

**A CRITICAL RACE FEMINIST PERSPECTIVE ON SECTION 217 OF THE CONSTITUTION**

BY

PAMELA NYAWO

STUDENT NUMBER 96057395

SUPERVISOR: PROF. K VAN MARLE

SUBMITTED IN THE FULFILLMENT OF THE REQUIREMENTS FOR THE LL.M DEGREE IN THE FACULTY  
OF LAW AT THE UNIVERSITY OF PRETORIA

SEPTEMBER 2013

## Table of Contents

<b>Summary</b> .....	<b>iv</b>
<b>Chapter 1</b>	
<b>Introduction</b> .....	<b>1</b>
1.1 Introduction .....	1
1.2 Background.....	1
1.2.1 The Constitution, Individual Autonomy and Public Procurement Contracts....	2
1.3 Theoretical Approaches .....	3
1.4 Problem Statement .....	3
1.5 Assumptions and Limitations .....	4
1.6 Structure of the Study .....	5
<b>Chapter 2</b>	
<b>Equality and the Law</b> .....	<b>6</b>
2.1 Introduction .....	6
2.2 Positivism and American Legal Realism .....	6
2.2.1 Legal Realism.....	7
2.1.1.1 Introduction.....	7
2.1.1.2 The Conscientious Judge .....	8
2.3 Critical Legal Studies .....	10
2.3.1 Neutrality and the Equality Act .....	11
2.3.1.1 Constitution and the Equality Act.....	11
2.3.1.2 Dominant Male Voice of the Law .....	12
2.3.1.3 The Phallogocentric Culture .....	12
2.3.1.4 Objectivity, Disadvantage and Substantive Equality .....	14
2.4 Concluding Remarks.....	15
<b>Chapter 3</b>	

<b>Transformation, Black Women and the Law</b> .....	<b>17</b>
3.1 Critical Race Feminism .....	17
3.2 Introduction .....	17
3.3 Race, Racialism and the Law .....	18
3.4 Race and Disadvantage.....	20
3.4.1 Disadvantage of Being Black and a Woman .....	20
3.4.2 Multiple Consciousness.....	22
3.5 Class and Black Women.....	23
3.5.1 The Black Elite and the Underclass.....	24
3.6 Concluding Remarks.....	27
<b>Chapter 4</b>	
<b>Black Women’s Oppression and Government Procurement Contracts</b> .....	<b>29</b>
4.1 Introduction .....	29
4.2 Background.....	29
4.2.1 The Constitution and Public Sector Contracts .....	29
4.2.1.1 The Preferential Procurement Policy Framework Act .....	30
4.2.1.2 The Broad Based Black Economic Empowerment Act .....	31
<i>Fairness</i> .....	32
<i>Equitable</i> .....	32
<i>Transparency</i> .....	33
<i>Competitive</i> .....	33
<i>Cost-Effective</i> .....	34
4.3 Transformative Objectives of Section 217 .....	34
4.3.1 The Black Elite and Black Women .....	35
4.4 Intersectionality and Domination .....	37
4.4.1 Black Women’s Oppression and Society.....	38
4.4.2 Black Women’s Socioeconomic Status and Black Male Dominance.....	40
4.5 Concluding Remarks.....	42
<b>Chapter 5</b>	
<b>Conclusion</b> .....	<b>43</b>
<b>Bibliography</b> .....	<b>45</b>

## SUMMARY

Section 217 of the Constitution of South Africa regulates the procurement of goods and or services by any organ of state. Similarly, this section mandates state-owned institutions to adhere to a procurement system that promotes groups that were previously disadvantaged by past colonial and apartheid regimes. In this dissertation I argue that due to South Africa's oppressive culture, the law has been ineffective in promoting the socio economic interests of black women due to race, gender and class subjugation.

Firstly, central to my argument is the judiciary's traditional role that is still steeped in an interpretative process of the law that is detrimental to the transformative spirit of the Constitution. In identifying the South African judiciary system as positivistic in nature I will critically analyse the *Sonke Gender Justice Network v Malema* hate speech court case. I posit that the Equality Court's decision was mainly result based and as a result fell short of addressing the core issues affecting black women on the basis of race, gender and class which mirror the substantial part of the South African socio economic structure. Secondly, in support of my argument, I criticise a legislative framework that perpetuates socio economic disparities at the expense of a group in society it claims to protect. Whilst I will rely on American Legal Realism and Critical Legal Studies in support of my arguments, my main theoretical approach will be based on Critical Race Feminism. Lastly, intersectionality will be used in contextualising the interrelationships of race, gender and class as they impact on black women's material circumstances in the regulatory legislative public procurement process.

When the Constitution came into effect in 1994 South Africa became an egalitarian state. Nevertheless, the country is struggling with the prevalence of unemployment, poverty, HIV/Aids, skills shortages, male violence including rape, to name just a few. These social ills pose a threat to a Constitution that extolls values like dignity, freedom and equality for all. It so happens also that the majority of the people confronted by these socio economic challenges are black women.

The tender process faces numerous challenges and by identifying the South African culture as oppressive supported by a legal process that stifles transformation, this study expounds the experiences of black women by engaging in a contextual analysis of the courts and legislation. This consciousness raising exercise is not meant to portray black women as victims or invoking “special treatment” in the legal realm. It resonates with Steve Biko’s theme of black consciousness, being aware of the marginalisation and addressing it. Black consciousness represents an emancipatory state and optimistic outlook. Consciousness raising situates the oppression of black women in any form as a site for struggle, a struggle for social and individual change.

## Chapter 1

### Introduction

#### 1.1 Introduction

The Constitution of South Africa is the supreme law of the country.<sup>1</sup> In terms of section 217 of the Constitution, when state institutions procure goods and or services for the government, the exercise falls within this ambit. This process of state procurement contractual transactions is called government procurement contracting.<sup>2</sup> In order to give effect to this section, two pieces of legislation were promulgated, namely the Broad-Based Black Economic Empowerment Act<sup>3</sup> and the Preferential Procurement Policy Framework Act.<sup>4</sup> Both these Acts were primarily aimed at advancing the socio-economic status of the people who were marginalised in the past due to colonial and apartheid laws and policies that severely and adversely impacted on the socio economic status of those marginalised.<sup>5</sup>

#### 1.2 Background

I suggest in this study that the award of government procurement contracts to black women as a policy derived from section 217 of the Constitution has failed to bear fruit as a result of the racist, patriarchal and class oppressive South African culture. I argue that it is precisely this oppressive culture that stifles the realisation of the transformative objectives of the Constitution. In identifying the South African culture as oppressive I will use the intersectional approach in my analysis. Kimberley Crenshaw is an American Critical Race scholar who first coined the term intersectionality in an attempt to capture the multifaceted nature of the experiences of black women at the intersection of race, gender and class. Crenshaw asserts that intersectionality addresses the manner in which racism; patriarchy, class oppression and other discriminatory systems create inequalities that structure the relative positions of women, races, ethnicities, classes and

---

<sup>1</sup> Section 2 of Act 108 of 1996 (hereinafter referred to as 'the Constitution').

<sup>2</sup> Bolton, P. *The Law of Government Procurement in South Africa* (2007) 1.

<sup>3</sup> Act 3 Of 2003

<sup>4</sup> Act 5 of 2000

<sup>5</sup> Section 217(2)

the like.<sup>6</sup> It does this by taking into consideration the actual accounts of the experiences of black women at the intersection of race, class and patriarchy.

### **1.2.1 The Constitution, Individual Autonomy and Public Procurement Contracts**

The Constitution has introduced commercial transactions that have transformative objectives as their foundational basis. This has an important effect on the freedom to contract principle as one of the significant principles found in the law of contract.<sup>7</sup> Individual autonomy plays a significant role within this rule as a contract is constituted by an agreement.<sup>8</sup> The freedom to contract principle means that a person can enter into agreements with whomever they choose and they decide what the terms and conditions of the transactions will be.<sup>9</sup> In so far as government procurement contracts are concerned, section 217 of the Constitution has eradicated this autonomy exercised by individuals when dealing in state procurement transactions and has put the transformative objectives at the core of these contracts. This essentially puts less considerable weight on individual autonomy and the freedom to contract principle in favour of transforming the entire commercial nature of public procurement contracts.

The nature of the transformative objectives of the Constitution as a political imperative has been given legal effect by the courts, as well as the interests of the community and social or economic experiences, interests of the state or of justice.<sup>10</sup> This effectively implies that in government procurement contracts the ideals central to the social and economic change in society like equal opportunity in commercial transactions takes precedence over the common law freedom to contract principle.

---

<sup>6</sup> Yuval-Davis, N 'Intersectionality and Feminist Politics' (2006) *European Journal of Women's Studies* 13(3) 196.

<sup>7</sup> Hoctor, S 'Legal realism' in Roederer C & Moellendorf D (eds) (2004) *Jurisprudence* 159.

<sup>8</sup> Van Der Merwe SW, Van Huyssten LF & Lubbe MFB *Contract: General Principles*, (2007) 10-11.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

### 1.3 Theoretical Approaches

In the analysis of the *Sonke Gender Justice Network*<sup>11</sup> case, I will adopt American Legal Realism as a basis to support my arguments. American Legal Realism as a movement reacted strongly to the notion that judges find the law and directly opposed this assertion. They argued that judges actually make the law because when they interpret it they give judgements influenced by their own convictions.<sup>12</sup> Critical Legal Studies (CLS) will also form part of my discussion as an ideological approach that grew out of Realism wherein legal scholars stretched the debate even further from just the conduct of the judges. They did that by deconstructing the law and challenging its claims of objectivity, neutrality and determinacy.<sup>13</sup> For the purposes of my arguments when analysing the judgment I will limit myself to the law's claim to neutrality and universality. I will focus particularly on the Equality Act. A Critical Race Feminist approach will be my main theory in the subsequent discussion and analysis of the regulative legislative framework in respect of government procurement. My Critical Race feminist arguments will unfold by contextually analysing section 217 of the Constitution by means of an intersectional approach in identifying the actual experiences of black women in relation to public procurement legislation.

