace, and peace research' (1969) 6 (3) *J Peace Res* 167–191.

Noel Garson 'Smuts and the idea of race' (2007) 57(1) *S Afr Hist J* 153–178.

Willem Gravett ‘Of “Deconstruction” and “Destruction” – Why Critical Legal Theory cannot be the Cornerstone of the LLB Curriculum’ (2018) 135(2) *SALJ* 385 – 323.

Adam David Gearey ‘WEB du Bois ambiguous politics of liberation: Race, marxism and pan Africanism’ (2012) 1(3) *CJRL* 265–272.

Judith Geldenhuys and Michelle Kelly-Louw ‘Hate speech and racist slurs in the South African context: Where to start?’ (2020) 23 *PELJ* 1–46.

Veronica Gentilli ‘A double challenge for critical race scholars: The moral context’ (1992) 65 *South Calif Law Rev* 2361–2386.

D Gillborn ‘Racism as policy: A critical race analysis of education reforms in the United States and England’ (2014) 78 (1) *Educ F* 26–41.

Rebecca Ginsburg ‘Come in the dark: Domestic workers and their rooms in apartheid-era Johannesburg, South Africa’ (2000) 8 *PVA* 83–100.

Bentley Glass ‘Racism and eugenics in international context’ (1993) 68 (1) *Q Rev Biol* 61–67.

Daphna Golan ‘The life story of King Shaka and gender tensions in the Zulu state’ (1990) 17 *Hist Afr* 95–111.

Leo Goodstadt 'Labour – Just another commodity for sale' (1979) 8(3) *Anglo-Am Law Rev* 160–174.

Neil Gotanda ‘A critique of "our constitution is colorblind’ (1991) 44 *Stanford Law Rev* 1–68.

BC Graham ‘Slavery at the Cape’ (1933) 50(1) *S Afr Law J* 4–12.

Linda S Greene ‘Critical Race Theory: Origins permutations, and current queries’ (2021) 2 *Wis Law Rev* 259–268.

Andrew W Haines ‘The critical legal studies movement and racism: Useful analytics and guides for social action or an irrelevant modern legal scepticism and solipsism?’ (1987) 13(4) *William Mitchell Law Rev* 685–736.

Chris Hallinan & Stella Coram ‘Critical race theory and the orthodoxy of race neutrality: Examining the denigration of Australian indigenous athlete Adam Goodes’ 2017 *AAS* 99–111.

Vivian E Hamilton ‘Reform, retrench, repeat: The campaign against critical race theory, through the lens of critical race theory’ (2021) 28(1) *RGSJ* 61–102.

Cheryl I Harris ‘Whiteness as property’ (1993) 106 *Harv Law Rev* 1707–1791.

Donald R Harris ‘The development of socio-legal studies in the United Kingdom’ (1983) 3 *Legal Studies* 315–333.

Suzanna Harvey ‘Labour brokers and workers’ rights can they co-exist in South Africa?’ (2011) 128 *S Afr Law J* 100–127.

Savo Heleta ‘Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa’ (2016) 1(1) *Transform High Educ* 1–8.

Savo Heleta ‘Decolonizing knowledge in South Africa: Dismantling the “pedagogy of big lies”’ (2018) 40(2) *Ufahamu: J Afr Stud* 48–65.

Chuma Himonga ‘The constitutional court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law’ 2017 *Acta Juridica* 101–123.

Chuma Himonga & Fatimata Diallo ‘Decolonisation and teaching law in Africa with special reference to living customary law’ 2017 *PER* 1–19.

Charles Hirschman ‘The origins and demise of the concept of race’ (2004) 30(3) *Popul Dev* 385–415.

David Holness ‘Improving access to justice through law graduate post-study community service in South Africa’ 2020 *PER* 1–24.

Bonny Ibhawoh & JI Dibua ‘Deconstructing Ujamaa: The legacy of Julius Nyerere in the quest for social and economic development in Africa’ (2003) 8(1) *Afr J Pol Sci* 59–83.

Wilmot G James ‘Grounds for a strike: South African gold mining in the 1940s’ (1987) 16 *Afr Econ Hist* 1–22.

Jonathan Jansen ‘The problem with decolonisation: entanglements in the politics of knowledge’ 2023 61(1) *Journal of Modern African Studies* 139-156.

Sandra Fullerton Joireman ‘Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy’ (2001) 39(4) *J Mod Afri Stud* 571–596.

Tanveer Rashid Jeewa & Jatheen Bhima ‘Discriminatory language: A remnant of colonial oppression’ (2021) 11 *Const Court Rev* 323–339.

SD Johnson ‘Darwin’s legacy in South African evolutionary biology’ (2009) 105 (11-12) *S Afr J Sci* 403–409.

Richard A Jones ‘Philosophical methodologies of critical race theory’ (2009) 1(1) *MCRP* 17–40.