### 1.4 Problem Statement

In this research my primary aim is to identify how and whether the award of government procurement contracts in line with the Broad Based Black Economic Empowerment Act and the Preferential Procurement Policy Framework Act has succeeded in transforming the socio economic conditions of black women. A Critical Race Feminist approach will be my main theoretical approach.

My study will unfold in the following manner:

- Firstly, I will discuss the hate speech Equality court case. The primary aim is to expose the positivism of legal interpretation that is prevalent in the South African courts. In identifying the conduct of the judiciary as positivistic, I mean to criticise it

---

<sup>11</sup> *Sonke Gender Justice Network v Malema 2010 (7) BCLR 729.*

<sup>12</sup> Hoctor, S 'Legal Realism' in Roederer, C & Moellendorf D (2004) *Jurisprudence* 160.

<sup>13</sup> *Ibid.*

as a hindrance in legal reform as it prejudices the very social structures it claims to protect.

- Secondly, I will then analyse the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>14</sup> I will refer to it as the Equality Act, with the aim to point to its lack to substantively address the multiplicity of events impacting on equality and black women.
- In the subsequent part of my study I will delve into the regulatory process involving public procurement contracting. I will then discuss the experiences of black women as they intersect with the law governing government contracts, with particular reference to race, class and patriarchy.
- Lastly, I will conclude my study and propose a possible manner to address this problem.

### **1.5 Assumptions and Limitations**

There is an abundance of legal scholarship on the issues impacting socio-economic conditions and the law.<sup>15</sup> I will not base my study on a purely rights- based or equality approach and this deviation must be seen as a mere extension of legal scholarship. There is also paucity on studies dealing specifically with government procurement contracts,<sup>16</sup> more particularly a black feminist one. I would like to introduce a black and feminine voice, without essentialising the issues but merely raising awareness about the lived experiences of black women within government procurement law. When Angela Harris discussed her concerns with essentialism, she cited that in her view “contemporary legal theory needs less abstraction and not simply a different sort of abstraction”.<sup>17</sup> She went on and stated further that “to be fully subversive, the methodology of feminist legal theory should challenge not only law’s content but its tendency to privilege the abstract and unitary voice and gender essentialism also fails to do”.

---

<sup>14</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>15</sup> Liebenberg, S ‘Needs, Rights and Transformation: Adjudicating Social Rights’(2005).  
*Paper 8 Center for Human Rights and Global Justice 3.*

<sup>16</sup> Bolton, P *The law of Government Procurement in South Africa* (2007) 1<sup>st</sup> Edition 6.

<sup>17</sup> Harris, A ‘Race and Essentialism in Feminist Legal Theory’ (1990)*Stanford Law Review* 142 3, 581.

Based on these utterances, I concede that it might seem I am doing exactly that which I aim to avoid. I therefore state from the outset that this work should not be seen as disregarding the voices of women of other colour or consider them as unimportant. I would rather this be taken for what it is; a conscious raising exercise that is without a doubt filled with generalizations. However, the substantive issues that I aim to engage in are meant to invite more debate on the issues raised.

## **1.6 Structure of the Study**

In Chapter 2 I will discuss the hate speech court case, American Legal Realism, the role of positivism in shaping the law and the effect it has on society. I will also discuss the Equality Act, its limitation in the context of my discussion by engaging with the Critical Legal Studies theme of neutrality and universality.

In Chapter 3, I will discuss an intersectional approach pertaining to race, gender and class by mainly focusing on Critical Race Feminism.

In chapter 4 I will discuss section 217, the Preferential Procurement Policy Framework Act & its Regulations, the Broad Based Black Economic Empowerment Act and the position of black women as it intersects with the economy and patriarchy.

In chapter 5, I will conclude my study.

## Chapter 2

### Equality and the Law

#### 2.1 Introduction

In 1994 South Africa experienced a political shift that finally eradicated all forms of domination and introduced a Constitution with its Bill of Rights. Apartheid rule with its parliamentary sovereignty was soon replaced by the rule of law.<sup>18</sup> Following Karl Klare's line of thought that the Constitution is post-liberal in that it is social, redistributive, caring, positive, horizontal, participatory, multicultural and self-conscious<sup>19</sup> about its historical setting and transformative role and mission, my starting point will be a discussion of the *Sonke Gender Justice Network v Malema* court case.

The discussion of this judgment will focus on the positivistic interpretational approach adopted by the South African court system. I posit that this approach is narrow in its application and has the potential to stagnate social transformation and legal reform by its detachment from considering materialistic conditions of black women. The judge's interpretative method is severely limiting and this is harmful to a society that has long suffered social injustice.

#### 2.2 Positivism and American Legal Realism

The *Sonke Gender Justice Network v Malema* court case centred on the definition of hate speech and harassment as defined in the Equality Act. The purpose of this case is to illustrate the possible harm the judge's style of interpretation is likely to incite for black women. This kind of reasoning has the potential to reaffirm the injustices of the past discriminatory laws. Its silence about marginalisation in social structures where black women experience diverse oppression has the likelihood of being interpreted to confirm the prevailing status quo. Therefore, the judge's lack of insight into the oppressive social structures might have the effect that rape victims do not report the offences committed against them due to their distrust of the criminal justice system and also that marginalisation is acceptable. He does not seem to understand the delicate line the

---

<sup>18</sup> Section 2 of the Constitution.

<sup>19</sup> Klare, K 'Legal Culture & Transformative Constitutionalism'(1998) *South African Journal of Human Rights* 14 153.

utterances trod on. They go deeper than wound and harm; they affirm the inferior status that differentiates them as black women, poor and without virtue.

The facts of this case were that Mr Julius Malema was the President of the African National Congress Youth League. Whilst canvassing for vote for his political party in an academic institution he uttered the following statements:

*“When a woman didn’t enjoy it, she leaves early in the morning. Those who had a nice time wait until the sun comes out, requests breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don’t ask for taxi money from somebody who raped you”.*

Sonke Gender Justice Network then challenged him in the Equality Court for this statement in that it amounted to hate speech and or harassment as defined in the Equality Act. Sonke Gender Justice Network sought a declaratory relief from court, an unconditional apology for the statements and compensation in terms of section 21(2) (e) of the Equality Act. In his defence, Mr Malema contended that the utterances complained of is not offensive to gender equality and also does not constitute hate speech but amount to fair comment. The Equality Court found him guilty of hate speech and ordered him to make a payment of R50 000.00 to a charitable organisation and issue a public apology.

## **2.2.1 Legal Realism**

### **2.1.1.1 Introduction**

American Legal Realism was a movement based on the premise that formalism with its concentration on logic and reasoning had little urge to link these to the realities of life.<sup>20</sup> The Realists detracted from the positivist view that occupied the American legal system, arguing that judges make the law based on their own convictions, what they think is best for the community.<sup>21</sup> This case demonstrates that the South African judicial system is rife with a formalistic interpretation that is firmly grounded on logic. I posit that this approach is detrimental to the case as well as South Africa in that should the courts maintain the status quo when deciding cases particularly of this nature, then oppression

---

<sup>20</sup> Hector, S ‘Legal Realism’ in Roederer C & Moellendorf D (eds)(2004) *Jurisprudence* 160.

<sup>21</sup> Ibid.

in any form will remain in obscurity. The long and hard earned values of freedom, dignity and equality will not be realised as long as judges retain this rigid interpretation of the law.

### 2.1.1.2 The Conscientious Judge

When Klare cited Etienne Mureik's use of the phrase 'conscious judge', in light of the current Constitutional dispensation, he interpreted it as "mean(s) above all to 'promote and fulfil' through one's professional work the 'democratic values of human dignity and equality and freedom' and to work to 'establish a society based on democratic values, *social justice* and fundamental human rights".<sup>22</sup>

I argue that an abstract interpretation will not assist in the elimination of oppression against black women instead this kind of ruling merely maintains the structurally constructed inferior status of black women. This abstract view by the judge becomes apparent in his frequent reference to what constitutes equality in terms of the Equality Act to arrive at the "right" finding<sup>23</sup> and therefore releases him from the cumbersome application of a reasoning contextualised within the oppression of black women. Had he taken into consideration the social context within which these words were uttered, he would have realised the oppressive social structures black women associate with daily. He would have observed how a woman's worth is trivialised and damaged by the symbolic significance the words displayed, the degrading and shaming of black women and their dire materialist circumstances. This positivistic attitude he portrayed in his reasoning failed to reflect these social demographics.

Holmes once remarked:

*"I think that the judges themselves have failed adequately to recognise their duty of weighing considerations of social change. The duty is inevitable and the result of the often proclaimed*

---

<sup>22</sup> Klare, K 'Legal Culture & Transformative Constitutionalism' (1998) *South African Journal of Human Rights* 14 148.

<sup>23</sup> Bell, D Jnr 'Racial Realism' in Crenshaw K, Gotanda N, Peller G & Thomas K (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1996) 303.

*judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious, as I have said.*<sup>24</sup>

Surely that is the point of having a Constitution that is value laden, so that judges engage in an interpretative process that is not just result driven but is conscious of prejudice that is structurally construed. The prejudice experienced by black women when contextually analysed demands a thorough interrogation of material aspects impacting on the realities of black women. By his failure to disengage himself of a results driven and reason influenced decision, the judge in the *Sonke Gender Justice Network* court case failed to serve the law and the people, and in this case black women.

I argue that he could have been more progressive and innovative in his judgement than merely settling for an abstract definition of hate speech and the words “hurtful and hateful”. The public mockery and humiliation by a prominent political youth leader about a crime of rape extends beyond these words, regardless whether the complaint is laid by a civil rights group or the person that initially opened the rape charge. This act by Mr Malema deserves substantial criticism that addresses the seriousness of oppression against black women and cannot simply be summed up in those words. Clearly the judge missed the depth of hurtful and hateful in this regard because it extends beyond just being hurt but impacts on self worth of those the words are directed to, their interaction with others and most importantly their mental attitude. In his judgement he would have dealt and described the terror, violence, shame, low self esteem and social stigma and fear this kind of attitude by Mr Malema invoke in black women. He would have admonished Mr Malema for perpetuating the social myths against black women.

Most importantly, somebody in his position should have realised the possible distrust women might experience or perceive in the justice system based on the words of Mr Malema. The judge’s stance towards such conduct is illustrative of somebody who is unwilling to concern himself with the relationship between black women and how they

---

<sup>24</sup> Holmes, W ‘The Path of Law’ (1996-1997) *Harvard Law Review* 110 997.

perceive the law and the justice system. The law is supposed to protect its citizens too and no amount of “word description and alignment” can provide that. In this case, the judge should have made an effort to ensure that Mr Malema understood just how much his actions damaged all that the law stands for and undermined the security offered by the values enshrined in the Constitution.

### 2.3 Critical Legal Studies

Legal Realism was concerned with the interpretation of the law by the judges and in the main critical about formalism adopted by the courts. Critical Legal Studies seized the debate further and their theory is concerned with the content of law itself. The law's position to claims of objectivity, neutrality and determinacy are some of the themes found in CLS.<sup>25</sup> CLS critiques abstract individualism that portrays people as rights-bearing human beings devoid of social relationships and separate from the realities of life.<sup>26</sup> In the words of Albertyn and Goldblatt which I concur with: “the law should recognise the unequal life chances occasioned by race, gender, socio-economic status and a host of other factors, which affect a person's ability to compete on an equal footing”.<sup>27</sup> In view of these words I posit that the law in this case and in the context of the experiences of black women, does not take into consideration all the dimensions involved in the oppression of women at the intersection of race, gender and class. By maintaining its neutral and universal status it blurs the effect the adverse social structures have on black women.

---

<sup>25</sup> Van Marle, K & Le Roux, W ‘Critical Legal Studies’ in Roeder C & Moellendorf, D *Jurisprudence* (2004) 247.

<sup>26</sup> Albertyn, C & Goldblatt, B, ‘Facing the challenge of Transformation: Difficulties in the Development of an indigenous jurisprudence of Equality’ (1998) *South African Journal of Human Rights* 14 248.

<sup>27</sup> Ibid.

## 2.3.1 Neutrality and the Equality Act

### 2.3.1.1 Constitution and the Equality Act

In the following discussion I argue that the law is hardly what one may call “objective or neutral”. I say this based on the principle that “liberal equality is often understood as an engine of liberation with respect to sex-specific rules”<sup>28</sup> and the exclusion of women from the social contract and how this grounding of law excluded the voices of women, traditionally perceived to be naturally emotional and less virtuous than men.<sup>29</sup>

The legal basis of the Equality Act is to be found in sections 9 and 10 of the Constitution. Section 9(1) and (2) of the Constitution provides as follows:

- (1) *“Everyone is equal before the law and has the right to equal protection and benefit of the law.”*
- (2) *“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken”.*

The Equality Act is derived from section 9 of the Constitution and it is aimed at giving effect to the spirit and purpose of the Constitution.

How is hate speech and harassment defined in the Equality Act? Section 10 defines hate speech as:

- “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 to incite harm*
  - (c) Promote or propagate hatred.”*

Section 11 on the other hand defines harassment as:

---

<sup>28</sup> Frug, M ‘A Postmodern feminist legal manifesto (An Unfinished Draft)’ 1992 *Harvard Law Review* 105 1045.

<sup>29</sup> Albertyn, C ‘Feminism and the Law’ in Roederer, C & Moellendorf, D *Jurisprudence* (2004) 291.

*“Harassment means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or intended adverse consequences and which is related to-*

*(a) Sex, gender or sexual orientation*

*(b) A person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group”.*

### **2.3.1.2 Dominant Male Voice of the Law**

The scant attention afforded to the social realities impacting on women in the law deserves attention. It is a long held view in feminist theory that the law and legal language are socially structured and produce meanings and interpretations which reinforce certain world views and understanding of events and exclude others.<sup>30</sup> The law is understood to be neutral, universal, and impartial,<sup>31</sup> to name just a few of its Enlightenment based characteristics. Critical Legal Studies argued this approach to law as one that actually conceals the gendered side of the law, the law that is fraught with fragments of class, race, sexual and sexuality, and other diverse differences.

Albertyn argues that the “claim that law is gendered or ‘male’ should not be understood to mean that the law is the product of a simple and instrumental relationship between powerful men and the law”.<sup>32</sup> This implies that the law is not objective or neutral but rather filled with ideological ideas and dominant values of the dominant race, gender, class and other dominant culture that seeks to oppress.

### **2.3.1.3 The Phallocentric Culture**

In line with the argument that the law is far from objective, Smart views the law as a “discursive field which disqualifies women’s accounts and experiences”<sup>33</sup> what Frug calls the “repressive function of law”.<sup>34</sup> However, Smart makes it clear that she is in no way referring to the discussion above about the law being man made.<sup>35</sup> When referring

---

<sup>30</sup> Albertyn, C ‘Women and the Law: The discriminatory and gendered nature of the law and institutions of criminal justice’ Jagwanth S, Schwikkard PJ, Grant B (eds) in *Women and the Law* (1994) 15.

<sup>31</sup> See 30 above.

<sup>32</sup> See 19 above.

<sup>33</sup> Smart, C *Feminism and the Power of Law* 1986 27.

<sup>34</sup> Frug, M ‘A Postmodern feminist legal manifesto (An Unfinished Draft)’ 1992 *Harvard Law Review* 105 1045.

<sup>35</sup> See 33 above.

to the law being phallogocentric she makes reference to the problems of masculine sexual power and heterosexism.<sup>36</sup> When exploring a phallogocentric culture she goes further and explain the Lacanian feminist psychoanalytic school of thought in terms of which women enter into the symbolic order which is male.<sup>37</sup> This order is patriarchal and sexuality is comprehended as the pleasure of the phallus.<sup>38</sup> She argues that in this order, sexuality is comprehended as the “pleasure of the Phallus, and by extension the pleasures of penetration and intercourse-for men”.<sup>39</sup>

In the light of the present case and in view of the phallogocentric culture meaning, the hate speech consisted of the words "*When a woman didn't enjoy it... Those who had a nice time...*" This gives credence to this psychoanalytic approach and with the law being masculine; a woman faces a difficult task by attempting to express her experience within this dominant voice. Smart further asserts that pleasure of the female is assumed either as having to coincide with the male definition as it appears in these aforementioned words or incomprehensible as these words "*You don't ask for taxi money from somebody who raped you*" seem to imply. According to Mr Malema a woman cannot ask for any “help” from her alleged rapist, asking for “help” extinguishes the act of rape and makes the act lawful. Clearly what Mr Malema views as *not rape* is contradictory to what a rape victim might perceive as such. One example is where an uncle engages in sexual relations with a girl -child relative who is under his guardianship until she reaches the age of majority.<sup>40</sup> Does the fact that she was dependent on her uncle who also happened to be her guardian all her life for her needs, mostly materialistic, exclude rape? That is the conclusion that one draws from the comments made by Mr Malema.

---

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> See for example this article 'My father is the father of my daughter' by Elizabeth & Virahsawmy L (05 December 2011) available at <http://www.genderlinks.org.za/article/my-father-is-the-father-of-my-daughter>.

The possibility that men and women might view sexuality differently irks the phallogocentric culture<sup>41</sup> and this difference “which the liberal equality guarantee seeks to avoid through neutrality is unavoidable”.<sup>42</sup>

#### **2.3.1.4 Objectivity, Disadvantage and Substantive Equality**

Objectivity in so far as this case and the law are concerned is problematic. The issue pertaining to the law being objective in South Africa has received criticism, with particular reference to the situations where it is applied in isolation of the lives it impacts upon.

In the *President of Republic of South Africa v Hugo*<sup>43</sup> the Constitutional Court had to decide whether the remission of all the mothers in prison who had children under the age of 12 years was discriminatory on the bases of sex. The Court acceded that by releasing only the mothers the president acted on the perception that women were primary care givers. Critical legal feminists have lauded an analytical contextual approach adopted by the judgements of both O’Regan J and Goldstone J. O’Regan clearly indicated in her judgment that women’s primary function as being responsible for childrearing was a reality.<sup>44</sup>

What follows is a discussion of a critical and important part that the law undermined when the equality principle was entrenched. I argue that the words complained of are not just based on gender and sex as listed in the Equality Act and applies in the *Sonke Gender Justice* case. The other element that is missing is one that is vital in this study: disadvantage. This becomes apparent in the judge’s clinical words, devoid of any detraction from perceiving this to be a case based on disadvantage as well, that:

---

<sup>41</sup> Smart, C, *Feminism and the Power of Law* (1986) 28.

<sup>42</sup> Frug, M, *A Postmodern feminist legal manifesto (an unfinished draft)* *Harvard Law Review* 105.