Bernie D Jones 'When critical race theory meets legal history' (2006) 8(1) *Rutgers L Rev* 1–26.

Charline Jordaan & Wilfred Isioma Ukpere ‘South African Industrial Conciliation Act of 1924 and current Affirmative Action: An analysis of labour’ (2011) 5(4) *Afr J Bus Manag* 1093–1101.

Henry Kah ‘Kwame Nkrumah and the pan African vision: Between acceptance and rebuttal’ 2016 *Austral Braz J Strategy Int Relat* 141–164

Andrew Kaye ‘Apartheid Labour Legislation in South Africa’ 1976–1977 (5) *Ind Labor Relat Rev* 5–22.

Bongani Khumalo 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30(3) *SA Merc Law* J 377–394.

JB Knight and MD McGrath ‘The erosion of apartheid in the South African labour market: Measures and Mechanisms' (1987) Applied Economics Discussion Paper No. 35, Oxford Institute of Economics and Statistics.

Anton Kok ‘The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature-driven societal transformation?’ (2008) *Stell LR* 122–142.

Anis Mahomed Koradia ‘Labour broking: Modern slavery or capitalist necessity’ (2013) 1(6) *AJBMR* 20–24.

Lux Lesley Kubjana ‘Understanding the law on sexual harassment in the workplace (through a case law lens): A classic fool's errand’ 2020 *Obiter* 88–105.

Heinz D Kurz ‘Marx and the law of value: A critical Appraisal of on the occasion of his 200th birthday’ 2018 *Investigación Económica* 77(304) 40–71.

Gloria Ladson-Billings ‘Just what is critical race theory and what’s it doing in a nice field like education?’ (1998) 11(1) *Int J Qual Stud Educ* 7–24.

Pius Langa ‘Transformative constitutionalism’ (2006) 3 *Stellenbosch Law Rev* 352–353

Tom Langford ‘Strikes and class consciousness’ (1994) 34 *Labour* 107–137.

Brian Langille ‘Labour law is not commodity’ (1998) 19(5) *Industrial Law Journal* 1002.

Anna Lawson ‘Disability law as an academic discipline: Towards cohesion and mainstreaming?’ (2020) 47 *J Law Soc* 558–587.

Henry Laycock ‘Exploitation via labour power in Marx’ (1999) 3(2) *J Ethics* 121–131.

Lesley le Grange ‘Decolonising, Africanising, indigenising, and internationalising curriculum studies: Opportunities to (re)imagine the field’ (2018) (74) *J Educ* 4–18.

Rochelle le Roux ‘The evolution of the contract of employment in South Africa’ (2010) 39(2) *ILJ* 139–165.

Tebello Letsekha ‘Revisiting the debate on the Africanisation of higher education: An appeal for a conceptual shift’ (2013) 8 *IJTL* 5–18.

Jeremy I Levitt ‘Beyond borders: Martin Luther King, Jr., Africa, and pan Africanism’ (2017) 31(1) *Temple Int Comp Law J* 301–324.

Bruce G Link & Jo C Phelan ‘Conceptualizing stigma’ 2001 *Annu Rev Sociol* 363–385.

Joseph W Little ‘Affirmative action: Legal bases and risks in the United States and South Africa’ 1994 *Stellenbosch Law Rev* 262–275.

Douglas E Litowitz ‘Some critical thoughts on critical race theory’ (1997) 72(2) *Notre Dame Law Rev* 503–530.

Louw, W ‘Africanisation: A rich environment for active learning on a global platform’ (2010) 32(1) *Progressio* 42–54.

Fanelesibonge Mabaso ‘A much needed reaffirmation of a settled principle of law: Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others’ (2021) 42 ILJ 2371 (CC) (2022) 43 ILJ 1522’ (2022) 2 *ILJ* 1522.

Phyllis MacRae ‘Race and class in Southern Africa’ (1974) 4(2) *Afr Rev: J Afr Pol Dev Int Aff* 237–257.

Tshepo Madlingozi ‘Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution’ (2017) 1 *Stellenbosch Law Rev* 123–147.

Ben Maddison ‘Labour commodification and classification: An illustrative case study of the New South Wales boilermaking trades, 1860–1920’ (2008) 53(2) *Int Rev Soc Hist* 235–260.

Bernard Magubane ‘The mounting class and national struggles in South Africa’ (1984) 8(2) *Rev Fernand Braudel Center* 197–231.

Amy Maguire ‘Contemporary anti-colonial self-determination claims and the decolonisation of international law’ (2013) 22(1) *Griffith Law Rev* 238–268.

Tayyab Mahmud ‘Cheaper than a slave: Indentured labor, colonialism, and capitalism' (2013) 34(2) *Whittier Law Rev* 215–243.