<sup>43</sup> *President of Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC).

<sup>44</sup> See 43 above.

*“It is clear the words complained of are based on not only one but two of the listed prohibited grounds, i.e. gender and sex.”<sup>45</sup>*

According to Albertyn and Goldblatt, one of the fundamental objectives of critical legal studies is to locate its understanding of the law and legal concepts in the lived experiences of men and women.<sup>46</sup> Therefore it follows that when applying the Equality Act in a case of this nature it is imperative to have regard of the fact that the law must talk to the realities or lived experiences of those the law seeks to protect. Critical legal feminists put an emphasis on substantive equality as opposed to formal equality.<sup>47</sup> In this present case, this means that the law should not be solely based on the stated differences but must extend equality to that “which recognises that women (and other disadvantaged groups) are subject to forms of inequality which are not the incidental results of prejudice or stereotypes, but which are deeply structural, embedded in the very way in which society is organised”.<sup>48</sup>

The judgement must reflect the inequality, difference and disadvantage that are peculiar to black women in this case. As Crenshaw elaborates, a “bottom- down” approach is one which “the dominant message of antidiscrimination law is that it will regulate only the limited extent to which race or sex interferes with the process of determining outcomes”.<sup>49</sup> A black woman’s experience of sexual and gender based oppression is a multiplicity of experiences, grounded both in difference and disadvantage imposed by a dominant cultural system, as shall be discussed at length later as the study progresses.

## **2.4 Concluding Remarks**

In this chapter I have discussed the hate speech case within its adjudicative process at the Equality court. My aim was to capture the importance of Constitutional adjudication and some of the challenges it faces within its relationship with a diverse and socially

---

<sup>45</sup> *Sonke Gender Justice Network v Malema 2010 (7) BCLR 729 paragraph 7 (a).*

<sup>46</sup> Albertyn, C & Goldblatt, B ‘Facing the challenge of Transformation: Difficulties in the Development of an indigenous jurisprudence of Equality’ (1998) 14 *South African Journal of Human Rights* 251.

<sup>47</sup> *Ibid.*

<sup>48</sup> See 46 above.

<sup>49</sup> Crenshaw K, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, in James J and Sharpley-Whiting T D (ed), *The Black Feminist Reader* (2000) 218.

construed culture. This exercise was driven by the intention to argue that the adjudication of the Constitution necessitates a change in the practice of law that is driven towards reifying the pluralistic nature of the South African culture by opting for adjudication that reflects the social dynamics within which people live and not depart from an interpretation that affirms a dominant voice. The danger that is presented by such an application is that it successfully alienates other voices and oppresses even further. It is a fact that the law does not exist in isolation but has an interrelationship with its subjects that is complex and diverse. As Klare puts it “I do believe that a progressive legal culture is a necessary condition for a long term success of transformative constitutionalism”.<sup>50</sup>

---

<sup>50</sup> Klare, K ‘Legal Culture & Transformative Constitutionalism’ ) *South African Journal of Human Rights* (1998) 14 146.

## Chapter 3

### Transformation, Black Women and the Law

#### 3.1 Introduction

What does it mean to be black “*in and through the eyes of the law?*”<sup>51</sup> This is a contentious issue based on the history of racism that prevailed during colonialism and apartheid with its white supremacy ideology in this country. In the previous political regimes that endorsed racism, black people were inferior in status and culture as compared to white people and the laws were racist and differently applied too in support of the then prevailing of the political dispensation. Consider these words that were uttered by the judge in the *R v Mbombela* court case where the court had to define the “reasonable man test” in a case of murder:

*“I have no doubt that by the law of this country there is only one standard of “reasonable man” I say this for several reasons. Thus in the present case if the standard were taken to be “an ordinary 18 year old native living at home in his kraal” , then in each and every case the standard would have to be varied so as to suit the description of the particular accused. In other words, there would be no standard, and all that the jury would have to enquire into would be whether a person with the mental and moral and temperamental and racial idiosyncrasies of the accused could reasonably fall into such a mistake of fact.”*<sup>52</sup>

The institutionalisation of racial laws and policies as well as racism and apartheid in South Africa has had an adverse impact on the social and economic structure of the country<sup>53</sup> and legal culture too.<sup>54</sup> The question that one will have to confront is whether a change in the political regime also implies a change in the socio-economic structures that were racist and in turn, a law that entrenched these ideologies? The *Sonke Gender Justice Network* court case does not display that that seems to be the case within the legal realm. What this case seems to illustrate is the tendency of the judges and

---

<sup>51</sup> Harris, A ‘The Jurisprudence of Reconstruction’ *California Law Review* (1994) 741.

<sup>52</sup> *R v Mbombela* 1933 AD 269.

<sup>53</sup> Terblanche, S A *History of Inequality in South Africa, 1652-2002* 14.

<sup>54</sup> Immorality Act of 1927, Group Areas Act 57 of 1957

legislature to reluctantly depart from approaches to law that are marked by formalism and positivism,<sup>55</sup> a culture that was prevalent during the apartheid era.

### 3.2 Critical Race Feminism

Critical race feminism is a school of thought within critical race theory “but argues that the gender subordination of black women does not receive sufficient attention in this theory, while feminist theories do not pay sufficient attention to the racialised experiences of black women.”<sup>56</sup> Critical race feminists have criticised mainstream feminism on these four aspects that: it has excluded experiences of black women, the issues that are deemed important are those relevant to white feminists, a shared experience of sisterhood and lastly the alienation of black and working class women.<sup>57</sup> The issues affecting black women have been simultaneously addressed within race, class and gender.

### 3.3 Race, Racialism and the Law

In a demonstration of the importance of race, three years ago the Northern Gauteng High Court made a ruling that altered the entire procurement process. This landmark judgment also has had an impact on employment related legislation and the application of racial based policies like affirmative action and employment equity. The judge had to decide whether Chinese people could be categorised as ‘black’ people for the purposes of public procurement.<sup>58</sup> The ruling was in the affirmative, the judge ruled that Chinese people should be categorised as black as defined in the Employment Equity Act<sup>59</sup> and BBBEE legislation. This decision is important in that during the evaluation of bids, when awarding preference points and evaluating black economic statuses of entities, the definition of black people must also include Africans, Coloureds, Indians as well as Chinese. This legal approach is vital in that it highlights the fact that race involves more

---

<sup>55</sup> Van Marle, K ‘Reflections on post-apartheid being and becoming in the aftermath of amnesty: Du Toit v Minister of Safety and Security’ (2010) *Constitutional Court Review* 348.

<sup>56</sup> Van Marle, K & Bonthuys, E ‘Feminist Theories and Concepts’ in Albertyn C & Bonthuys E (eds) *Gender, Law and Justice* (2007) 1<sup>st</sup> Edition 40.

<sup>57</sup> Ibid.

<sup>58</sup> *Chinese Association of South Africa v Minister of Labour and Others*, unreported case in the TPD, Case number:59251/2007.

<sup>59</sup> Employment Equity Act 55 of 1998.

than just skin pigmentation. Race in South Africa is rooted deeper than skin colour and involves complex cultural practices that deemed white people *better* during apartheid.

To better understand the politics of race, it is imperative to understand what race and white supremacy represented during the apartheid regime. According to MacDonald, the meaning of racism in South Africa differs from what racism is in the United States.<sup>60</sup>

He describes racism as:

*“Racism has members of one racial group, usually whites, dominating members of a different social group, usually blacks, for material or expressive reasons...Racism deems some people as better than other people on the basis of their membership in a race. The ‘better’ people, - usually white-deserve more power by virtue of their superiority...Ostensibly; superiority precedes and grounds supremacy... Whites are more powerful because they are superior, because nature or culture has made them better and more worthy, moreover whites are superior even when they are not more powerful. It is the putative inferiority of blacks that justifies the subordination of black.”<sup>61</sup>*

Clearly the judge was not far off the mark in his finding because race is created, it is ordered depending on the social, political and economic dynamics of a particular society. According to MacDonald apartheid cannot be simply reduced to white supremacy because of its grounding in segregation.<sup>62</sup> Apartheid innovated a certain distinct conception of race, he asserts that “segregation ordained blacks to be *inferior* to whites; apartheid cast them as *different*.”<sup>63</sup> Black people were regarded as inferior for reasons of nature and culture;<sup>64</sup> they had to be denied citizenship and therefore segregated into ‘bantustans’ lest they assimilate white culture.

The inferior and different status afforded black people during apartheid necessitate a further debate. A debate that was conceived by Biko and his ‘black consciousness’ approach. To Biko, blackness was not ascribed, it was achieved and earned.<sup>65</sup> Biko sees no colour or Africanness in his debates about being black; blackness is “contrived consciousness”.<sup>66</sup> Black consciousness is emancipation and “*it involved non-whites*

---

<sup>60</sup> MacDonald, M *Why Race Matters in South Africa* (2006) 1<sup>st</sup> Edition 117.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

*freeing themselves from feelings of inferiority, unworthiness, and powerlessness and asserting themselves as actors, as subjects, as efficacious, as black.*<sup>67</sup>

Biko's statement clearly demonstrates his disregard of skin colour in so far as race is concerned. This is one of the reasons why being black in South Africa includes other races with the exception of white people. Clearly the politics of today realised that it was not only the Africans that were disadvantaged by the previous rule. However; they are not as generous and can only embrace racialism to the extent that it excludes white people therefore departing from the black consciousness views of Biko in that one aspect. In as much as this is the case, white women are categorised as previously disadvantaged in the preferential Act and for the purposes of employment equity. It is important to note though that they are classified as "previously disadvantaged" and not black per se. Nevertheless, being black is not simply reduced to skin colour and being of African descent. For the purposes of my debate I will exclude the role of white women in public procurement contracts in so far as the application of legislation is concerned. Therefore any mention of black women must be understood to indicate African, Coloured, Indian and Asian women.