Saul Porsche Makama & Lux Lesley Kwena Kubjana ‘Collective bargaining misjudged: The Marikana massacre’ (2021) 42(1) *Obiter* 39–56.

Mahmood Mamdani ‘Between the public intellectual and the scholar: Decolonization and some post independence initiatives in African higher education’ 2016 *Inter-Asia Cult Stud* 68–83.

Lindiwe Maqutu ‘The concept of labour in South African law’ (2020) 26(1) *Fundamina* 42–90.

ME Marais and JL Pretorius ‘A contextual analysis of the hate speech provisions of the Equality Act’ (2015) 18(4) *PELJ* 901–942.

Peter Margulies ‘Inclusive and exclusive virtues: Approaches to identity, merit, and responsibility in recent legal thought’ (1997) 46(4) *Catholic Univ Law Rev* 1109–1161.

Martine Mariotti ‘Labour markets during apartheid in South Africa’ (2012) 65(3) *Econ Hist Rev* 1100–1122.

Igor Martins ‘An act for the abolition of the slave trade: The effects of the import ban on Cape Colony slave holders’ (2019) 43 *Afri Econ Hist Netw* 1–45.

Mari J Matsuda ‘Voices of America: Accent, antidiscrimination law, and a jurisprudence for the last reconstruction’ 1991 *Yale Law Rev* 1329–1407.

Mari J Matsuda ‘Public response to racist speech: Considering the victim's story’ (1989) 87 *Michigan Law Rev* 2320–2381.

Ali A Mazrui 'From social Darwinism to current theories of modernization: A tradition of analysis' (1968) 21 (1) *World Polit* 69–83.

Archille Mbembe ‘Passages to freedom: The politics of racial reconciliation in South Africa’ (2008) 20 *Public Cult* 10–11.

Jerome McCristal Culp Jr ‘To the bone: Race and white privilege’ (1999) 83 *Minn Law Rev* 1637–1679.

Jerome McCristal Culp Jr ‘Toward a black legal scholarship: Race and original understandings’ (1991) *Duke LJ* 39-105.

Christopher McCrudden ‘Legal research and the social sciences’ (2006) 122 *Law Q Rev* 632–650.

Christopher McCrudden, ‘Merit principles’ (1998) 18 (4) *Oxford Journal of Legal Studies* 543–579.

Thabiso Mfete 'Neoliberalism and inequality in post-apartheid South Africa' (2020) 14(2) *PSLR* 270–275.

Gift Mheta ‘Decolonisation of the curriculum: A case study of the Durban University of Technology in South Africa’ (2018) 38 (4) *S Afr J Educ* 1–7.

Joel Modiri ‘Azanian political thought and the undoing of South African knowledges’ (2021) 68(168) *Theoria* 42–82.

Joel Modiri ‘Race, realism and critique: The politics of race and Afriforum v Malema in the (in)equality court’ (2013) 130 (2) *South Afr Law J* 274–293.

Joel Modiri ‘Towards a “(post-)apartheid” critical race jurisprudence: “Divining our racial themes”’ (2012) 27 *S Afr Public Law* 231–258.

Joel Modiri ‘The colour of law, power and knowledge: Introducing Critical Race Theory (CRT) in (post) apartheid South Africa’ 2012 *S Afr J Hum Rights* 405–436.

Joel Modiri ‘The grey line in-between the rainbow: (Re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse’ (2011) 26 *SAPL* 177–201.

Haradhan Kumar Mohajan ‘Qualitative research methodology in social sciences and related subjects’ (2018) 7(1) *J Econom De. Env People* 23–48.

Kgomotso Busisiwe Mokoena ‘The subtleties of racism in the South African workplace’ (2020) 3(1) IJCDS 25–36.

TO Molefe ‘Oppression must fall: South Africa’s revolution in theory’ (2016) 33(1) *World Policy J* 30–37.

T Dunbar Moodie ‘The moral economy of the Black Miners' Strike of 1946’ (1986) 13(1) *JSAS* 1–35.

Fred Morton ‘Slavery in the South African interior during the 19th century’ 2018 *Oxford Research Encyclopaedia, African History* 1–19.

Fred Morton ‘Slave-raiding and slavery in the Western Transvaal after the Sand River Convention’ (1992) 20 *Afr Econ Hist* 99–118

Pontso Moroosi ‘Colour-blind educational leadership policy: A critical race theory analysis of school principalship standards in South Africa’ (2021) 49(4) *EMAL* 644–661.

Dikgang Moseneke ‘The fourth Braam Fischer memorial lecture: Transformative adjudication’ (2002) 18 *SAJHR* 309–318.

Khanya B Motshabi, ‘Decolonising affirmative action in 21st-century Africa: Reparatory alternatives for affirming South Africa’ (2020) 2 *Journal of Decolonising Disciplines* 1–25.

Khanya B Motshabi ‘Decolonising the university: A law perspective’ (2018) 40(1) *Strategic Review for Southern Africa* 104–115.

Etienne Mureinik ‘The contract of service: An easy test for hard cases’ (1980) 97 *S Afr Law J* 246–266.

Athena D Mutua ‘The rise, development, and future directions of critical race theory and related scholarship’ (2006) 84 *Denver Univ Law Rev* 329–394.

Motseotsile Clement Marumoagae ‘Disability discrimination and the right of disabled persons to access the labour market’ (2012) 1(15) *PELJ* 345–428.

Sonia Mbowa ‘Exploring the use of South African ethnic and racial slurs on social media’ (2020) 3(1) *IJCDS* 53–68.

Anton Myburgh ‘The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law’ 2013 23(1) *CLL* 1–4.

Silvia Nagy-Zekmi ‘Frantz Fanon in new light: Recycling in postcolonial theory’ (2007) 4 (3) *JCLs* 129–139.

Carlos J Nan ‘Adding salt to the wound: Affirmative action and critical race theory’ (1994) 12(2) *Minn JLI* 553–572.

Thillayvel Naidoo ‘Proselytism within South Africa's Hindu community' (2000) 14(2) *EILR* 1121–1146.

John O Nelson ‘That a worker's labour cannot be a commodity’ (1995) 70 (272) *Philos* 157–165.

Tembeka Ngcukaitobi ‘Strike law, structural violence and inequality in the Platinum Hills of Marikana’ 2013 *ILJ* 836–858.

Charles Ngwena ‘Interpreting aspects of the intersection between disability, discrimination and equality’ (2005) 16(2) *Stellenbosch Law Rev* 210–243.

Charles Ngwena & Catherine Albertyn ‘Special issue on disability: Introduction’ (2014) 30 *SAJHR* 214–220.

Judith Nolde ‘South African women under apartheid: Employment rights with particular focus on domestic service and forms of resistance to promote change’ 1991 *Third World Leg Stud* 203–223.

Martha C Nussbaum ‘Capabilities and human rights’ (1997) 66 *Fordham Law Rev* 273–300.

Julius K Nyerere ‘Progress comes with production’ (1973) 3(4) *The Afr Rev: A Journal of African Politics, Development and International Affairs* 519–539.

Kola O Odeku ‘Emancipating domestic workers: Challenges, interventions and prospects’ (2014) 5(8) *Mediterranean Journal of Social Sciences* 672–677.

Paul O'Higgins ‘Labour is not commodity an Irish contribution to international labour law’ (1997) 26(3) *Industrial Law Journal* 225.

Emma Oliver & Willem Hendrik Oliver 2017 ‘The colonisation of South Africa: A unique case’ (2017) 73(3) *HTS Teol Stud/ Theol Stud* 1–8.

Angela Onwuachi-Willig ‘Celebrating critical race theory at 20’ (2009) 94 *Iowa Law Rev* 1497–1504.

Timothy Sizwe Phakathi ‘Worker agency in colonial, apartheid and post-apartheid gold mining workplace regimes’ (2012) 39 (132) *Rev Afr Political Econ* 279–294.

Kathryn Pillay ‘“The coolies here”: Exploring the construction of an Indian “Race” in South Africa’ (2017) 34(1) *J Glob South Stud* 22–49.

Cheryl L Poinsette ‘Black women under apartheid: An introduction’ (1985) *8 HWLJ* 93–120.

Roscoe Pound ‘Law in books and law in action’ (1910) 44 *Am L Rev* 12–36.

R Mansell Prothero ‘Foreign migrant labour for South Africa’ (1074) 8(3) *Int Migr Rev* 383–394.

Jacquelyn Rahman (2015) ‘Missing the target: Group practices that launch and deflect slurs’ (2015) 52 *Lang Sci* 70–81.

Nomfundo Ramalekana ‘A critique of the stigma argument against affirmative action in South Africa’ (2022) 4 *U OxHRH J* 1–32.

Sean Redding ‘A blood-stained tax: Poll tax and the Bambatha rebellion in South Africa’ (2000) 43(2) *Afr Stud Rev* 29–54.

Nicholas T Rinehart ‘The man that was a thing: Reconsidering human commodification in slavery’ (2016) 50(1) *J Soc Hist* 28–50.

Guy Robinson ‘Labour as commodity’ (1996) 71 (275) *Philosophy* 129–138.

Tonette S Rocco ‘From disability studies to critical race theory: Working towards critical disability theory’ (2005) *Adult Education Research Conference.*

Aaron Roussell, Kathryn Henne, Karin S Glover & Dale Willits ‘Impossibility of a "reverse racism" effect’ (2017) 18 (1) *Criminol Public Policy* E5–E16.

Alan Rycroft & Rochelle le Roux ‘Decolonising the labour law curriculum’ 2017 *ILJ* 1473–1487.