### **3.4 Race and Disadvantage**

An important aspect of this debate relates to Mr Malema in the hate speech case. His 'whiteness' is not ascribed on the colour of his skin. He is white by definition because he has done what MacDonald whilst quoting Biko says is "as blacks develop through suffering from and rejecting of white racism, *"so whiteness requires blacks to establish the domination that constitutes it"*.<sup>68</sup>

#### **3.4.1 Disadvantage of Being Black and a Woman**

Davis and Wildman whilst relying on Foucault explain how "symbols provide indicators for historians of the "essence" of historical eras, the main images of words, pictures, and

---

<sup>67</sup> MacDonald, M *Why Race Matters in South Africa* (2006) 1<sup>st</sup> Edition 118.

<sup>68</sup> Ibid.

sounds that people welcomed (or rejected) in their lives”,<sup>69</sup> to the extent that “symbols filter understanding of events in particular affect the way history will record them, the ability to share in their creation and presentation is paramount to constructing reality.<sup>70</sup> The point that I am trying to make is that Mr Malema “was the object, the referent of the symbol “Black”.<sup>71</sup> I say this because he had the advantage of being a beneficiary of anti discrimination and non racial laws, what is loosely termed ‘*tenderpreneur/BEE*’. He was a popular youth leader of a large political party, leading an affluent lifestyle that saw him rise from poverty to being a prominent proponent for some controversial economic policies. He enjoyed the status of social and economic privilege and through his elitist image he constructed race as “a symbol of making it”<sup>72</sup> in the new democratic South Africa.

This symbolic value of race was replaced by gender<sup>73</sup> and sex discrimination in the Equality court. The symbolic meaning of black not only reveals that that the symbol is black but that it is also gendered.<sup>74</sup> This in turn implies the assumption that “all women are white and that all blacks are men”.<sup>75</sup> This means that in the absence of the “race card” being raised in the dispute, the law has successfully rendered the rape complainant as invisible except as part of the sex and gender complaint, therefore discharging the existence of white supremacy or racism. This effectively “de-raced”<sup>76</sup> the rape complainant and this “erasure of her race allowed racism to act as a phantom once again”,<sup>77</sup> clearly indicating that the complaint was made under a law that has already been discussed as representing white male values. This avoidance of race might seem justified under the current law that is colour blind but “failing to talk about

---

<sup>69</sup> Davis, DA & Wildman, S ‘The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings’ in Wing,AK(ed), *Critical Race Feminism a Reader* (1997) 175.

<sup>70</sup> Ibid.

<sup>71</sup> See 69 above

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

race forces racism off limits, but it does not make either be gone”.<sup>78</sup> This also seems to indicate that as a society “we tiptoe around the dynamic of racism, keeping it intact”.<sup>79</sup>

### 3.4.2 Multiple Consciousness

Adrienne Wing describes the multiplier effect in the words “I am not an *indivisible* black female with a multiple consciousness”.<sup>80</sup> She further explains that the actuality of black women’s experience is multiplicative and that the law is ignorant of this multiplicative nature.<sup>81</sup> The relevance of this multiplicative nature of black women lies with its tension with dominant conceptions of justice.<sup>82</sup> The Equality Act has treated the gender/sex dispute within a neoliberal discourse that Crenshaw rightly describes as “identity categories are most often treated in mainstream liberal discourse as vestiges of bias or domination- that is, as intrinsically negative frameworks in which social power works to exclude or marginalise those who are different”.<sup>83</sup> Such identities are collective narratives in the sense that they answer the question ‘*who am I?*’<sup>84</sup> As a black woman read against the Constitution’s ‘*we the people of South Africa*’. Crenshaw argues that identity politics ignores intra group differences and that this contributes to tension among groups.<sup>85</sup> As I have illustrated above, the fact that Mr Malema is black and the woman in the rape case was black outweighed the issue of race in spite of the racist behaviour of Mr Malema.

In the following discussion I will discuss gender and class and its role in determining space for black women. I have attempted to illustrate how race in the hate speech case successfully outweighed racism. I am now going to explain how this oppression on the

---

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Wing, A ‘Brief Reflections toward a Multiplicative Theory and the Praxis of being’ in Wing, AK(ed), *Critical Race Feminism a Reader* (1997) 27.

<sup>81</sup> Ibid.

<sup>82</sup> Crenshaw, K ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour’ in in Crenshaw K, Gotanda N, Peller G & Thomas K (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1996) 1<sup>st</sup> Edition 357.

<sup>83</sup> Ibid.

<sup>84</sup> Yuval-Davis, N ‘Intersectionality and Feminist Politics’(2006) *European Journal of Women’s Studies*, 13(3) 197.

<sup>85</sup> See 82 above.

basis of gender and class intersect by locating some of the difficulties black women are faced with by arguing class and gender. This discussion is intended to highlight how black women experience discrimination as black women, not as a collective within *we the people of South Africa* as alluded in the Constitution but as simply black women. I am of the view that “blacks” as often used is a camouflage to classify firstly, black people as singular and secondly, with the intention to effectively suppress the “other” (women) as a group within the black race. As Crenshaw puts it:

*“Black women’s experiences are much broader than the general categories that discrimination discourse provides. Yet the continued insistence that Black women’s demands and needs be filtered through categorical analyses that completely obscure their experiences guarantees that their needs will seldom be addressed.”<sup>86</sup>*

### 3.5 Class and Black Women

In as much as racism and white supremacy have contributed to the inequalities experienced to access to resources, Terreblanche has this to say about the settlement that was entered into before the democratic elections of 1994:

*“The terms of this settlement were such that the poorest half of the population has, over the last eight years, become entrapped in a new form of oppression: a state of systemic exclusion and systemic neglect by the democratically elected government and the modern sector of the economy respectively. It is therefore not surprising that the situation of the poorest half of the population has deteriorated during the past eight years.”<sup>87</sup>*

During white minority rule, socio-economic structures were determined in accordance with maintaining the status of white people by “keeping blacks subjugated as a subservient labour force”.<sup>88</sup> In light of the fact that I am only concerned with capitalism as it affects black women I will only concentrate on the “highly differentiated class structure that has emerged among blacks and the rise of the black elite”.<sup>89</sup>

---

<sup>86</sup> See 82 above.

<sup>87</sup> Terreblanche, *S A History of Inequality in South Africa, 1652-2002* 18.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

### 3.5.1 The Black Elite and the Underclass

The Constitution in terms of section 9 and the Equality Act discourages any kind of discrimination and it has ensured to entrench socio economic rights that are protected under the law. South Africans have a Constitution that ensures that their socio economic rights are protected.<sup>90</sup> This however has not deterred the upsurge in the number of the black elite, which has benefited immensely under section 217 of the Constitution. The emergence of the black elite has been lamented by Terreblanche as emerging at the same time with the underclass becoming poorer.<sup>91</sup> These elite black people who have benefited under the preference and the BEE Acts must not be confused with “Black Women”.

I have singled out Mr Malema as a symbol of the black elite with the intention of identifying the plight of women in South Africa. The substantial gap that exists regarding the living conditions of the black elite and the rest of the country is a clear indication that an underclass does exist in South Africa. This class difference must also be noted not to be simply regarded as one of the injustices that was inherited from the previous rule and therefore cannot be deemed easily resolved within a young democracy. Viewing this class difference in that manner will constitute an over-simplification of issues as it has undoubtedly become a complex combination of colonialism, apartheid and democracy that has systematically eroded black women in particular, from meaningful participation in the economy due to social structures that still remain racist, patriarchal and class based, even under a majority black rule.

Davis asserts that “even as black women have acquired a greater equality as women within certain institutions of the black community, they have always suffered a far greater proportion and intensity the effects of institutionalised male supremacy.”<sup>92</sup> Rightly so, I am persuaded to agree because with the exit of apartheid emerged a black

---

<sup>90</sup> See for example an article by Angela Davis, where she explains the class structure that has no protection under the law in the United States in ‘Theorizing Class, Gender and the Law: Three Approaches’ (2009) *Law and Contemporary Problems* 72 37.

<sup>91</sup> Ibid.

<sup>92</sup> Davis, A ‘Women and Capitalism: Dialectics of Oppression and Liberation’ in James, J and Sharpley-Whiting, T D (eds) *The Black Feminist Reader* (2000)146.

elite that has in turn succeeded in the oppression of its black women, within a law that similarly like the apartheid based laws, allows this kind of discrimination to occur and flourish.

In an unreported case in 2012, a black woman was arrested and charged for theft for stealing a cough mixture worth R20.00. Although the court a quo found her guilty of theft and sentenced her to a fine or imprisonment, she appealed her sentence and the court acquitted her on the grounds of poverty.<sup>93</sup> In another landmark case at the Constitutional Court, Ms Irene Grootboom succeeded to challenge the government to provide shelter for the poor based on the socio economic values touted in the Constitution with the inherent values therein.<sup>94</sup> Although the Court steered clear of pronouncing that the government provide the houses as challenged by Grootboom, it did make the ruling that the state must formulate a measure to address the housing crisis.<sup>95</sup> What is interesting in this ruling is its determination to steer clear of any matters that were gender-specific. The Judge treads carefully thereby avoiding any specific reference to the link between the large numbers of children living in squalor proportional to the number of their caregivers, the women. It seems that the law in this case tacitly identified lack, poverty and degradation synonymously with being black and a woman. This is the trend that also appears in the *Blue Moonlight Properties* court case that was decided in 2011 at the Constitutional Court. In the latter case, the Court merely took note of the fact that most of the illegal occupiers were women and children. My point is that in cases such as these where poverty and lack are litigated at the highest Court in the land, within a supreme statute, the judges supported by the universal application of the law under a neoliberal system, have never highlighted the gendered nature of these disputes. The law in this regard has simply tacitly affirmed the inequality in society with women and skin colour without any attempts to remedy the situation.

---

<sup>93</sup> See [www.news24.com/SouthAfrica/News](http://www.news24.com/SouthAfrica/News)

<sup>94</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) BCLR 150 CC.*

<sup>95</sup> *Grootboom and Others v Government of the Republic of South Africa and Others (1997) 3 All SA 51*

The emphasis has always been on the realisation of socio-economic rights as Jacob J indicated in the *Grootboom* decision when he quoted Chaskalson J's judgment in *Soobromoney*:

*"We live in a society in which there are great disparities in wealth. Millions are living in deplorable conditions and in great poverty. There is a high level of not having access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and the commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions exist that aspiration will have a hollow ring."*<sup>96</sup>

The quest to fulfil these rights has at the same time failed to recognise the people most severely affected by this injustice. The court's regard for the welfare of the children in these cases is commendable as much as its neglect for the women is lamentable. The tension between race and class is apparent in this case but the recognition of the location of gender and its intersection with class is non-existent. In the *Blue Moonlight* court case the judge merely makes mathematical calculations without adding any jurisprudential value to the gender aspect of lack and therefore does not link the issue of class, gender and poverty. The same pattern has been exhibited by the hate speech court case in the Equality court regarding the case of Mr Malema.

These cases have undoubtedly shown that a majority of the women still form part of the society that can be classified as 'the underclass' which a capitalist South Africa does not cater for under the privilege rule of the likes of Mr Malema. As Davis puts it "some women continue to play subordinate roles in existing societies, their oppression assumes yet another, but far less dangerous character."<sup>97</sup> In this way, the law and the ruling class have successfully entrenched the oppression of black women as a class, bearing in mind that capitalism has a national origin.

---

<sup>96</sup> See 95 above.

<sup>97</sup> See 92 above.

Mr Malema's elitism and self-enrichment become apparent in his use of the words '*you do not ask for money from somebody who raped you*'. Herein lies what connects Ms Grootboom, the women in *Blue Moonlight* and the woman in the case under discussion: the disjuncture between the privileged and the 'have not's. This materialistic feature of the South African class structure and its effect on black women is oversimplified if not completely ignored. It is never a subject that the law rigorously debates, even when it has the opportunity to do so, in order to afford justice to the black women whose oppression seems to exist in perpetuity. It is almost a mimic of the previous apartheid era where free black labour deprived the majority of black women a well-balanced social structure without their men who were toiling for the white government to support job reservation laws.

I view this stance employed by the law's miscarriage of justice as one that is indicative of the way our society is structured, one that is either dismissive and or oblivious of the experiences of those in the margins. This tension between gender and class marked by its location will endure for a long time because in South Africa, just as it was during the apartheid era, class is intertwined with race and is a signal that the struggle at least for equal treatment under the law is not yet over.

### **3.6 Concluding Remarks**

In a contextual analysis aimed to locate the intersection of gender, race and class I have discussed the status of black women and their difficulty in engaging meaningfully in the public sector contracting sphere. These issues addressed here are but one of the many oppressive structures that black women have to contend with not only limited to racism but also extend to advantage. This advantage that is enjoyed by black men that has on many occasions obscured justice for black women.

The black bourgeoisie has strived under current capitalism and democracy, supported by a legislative framework that claims to right the wrongs of the past. MacDonald aptly describes the relationship between democracy and capitalism as the former having to

grapple with the power of the latter, with far reaching ramifications.<sup>98</sup> As long as the law identifies black with 'man' and fails to acknowledge and interrogate class and gender specific oppression as it has clearly shown in the hate speech case and the other decisions mentioned, justice will remain a pipe dream; as bell hooks mentions:

*“As a group, black women are in an unusual position in this society, for not only are we collectively at the bottom of the occupational ladder, but our overall social status is lower than that of any other group... White women and black men have it both ways. They can act as oppressor or be oppressed. Black men may be victimised by racism, but sexism allows them to act as exploiters and oppressors of women. White women may be victimised by sexism but racism enables them to act as exploiters and oppressors of black people.”<sup>99</sup>*

---

<sup>98</sup> MacDonald, M *Why race matters in South Africa*, Harvard University (2006) 179.

<sup>99</sup> Hooks, B 'Black Women: Shaping Feminist Theory' in James, J and Sharpley-Whiting, T D (eds), *The Black Feminist Reader* (2000) 131.

## Chapter 4

### Black Women's Oppression and Government Procurement Contracts

#### 4.1 Introduction

In the previous chapter I advocated for a progressive constitutional jurisprudence that is mindful of the location of race, gender and class. I have also highlighted how the law's failure to take into account issues pertaining to class structure and gender has the potential to result in unequal treatment under the law. In this chapter I pay particular attention to government procurement contracts, their legislative framework and transformative role in the socio-economic empowerment of black women. In this chapter my arguments are based on the empowerment role of the Constitution for black women.

#### 4.2 Background

The fact that South Africa is an egalitarian state and black people are a majority might make my arguments paradoxical. In the following discussion I firstly discuss the legal framework of section 217 of the Constitution and its implementation within national legislation. Thereafter I will focus my arguments on the transformative objectives of the Constitution and how they intersect at the location of class, gender and race and reparation.

##### 4.2.1 The Constitution and Public Sector Contracts

The Constitution is the main legal text that regulates the procurement process in the public sector. Therefore, public institutions procuring goods or services must be mindful of the provisions of section 217 which provides that:

*"Procurement-*

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-*
  - (a) categories of preference in the allocation of contracts; and*
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*

(3) *National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.*<sup>100</sup>

Bolton defines public sector contracts as “contracts entered into between a government and outside entities”.<sup>101</sup> She describes procurement as “the function of *purchasing* goods and services from an outside body”.<sup>102</sup>

Firstly, it is important to note that section 217 regulates the entire government procurement exercise. That means that every legal entity that falls within the definition of ‘organ of state’ as defined in section 239 of the Constitution must adhere to the regulatory process of section 217. Section 217 (3) makes it mandatory for national legislation to prescribe a framework within which the policy referred to in subsection 2 must be implemented. I have deliberately omitted the Public Finance Management Act<sup>103</sup> and the Local Government: Municipal Finance Management Act<sup>104</sup> as both Acts are in the main concerned with the financial management of the three levels of government. It is also important to realise that the regulatory process of the procurement system in South Africa is based on social justice.<sup>105</sup>

#### **4.2.1.1 The Preferential Procurement Policy Framework Act**

The policy referred to in subsection 2 is the Preferential Procurement Policy Framework Act.<sup>106</sup> In the past there was confusion whether this Act and its Regulations applied to organs of state that are listed as public entities in terms of the Public Finance Management Act.<sup>107</sup> The confusion arose as a result of the definition of ‘state-owned enterprise’ in section 1 (iii) of the Preferential Procurement Policy Framework Act and ‘organ of state’ as defined in section 239 of the Constitution. The confusion was later cleared and becomes a moot point at this stage as the Regulations have been revised.

---

<sup>100</sup> Section 217 of the Constitution.

<sup>101</sup> Bolton, P *The Law of Government Procurement in South Africa* (2007) 1.

<sup>102</sup> Ibid.

<sup>103</sup> Public Finance Management Act 1 of 1999 as amended.

<sup>104</sup> Local Government: Municipal Finance Management Act 32 of 2000 as amended.

<sup>105</sup> See 101 above

<sup>106</sup> Preferential Procurement Policy Framework Act 5 of 2000

<sup>107</sup> Bolton, P ‘The Regulation of preferential procurement in state-owned enterprises’ (2010) *South African Law Journal* 1 101.

In terms of the current legal dispensation<sup>108</sup> the Regulations of 2011 are applicable to every organ of state, including all those state enterprises listed in the Public Finance Management Act.<sup>109</sup>

This Act is a vigilant tool to ensure that the entities that participate in the bidding process are cognisant of the stance that South Africa has adopted regarding the discrepancies that resulted prior to 1994. Therefore, the procurement system during the evaluation process is based upon the elements that are mentioned in the Constitution in that it must be fair, equitable, competitive, transparent and cost effective.

#### **4.2.1.2 The Broad Based Black Economic Empowerment Act**

For the purposes of this discussion, I will refer to this piece of legislation as the BEE Act<sup>110</sup>. This Act was established among other reasons with the purpose of “promotion of black economic empowerment in South Africa”.<sup>111</sup> The most common feature that these two Acts exhibit is the advancement of previously disadvantaged groups within the economic industry in South Africa. Both the preference and BEE Acts play a vital role in the adjudication of tenders. As explained before, the preference Act and its Regulations sets out the parameters within which preference is to be awarded and the BEE Act acts as a compliance indicator relevant to black economic empowerment. In the *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems Ltd and Another*,<sup>112</sup> Chief Justice Mogoeng had this to say about the relevance of both Acts:

*“One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontier or in the subsequent development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic assets...Driven by the imperative to redress the imbalances of the past, the people of South Africa, through their democratic government, developed, among others, the broad based black economic empowerment programme and the preferential procurement policy.”<sup>113</sup>*

---

<sup>108</sup> Preferential Procurement Policy Framework Act Regulations of 2011.