Alan Rycroft 'Obstacles to employment equity? The role of judges and arbitrators in the interpretation and implementation of affirmative action policies' (1999) 20 *ILJ* 1411–1429.

Albie Sachs ‘A freedom charter for South African artists’ (1991) 9 *Staffrider* 45–50.

Innocent Simon Sanga & Ron Pagnucco ‘Julius Nyerere’s understanding of African socialism, human rights and equality’ (2020) 4(2) *J Soc Enc* 15–33.

Ntando Sindane ‘Prophecy and the Pandemic: The Vindication of Decolonial Legal Critical Scholarship’ 2022 37(1) *Southern African Public Law* 1 – 13.

Sharifah Sekalala, Lisa Forman, Timothy Hodgson, Moses Mulumba, Hadijah Namyalo-Ganafa & Benjamin Mason Meier ‘Decolonising human rights: How intellectual property laws result in unequal access to the COVID-19 vaccine’ 2021 *BMJ Glob* 1–9.

Sanjay Seth ‘Postcolonial theory and the critique of international relations’ (2011) 40 *Millenn J Int Stud* 167–183.

Carroll Serron ‘Law and inequality: Race, gender…and, of course, class’ (1996) *22 Annu Rev Sociol* 187–212.

R Shanafelt R. (2003). ‘How Charles Darwin got emotional expression out of South Africa (and the people who helped him)’ (2003) 45 *Comp Stud Soc Hist* 815–842.

Nicola Smit ‘Labour is not a commodity: Social perspectives on flexibility and market requirements within a global world’ (2006) 1 *S Afr Law J* 152–172.

Ben Smith ‘Intersectional discrimination and substantive equality: A comparative and theoretical perspective’ 2016 *ERR* 73–102.

Tom Soper ‘Labour migration in Africa’ (1959) 11(2) *J Afr Adm* 93–99.

Arthur K Spears 'Institutionalized racism and the education of Blacks' (1978) 9(2) *Anthropol* 127–136.

Evju Stein ‘Labour is not a commodity: Reappraising the origins of the maxim’ (2013) 4(3) *Eur Labour Law J* 222–229.

Rinie Steinmann ‘The core meaning of human dignity’ (2016) 19 *PELJ* 1–32.

Hazel Suchard ‘Labour relations in South Africa: Retrospect and prospect’ (1982) 12(2) *Afr Insight* 89–97.

Caroline Suransky & JC van der Merwe ‘Transcending apartheid in higher education: Transforming an institutional culture’ (2016) 19(3) *Race Ethn Educ* 577–597.

Brian Z Tamanaha ‘A vision of socio-legal change: Rescuing Ehrlich from living law’ (2011) 36 *Law Soc Inq* 297–318.

Mlungisi Tenza ‘The effects of violent strikes on the economy of a developing country: A case of South Africa’ (2020) 4 *Obiter* 519–537.

Mlungisi Tenza ‘The link between replacement labour and eruption of violence during industrial action’ 2016 *Obiter* 106–120.

Jan Theron ‘Erosion of workers' rights and the presumption as to who is an employee’ 2002 6(1) *Law Democr Dev* 27-56.

Jan Theron ‘Employment is not what it used to be’ 2003 *ILJ* 1247–1282.

Jan Theron ‘Intermediary or employer? Labour brokers and the triangular employment relationship’ 2005 *ILJ* 618–649.

Jan Theron ‘The shift to services and triangular employment: Implications for labour market reform’ 2008 *ILJ* 1–21.

Tsoaledi Daniel Thobejane ‘Becoming a domestic worker: The case of Mpumalanga Province, South Africa’ (2019) 12(3) *OIDA IJSD* 27–38.

AP Thornton ‘Decolonisation’ (1963) 19(1) *Int J* 7–29.

Gudani Tshikota ‘Racial epostemology at a time of a pandemic: A synopsis of South Africa’s persisting inequalities Through the lens of #FeesMustFall and #FreeDecolonisedEducation’ 2021 *PSLR* 25–37.

John Hayakawa Torok ‘Freedom now race consciousness and the work of de-colonization today’ (2004) 48(1) *Howard Law J* 351–394.

Mark Tushnet ‘Critical legal studies: A political history’ (1991) 5 *Yale Law J* 1515–1544.

D van der Merwe 'Not slavery but a gentle stimulus: Labour-inducing legislation in the South African Republic' (1989) 3 *S Afr Law J* 353–369.

BPS van Eck 'Temporary employment services (labour brokers) in South Africa and Namibia' (2010) 13(2) *Potchefstroom Electron Law J* 107–126.

Stefan van Eck & N Nemusimbori ‘Uber drivers: Sad to say, but not employees of Uber SA’ (2018) 81 *THRHR* 473–483.

Marlize van Jaarsveld 'An employee's contractual obligation to promote harmonious relationships in the workplace – When are the stakes too high? Some pointers from the judiciary' (2007) 19(2) *SA Merc LJ* 204–216.

CH van Zyl 'The Batavian and the Cape Plakaten – An historical narrative' (1908) 25(1) *S Afr Law J* 4–25.

Sabina E Vaught & Angelina E Castagno ‘“I don’t think I am a racist”: Critical race theory, teacher attitudes, and structural racism’ (2008) 11(2) *Race Ethn Educ* 95–113.

Samantha Vice ‘How do I live in this strange place?’ (2010) 41 (3) *J Soc Philos* 323–342.

Douglas W Vick ‘Interdisciplinarity and the discipline of law’ (2004) 31 *J Law Soc* 164.

Paul Warmington ‘Critical race theory in England: Impact and opposition’ (2020) 27(1) *Identities: Glob Stud* 20–37.

Anjuli Webster ‘On conquest and anthropology in South Africa’ (2018) 34(3) *SAJHR* 398–414.

Adrien Katherine Wing ‘Is there a future for critical race theory?’ (2016) 66(1) *J Leg Educ* 44–54.

Adrien Katherine Wing and Eunice P de Carvalho ‘Black South African women: Toward equal rights’ (1995) 8 *Harv Hum Rights J* 57–100.

Mohammad Zohrabi ‘Mixed method research: Instruments, validity, reliability and reporting findings’ (2013) 3(2) *Theory Pract Lang Stud* 254–262.

Books

Reza Banakar & Max Travers *Theory and Method in Socio-Legal Research* (2005).

Martin William Bauer ‘Chapter 8 – Classical content analysis: A review’ in Paul Atkinson, Martin W Bauer & George Gaskell eds *Qualitative Researching with Text, Image and Sound: A Practical Handbook* (2000).

Haroon Bhorat and Natasha Mayet ‘Chapter 4 – Employment outcomes and earnings in post-apartheid South Africa’ in A Black ed. *Towards Employment Intensive Growth in South Africa* (2016).

H Bhorat, A Lilenstein and B Stenwix *The Impact of the National Minimum Wage in South Africa: Early Quantitative Evidence* (2021).

Steve Biko *I Write What I Like* (1996).

E Bonilla-Silva *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States* (2006).

H Bradley ed *Men's Work. Women's Work* (1989).

Steven Budlender, Gilbert Marcus & Nick Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014).

Luli Callinicos ed ‘Labour history and worker education in South Africa’ in *Labour History 65* (1993) 162–178.

Hugh Collins *Employment Law* 3 ed (2010).

Roger Cotterell *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006).

Fiona Cownie *Legal Academics: Culture and Identities* (2004).

Fiona Cownie and Anthony Bradney ‘Chapter 2 – Socio-legal studies: A challenge to the doctrinal approach’ in D Watkins and M Burton eds *Research Methods in Law* (2011) 34.

Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas (eds) *Critical Race Theory: The Key Writings That Formed the Movement* (1995) 276.

Charles Darwin *Origin of Species by Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life* (1859).

Guy Davidov & Brian Langille (ed) *Labour Law after Labour: The Idea of Labour Law* (2011).

Richard Delgado & Jean Stefancic *Critical Race Theory: An Introduction* 2 ed (2012) 9.

Norman K Denzin & Yvonna S Lincoln *The SAGE Handbook of Qualitative Research* 3 ed (2005) 1–32.

Darren O Donovan ‘Chapter 7 – Socio-legal methodology: Conceptual underpinnings, justifications and practical pitfalls’ in Laura Cahillane & Jennifer Schweppe eds *Legal Research Methods: Principles and Practicalities* (2016).

Friedrich Engels *The Principles of Communism* (first published 1847).

Frantz Fanon *Black Skins, White Masks* (1967).

Frantz Fanon *The Wretched of the Earth* (1963).

Martheanne Finnemore *Introduction to Labour Relations in South Africa* (1999).

F Furedi *The Silent War: Imperialism and the Changing Perception of Race* (1999)

Gail M Gerhart *Black Power in South Africa: The Evolution of an Ideology* (1978).

DT Goldberg *The Threat of Race: Reflections on Racial Neoliberalism* (2008).

C Himonga and T Nhlapo eds *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014).

Bernard Makhosezwe Magubane *The Making of a Racist State: British Imperialism and Union of South Africa 1875–1910* (1996).

Malegapuru William Makgoba *Mokoko: The Makgoba Affair – A reflection on transformation* (1997).

Karl Marx *Capital, Volume I* (1954).

Tim May *Social Research: Issues, Methods and Practices* 2 ed (2001).

Sizwe Mpofu *The New Apartheid* (2021).