<sup>109</sup> Public Finance Management Act 1 of 1999.

<sup>110</sup> Broad-Based Black Economic Empowerment Act 53 of 2003

<sup>111</sup> See 107 above.

<sup>112</sup> *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems Ltd and Another* 2011 (2) BCLR 207 (CC).

<sup>113</sup> Act 3 of 2000

The other important pieces of primary legislation that is relevant in the procurement process include the Promotion of Just Administrative Act (PAJA),<sup>114</sup> the Equality Act, Construction Industry Development Board Act<sup>115</sup> and the Prevention and Combating of Corrupt Activities Act.<sup>116</sup> As my arguments are entirely based on a feminist theme, I will limit my discussions to the BEE and preference Acts, bearing in mind the administrative relevance of PAJA during the tender evaluation process and the contractual relationship during the tender award stage.

Section 217(1) of the Constitution has laid down five elements in respect of which procurement processes must adhere to in terms of good governance and they are briefly discussed in the next paragraphs.

### *Fairness*

Watermeyer describes this element to denote a process of offer that is conducted impartially without bias and provides parties in the tender process timely access to the same information.<sup>117</sup> For example, should there be an aspect in the tender document that needs to be clarified; the organ of state concerned will facilitate a bidder's conference meeting to make the necessary information available to all the parties with the willingness to participate in the tender process. This gives a fair chance to all the parties involved without affording favouritism to any tenderer.

### *Equitable*

The tender process must be exercised within the parameters of administrative action and the only grounds for not awarding a contract to a tenderer who complies with all the requirements are restrictions from doing business with the organisation, technical incapacity, other legal impediments and avoidance of a possible conflict of interest. In the *Black top Surfaces (Pty) Ltd v Member of the Executive Council for Public Works &*

---

<sup>114</sup> Promotion of Just Administrative Act 3 of 2000.

<sup>115</sup> Construction Industry Development Board Act 38 of 2000.

<sup>116</sup> Prevention and Combating of Corrupt Activities Act 12 of 2004.

<sup>117</sup> Watermeyer, RB 'Regulating public procurement in Southern Africa through international and national standards' Paper presented at the University of Stellenbosch in 2012.

*Roads Limpopo Province*,<sup>118</sup> the court had to decide whether establishing a contract price threshold as a ground for exclusion was not in conflict with the preference Act.

Section 2(1) of the preference Act provides the following:

*The contracts must be awarded to the tenderer who scores the highest points; unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.*<sup>119</sup>

The Judge ruled that the threshold principle constituted objective criteria as envisaged in the preference Act. His reasons were that the under estimation of 10% of the tender price is an indication of a business risk and past experience had proven that huge costs have to be incurred to salvage the project and added to that were time delays.<sup>120</sup>

### *Transparency*

The procurement process and its criteria have to be made available to the public.<sup>121</sup> The public law of administrative action finds application here in that the award and the reasons for the award are made available by the organ of state concerned. Watermeyer further asserts that the tender documents must be presented in a clear, unambiguous and comprehensive manner.<sup>122</sup> I have reservations about the applicability of this principle in so far as my study is concerned and that shall be explained later.

### *Competitive*

The competition element purports that the levels of competition are appropriate and ensures best value outcomes.<sup>123</sup> The business best practice rule so far is to advertise the tender in the form of a request for offer which grants easy access to everyone interested in doing that particular business.

---

<sup>118</sup> *Black top Surfaces (Pty) Ltd v Member of the Executive Council for Public Works & Roads Limpopo Province 2006 JOL 17099 T.*

<sup>119</sup> Preferential Policy Framework Act 2 of 2003.

<sup>120</sup> See 116 above.

<sup>121</sup> *Ibid.*

<sup>122</sup> Watermeyer, RB 'Regulating public procurement in Southern Africa through international and national standards' Paper presented at the University of Stellenbosch in 2012.

<sup>123</sup> *Ibid.*

### *Cost-Effective*

Ensuring the best value for money does not mean that the tenderer that scores the highest points during the evaluation process will be awarded the tender. Other factors come into play, most notably the one based on section 2(e) of the preference Act.

This basic explanation forms part of the good governance principles that have been entrenched into various legislation<sup>124</sup> to ensure an ethical procurement system. Another important feature of the South African public procurement legislative framework is its commitment to facilitate and achieve socio economic objectives.<sup>125</sup> It is this aspect of the system that I aim to criticise as being fraught with difficulties thus making it almost impossible to rely on public procurement as a role player in poverty reduction<sup>126</sup> and the economic empowerment of black women.

### **4.3 Transformative Objectives of Section 217**

As mentioned above, the South African public procurement system is driven by transformative objectives that are aimed at addressing the socio-economic inequalities in society. The BEE Act is one piece of legislation that has had a major influence on the economy of the country with transformation being the pillar of this Act. Race has been the driving force behind the implementation of this Act and ensuring that black people are able to participate meaningfully and productively in the economy. This Act within its preamble explains its existence by briefly engaging with the economy and the role of black people in it, the deprivation of some people to productive resources, skills, ownership of productive assets and increasing effective participation of the majority of South Africans in the economy.<sup>127</sup> And as part of its goals it seeks to encourage the active participation of black women in the economy. In its Codes it further illustrates how these goals can be achieved.<sup>128</sup>

---

<sup>124</sup> See section 51(1) of the Public Finance Management Act 1 of 199, section 9 of the Companies Act 71 of 2008 and sections 2 & 5 of the Local Government: Municipal Finance Management Act 56 of 2003.

<sup>125</sup> See 2 above.

<sup>126</sup> Ibid.

<sup>127</sup> Preamble: Broad Based Black Economic Empowerment Act 53 of 2003.

<sup>128</sup> Broad Based Black Economic Empowerment Act 53 of 2003:Codes of Good Practice.

### 4.3.1 The Black Elite and Black Women

I have shortly discussed being a black woman and poor and how this has been treated by mainstream legal discourse with its support of the oppressive dominant structures. This I have done by contextualising the race and class marginalisation of black women in the hate speech court case involving Sonke Gender Justice and Mr Malema. In my discussion on the prejudice directed at black women, I have not fully explained how this is integrated into the procurement process. Therefore in the next paragraphs I aim to posit how this discrimination has manifested itself in public sector procurement.

The social and economic exclusion of black women is further one that, as mentioned earlier, has advantaged the black elite which is represented by black affluent males. It has also at the same time side-lined and therefore failed to emancipate black women which is lamentable in light of the fact that the BEE Act has as its one of its objectives levelling the economic gap to enable black women to participate actively in the economy. The malfunction of the BEE Act and the transformative objectives of section 217 face the challenge that the law has failed to adequately provide for a legal mechanism to counter balance this injustice. It is precisely the power that black men exercise in domination of black women that has resulted in the disempowerment of women socially and economically.

David Byrne, quoting Heaney defines empowerment as:

*For poor and dispossessed people, strength is in numbers and social change is accomplished in unity. Power is shared, not the power of the few who improve themselves at the expense of others, but the power of the many who find strength and purpose in a common vision. Liberation achieved by individuals at the expense of others is an act of oppression.<sup>129</sup>*

The five elements of equity, transparency, competitiveness, cost effectiveness and fairness are a cause for concern in this discussion. On the one hand we have section 9 of the Constitution that has been promulgated as the Equality Act. In terms of the Equality Act, everyone is equal before the law and shall enjoy the protections and privileges under the law. The gender discrimination that the law provides protection for

---

<sup>129</sup> Byrne, D *Social Exclusion* (2005) 2<sup>nd</sup> Edition 40.

is one that is lacking in that it is based on the feminist agenda that excludes the realities facing black women.

What is at stake here and is not clarified by the law is how it balances these five elements against access to resources in order to enable black women as a previously disadvantaged group to be able to participate actively in the procurement/ economy of the country. For example, black women as illustrated in the *Blue Moonlight* and the *Grootboom* court cases form a large portion of the South African society. This portion is non-bourgeoisie, so far removed from urbanisation, unskilled and illiterate that some of them do not even know transformation or the Constitution. Albertyn and Bonthuys explain this divide as one that is characterised by race and gender.<sup>130</sup> They go further and explain that a larger percentage of these women live in rural areas away from schools, courts, public administration and health services.<sup>131</sup> These women are also primary carers for the children and they still lack access to basic services like sanitation and electricity.<sup>132</sup> They also make an important note that African women's, not black women, level of education is lower than any other in the country.<sup>133</sup> These are the women like Ms Irene Grootboom, they exist in the midst of an egalitarian South Africa and the law is not clear how it aims to emancipate them in the socio-economic sense.

With these facts in mind, it is difficult and problematic to imagine how an inclusive public procurement system can be achieved. It also poses a challenge in that the law has left an unfilled and yet fundamental gap that will essentially limit the disjuncture that currently exists between what is written down in paper and certified as law to the lives it has a direct impact on. On a more contextual analysis it becomes clear that the procurement process as a means to alleviate poverty is lacking in that its existence and application do not seem to have the social and economic impact for which it was intended.

---

<sup>130</sup> Albertyn, C & Bonthuys E in Albertyn C & Bonthuys E (eds), *Gender, Law and Justice* (2007) 1<sup>st</sup> Edition 7.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

These elements need to be applied in an economic sphere that is enabling in my opinion and as evidence has shown, a larger portion of society which is black women is left out in economic activity due to their class. The location at the intersection of race, class and gender is one that is complex and filled with a multitude of factors currently not given significance and as a result makes this exercise impossible. This is a kind of provision that caters for the bourgeoisie at the expense of black women. This is preposterous and is indicative of a legislative framework that has suffered a bad spell of amnesia. Barely three years before the promulgation of the BEE Act, the *Grootboom* judgment in its colour and gender blind inadequacies and class bias should at least have been a catalyst in addressing the plight of black poor women within this piece of legislation. However and once more, we find ourselves saddled with a law that claims to be inclusive of those previously excluded from meaningful participation in the economy to one that perpetuates this culture and which seems just as oppressive as its predecessor.