Credo Mutwa *Africa's Hidden History: The Reptilian Agenda* (1964)

Baldwin Ndaba, Therese Owen & Masego Panyane *The Black Consciousness Reader* (2017).

Tembeka Ngcukaitobi *The Land Is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (2018).

Jemima Pierre *The Predicament of Blackness: Postcolonial Ghana and the Politics of Race* (2013).

J Atticus Ryan & Christopher A Mullen *Unrepresented Nations and Peoples Organization Yearbook* (1998).

Austin Sarat & Thomas R Kearns eds 'Beyond the great divide: Forms of legal scholarship and everyday life' in *Law in Everyday Life* (1993) 21–62.

Jean Stefancic & Richard Delgado *Critical Race Theory: An Introduction* (2010).

Clive Thompson & Paul Benjamin *South African Labour Law* (2006).

Lynne Tirrell 'Genocidal language games' in Ishani Maitra & Mary Kate McGowan eds. *Speech and Harm: Controversies over Free Speech* (2012).

Lisa Webley 'Chapter 38: Qualitative approaches to empirical research' in Peter Cane & Herbert M Kritzer (ed) *Oxford handbook of empirical legal research* (2010) 927–950.

Eddie Webster *Essays in Southern African Labour history* (2001).

Patricia J Williams *The Alchemy of Race and Rights* (1991)

Stu Woolman 'Freedom of association' in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa Service* 6 ed (2014).

Iris Marion Young *Justice and the Politics of Difference* (1990),

Theses

Caitlin Bruce *Labour regulation in the on-demand economy: An "uberfication" of the status quo?* (unpublished LLM thesis, University of Cape Town, 2019).

Jacqui Cohen *Veil piercing a necessary evil? A critical study on the doctrines of limited liability and piercing the corporate veil* (unpublished LLM thesis, University of Cape Town, 2006).

Elizabeth Delport *The legal position of domestic workers in South Africa* (unpublished LLM thesis, University of South Africa, 1995).

Shakti Jainarain *A critical analysis of violent strikes in South Africa* (unpublished LLM thesis, University of KwaZulu-Natal, 2020).

Tapiwa Givemore Kasusa *The definition of an "employee" under labour legislation: An elusive concept* (unpublished LLM thesis, UNISA, 2015).

Nokulunga Mabuza *Salary disparities in South Africa: An analysis on race and gender in the labour market* (unpublished LLM thesis, University of Cape Town, 2020).

Lindiwe Nomachezi Maqutu, L *The postcoloniality of labour law: A South African perspective* (Unpublished PhD thesis, University of KwaZulu-Natal, 2020).

Ntokozo Steven Nkonzo Mnyandu *Circumventing another Marikana Massacre: A look into the provisions of the Labour Relations Amendment Act relating to the limitation on the right to strike* (unpublished LLM thesis, University of KwaZulu-Natal, 2015).

Joel Malesela Modiri *The jurisprudence of Steve Biko: A study in race law, and power in the "afterlife" of colonial apartheid* (unpublished PhD thesis, University of Pretoria, 2017).

Ntebo Lauretta Morundi *The indiginisation of customary law: Creating an indigenous legal pluralism* (unpublished LLM thesis, University of Pretoria, 2019).

Therusha Moodley *Progression of South African women in the workplace: A study to the right to development and the relevant legal framework that underpins the eradication of gender disparity in the workplace* (unpublished LLM thesis, University of KwaZulu-Natal, 2018).

Adél Schoeman *An analysis of temporary employment services and the new laws regulating them in South Africa* (unpublished LLM thesis, University of KwaZulu-Natal, 2014).

Phumzile Ziqubu *A critical evaluation of the Affirmative Action policy in South Africa in relation to the case of South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)* (unpublished LLM thesis, University of KwaZulu-Natal, 2015).

Internet sources

Leslie Anne Hadfield 'Steve Biko and the Black Consciousness Movement' *Oxford Research Encyclopedia of African History* 27 February 2017, available at https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-83, accessed on 8 April 2022.

Bernard Makhosezwe Magubane (ed) 'The problem and its matrix: Theoretical and methodological issues' in *The Political Economy of Race and Class in South Africa* (1979) 1–19, available at https://knowledge4empowerment.files.wordpress.com/2011/08/magubane-1979-1990_ch1_poliecon-raceclass.pdf, accessed on 23 January 2022.

M Meyerwitz 'Which trade unions are allowed to represent employees at the CCMA?' *South African Labour Guide*, available at https://www.labourguide.co.za/most-recent/1815-which-trade-unions-are-allowed-to-represent-employees-at-the-ccma, accessed on 15 January 2022.

Nomfundo Ramalekana '"White backlash" against affirmative action in the United States and South African courts' *Oxford Human Rights Hub*, 11 February 2022, available at https://ohrh.law.ox.ac.uk/white-backlash-against-affirmative-action-in-the-united-states-and-south-african-courts/, accessed on 31 March 2022.

Suellen Shay 'Decolonising the curriculum: It's time for a strategy' *The Conversation*, 13 June 2016 at 3:23, available at https://theconversation.com/decolonisingthe-curriculum-its-time-for-a-strategy-60598, accessed on 29 March 2022.

Staff Writer 'New minimum wage announced for South Africa' *BusinessTech*, 8 February 2022, available at https://businesstech.co.za/news/finance/556460/new-minimum-wage-announced-for-south-africa/, accessed on 18 February 2022.

George Yancy 'No, black people can't be racist' *Truthout*, 20 October 2021, available at https://truthout.org/articles/no-black-people-cant-be-racists/, accessed on 20 February 2022.

Newspaper Articles

Sherilee Bridge & Andrew Moses 'Ramaphosa's BEE Bonaza' *IOL*, 16 July 2004, available at https://www.iol.co.za/news/south-africa/ramaphosas-bee-bonanza-217325 accessed on 4 May 2022.

Rutledge M Dennis 'Social darwinism, scientific racism, and the metaphysics of race' (1995) 64(3) *The Journal of Negro Education* 243–252.

Editorial 'Many cadres today are living testimony of Smuts Ngonyama's 'I did not struggle to be poor' statement' *IOL*, 5 August 2020, available at https://www.iol.co.za/the-star/opinion-analysis/many-cadres-today-are-living-testimony-of-smuts-ngonyamas-i-did-not-struggle-to-be-poor-statement-310fac49-8b7e-4e9d-b504-b9416e6c388f, accessed on 4 May 2022.

Editorial 'BEE: Who are the beneficiaries' *Fin24*, 16 July 2004, available at https://www.news24.com/Fin24/BEE-Who-are-the-beneficiaries-20040716, accessed on 4 May 2022.

Editorial 'Whites still earning three times more than blacks in SA' *News24*, 15 November 2019, available at https://www.news24.com/fin24/Economy/South-Africa/whites-still-earning-three-times-more-than-blacks-in-sa-20191115, accessed on 4 May 2022.

Prince Mashele 'Job-creation is business people's craft, not BEE beneficiary like Cyril' *The Sowetan*, 19 August 2019 at 8:02, available at https://www.sowetanlive.co.za/opinion/columnists/2019-08-19-job-creation-is-business-peoples-craft-not-bee-beneficiary-like-cyril/, accessed on 5 May 2022.

Andile Mngxitama 'Lessons in the paradoxes of race and capital' *Mail and Guardian*, 15 December 2015, available at https://mg.co.za/article/2015-12-10-lessons-in-the-paradoxes-of-race-and-capital/, accessed on 4 May 2022.

Joel Modiri 'In the Fall: Decolonisation and the rejuvenation of the academic project in South Africa' *Daily Maverick*, 16 October 2016, available at https://www.dailymaverick.co.za/opinionista/2016-10-16-in-the-fall-decolonisation-and-the-rejuvenation-of-the-academic-project-in-south-africa/, accessed on 8 June 2021.

Joel Modiri 'Critical race theory is being attacked as need to take racism seriously can no longer be ignored' *Business Day*, 24 June 2021 at 16:30, available at https://www.businesslive.co.za/bd/opinion/2021-06-24-joel-modiri-critical-race-theory-is-being-

attacked-as-need-to-take-racism-seriously-can-no-longer-be-ignored/, accessed on 14 January 2023.

Lovelane Nwadeyi 'We all have a responsibility to disrupt the status quo' *Mail & Guardian*, 29 June 2016, available at http://mg.co.za/article/2016-06-29-we-allhave-agency-and-we-must-use-it-to-disrupt-the-status-quo, accessed on 29 March 2022.

Akin Olla 'Fred Hampton was a radical revolutionary. Judas and the Black Messiah ignores that' *The Guardian*, 25 February 2021 at 11:16, available at https://www.theguardian.com/commentisfree/2021/feb/25/judas-and-the-black-messiah-misses-the-mark-in-its-portrayal-of-fred-hampton, accessed on 4 May 2022.

Staff Writer 'New minimum wage announced for South Africa' *BusinessTech*, 8 February 2022, available at https://businesstech.co.za/news/finance/556460/new-minimum-wage-announced-for-south-africa/, accessed on 20 February 2022.

George Yancy 'No black people can't be racist' (2021) *Truthout* https://truthout.org/articles/no-black-people-cant-be-racists/ (Accessed 20 February 2022).

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Mr Fanelesibonge Craig Mabaso (216021321)
School Of Law
Howard College

Dear Mr Fanelesibonge Craig Mabaso,

Original application number: 00017633
Project title: A critical investigation into the reality of decolonising labour law: A South African perspective

Exemption from Ethics Review

In response to your application received on 17 November 2022 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law