It is unclear how these women can meaningfully participate in lucrative deals worth millions or even those simple off-the shelf procurement processes when they possess little or no numeracy skills, let alone literary skills and the law is silent on this aspect.

#### **4.4 Intersectionality and Domination**

Bozolli talks about the black model of proletarianisation during apartheid wherein black males became fully proletarianised earlier and the women leaving the land later as belonging to the men who left earlier.<sup>134</sup> Against this background I aim to explain the unique position currently occupied by black women as they experience oppression in that race is but one form of marginalisation. Black women's oppression not only stems from the colour of their skin; but as a group, black women also experience oppression within their communities based on the oppressive patriarchal structures within which they live. Therefore racism and capitalism are but some of the forms of hegemony that

---

<sup>134</sup> Bozolli, B 'Marxism, Feminism & South African Studies' (1983) *Journal of South African Studies* 9 145.

black women face but heteronormativity and male dominance<sup>135</sup> are rife in the black communal structures.

Patriarchy is manifest in the defence that Mr Malema used in the *Sonke Gender Justice* case. In his defence Mr Malema argued that the utterances complained of are not offensive to neither gender equality nor hate speech but amount to fair comment. During his testimony he contextualised his utterances as directed to women who lied and reported rape under false pretext and how they will not advance the struggle against rape. In a landmark court case *S v Masiya* concerning the definition of rape, the eleven year old girl child testified that she told her mother about what had happened to her (i.e. ...that that person was molesting me...).<sup>136</sup> Her mother, however, did not listen to her but said that the complainant was causing a quarrel/problems between her (the mother) and the accused who drank liquor with her. In the following discussion I argue how these words *to women who lied and reported rape under false pretext and how they will not advance the struggle against rape read with complainant was causing a quarrel/problems between her (the mother) and the accused who drank liquor with her* are indicative of black patriarchal communal structures and how the law sustains this position.

#### 4.4.1 Black Women's Oppression and Society

The *Sonke Gender Justice* and *Masiya* cases deal with rape with the former involving a black woman and the latter a black girl child of eleven years old. It is interesting to consider how the issue of rape has been treated by an oppressive male dominant and heterosexual black culture. Gender and heterosexuality are sustained not only through structural hierarchies and social norms but they manifest in every black woman's life. I am highlighting this part in light of the fact that the rape complainant in the Zuma rape case was a woman and a lesbian. Mr Malema's defence about reporting rape under false pretext and the lament not to cause problems for the mother by reporting rape in the *Masiya* court case is representative of the black societal structure. What this means

---

<sup>135</sup> Jackson. S 'Why a Materialist Feminism is(still) Possible And Necessary' (2001) *Women's Studies International Forum*, 24 3, 283.

<sup>136</sup> *SvMasiya (CC 628/05) (2005) ZAGPHC 69.*

is that denial of the act of rape is better, it helps keep the community intact; whereas the stigma of reporting this heinous crime endures and therefore rather the concealment than reporting to the authorities. The problems that the mother is complaining about in the other case are apparent in Mr Malema's words, a view shared by a majority of black men that black women are immoral. This behaviour by Mr Malema has been explained in terms of white supremacy in that "their (black men's) expressions of rage and anger are less a critique of the white patriarchal social order and more a reaction against the fact that they have not been allowed full participation in the power game".<sup>137</sup> Therefore this kind of behaviour by Mr Malema makes him feel less oppressed and more powerful.

This kind of marginalisation is prevalent in black social structures where women are belittled in the name of preserving the existing patriarchal structure. It serves to ensure that the woman that has laid the complaint is not only made inferior but ostracised as well. Therefore, the "hierarchy of interests within the black community assigns a priority to protecting the entire community against the assaultive forces of (maleness)".<sup>138</sup> By branding her a liar Mr Malema insinuates to exclude her socially and not precisely to discourage false rape reporting. This makes the woman in question a pariah and ultimately, just like the girl child in the Masiya case, "the relationship between the entire community and the interests of its female members creates a powerful dynamic in which black women must subordinate matters of vital concern in order to continue to participate in community life".<sup>139</sup>

---

<sup>137</sup> Hooks, B 'Black Women: Shaping Feminist Theory' in James J and Sharpley-Whiting T D (ed), *The Black Feminist Reader* (2000) 131.

<sup>138</sup> Coleman, J E 'Race, Gender, and Social Class in the Thomas Hill Harassment Hearings: The Hidden Fault Lines in Political Discourse' *Critical Race Feminism a Reader* (1997)169.

<sup>139</sup> Ibid.

#### 4.4.2 Black Women's Socioeconomic Status and Black Male Dominance

The economy is largely driven by income, occupation, wealth and consumption.<sup>140</sup> Work and material life are strong theories of the foundation of social relations.<sup>141</sup> Black men still wield power over black women in their societies and generally women are perceived as not as intellectual or possessing strong business acumen. This places black men in the position that subordinates women in the family, work, school, on the street, media and political life<sup>142</sup> and other public and private spaces. MacKinnon's dominance theory in South Africa is emphasised by quoting Albie Sachs, in the following words:

*"...Thus to challenge patriarchy, to dispute the idea that men should be the dominant figures in the family and society, is to be seen as not fighting against male privilege but as attempting to destroy African tradition...Men are exhorted to express their manhood as powerfully as possible...Patriarchy brutalises men and neutralises women..."<sup>143</sup>*

In spite of the existence of legislation that claims to protect and advance the interests of black women in the economy, the law has actually failed to call male dominance as exactly that.<sup>144</sup> Instead it has labelled it gender discrimination as is apparent from the Equality Act and other employment legislation. This has the effect that "many conditions of actual disadvantage are obscured...."<sup>145</sup> In their very own communities, black women are still "kept poor and dependent",<sup>146</sup> as is evident from Mr Malema's words: *You don't ask for taxi money from somebody who raped you*". In another judgment of the Labour Court, pregnancy has successfully eliminated the job prospects of women.<sup>147</sup> Sometimes the law itself is seen as perpetuating less competent and undeserving black women in positions previously occupied by whites and currently black men who are more preferable to black women. Jennifer Russell calls the appointment of a black

---

<sup>140</sup> Malamud D 'Class based affirmative action: Lessons and Caveats' (1996) *Texas Law Review* 1852-93.

<sup>141</sup> MacKinnon, C 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) *Signs: Journal of Women in Culture and Society* Vol 7 No. 3 515.

<sup>142</sup> MacKinnon, C *Sex Equality* (2007) 2<sup>nd</sup> Edition 37.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Whitehead v Woolworths (Pty) Ltd* (1998) 8 BCLR 862 (LC).

woman as a “diversity candidate”<sup>148</sup> to be contrasted against stellar candidates, one who cannot “claim any special competence or expertise in any subject or field”.<sup>149</sup>

An Employment Equity Report issued by the Department of Labour detailing a study spanning over a five year period paints a grim picture in the advancement of black women in top management, senior management and those professionally qualified.<sup>150</sup> What is apparent in the report is the lack of black women to participate effectively in top managerial positions, therefore marginalising them as only suitable for jobs like secretarial and administrative work or caring professions like nursing or day-care teaching.<sup>151</sup> This marginalisation is symptomatic of a complexity of issues involved in the black communal hierarchy where black women are marginalised even within their own communities daily and when a woman dares speak out risks being victimised and ostracised like the woman Mr Malema is referring to in the hate speech court case.<sup>152</sup>

South Africa seems to be oblivious to the power yielded by a black man over a black woman in society and the economy. It seems to be complacent in the notion that the law prohibits gender discrimination and yet that is precisely what must be treated with caution, because this has resulted in the law having divided the human status.<sup>153</sup>

---

<sup>148</sup> Russell, J' On being a gorilla in the midst, or the life of one black woman in the legal academy' *Critical Race Feminism a Reader* (1997) 110.

<sup>149</sup> Ibid.

<sup>150</sup> Booyesen L' Barriers to Employment Equity implementation and retention of blacks in management in South Africa' (2007) *South African Journal of Labour Relations* 31 1 48-50.

<sup>151</sup> See 142 above.

<sup>152</sup> The woman only known as Khwezi was vilified for having laid a rape charge against a prominent politician. She risked her life and her reputation in the process and as of today media reports state that she is currently 'safe' in the Netherlands where she now resides after the rape trial.

<sup>153</sup> See 142 above.

#### 4.5 Concluding Remarks

Even though my arguments have remained largely generalisations, I am aware of exceptions, of black women who have managed to hold their own in the economy. However, with the emerging black middle class having grown to 4.2million in 2012,<sup>154</sup> it is still a cause for concern that black women remain in the majority of those who live in poverty. In the bigger South African economy they still rank lower than men across all races and lower than white women because of their sex, colour and black male dominance in their communities.

The elements of the BBBEE scorecard include (for private entities): skills development, employment equity, preferential procurement, management control, enterprise development, socio- economic development and ownership. For state owned entities the elements remain the same with the exception that ownership is omitted on the basis that they are state owned. These elements are used to score or rate the entity's compliance to the BBBEE Act. As has been argued in this discussion, black women's potential to participate meaningfully in the commercial activities of the country is hindered by their sexed roles in society and racial and class issues that are supported by a legal culture that supports these oppressive structures. Therefore these six elements when applied, do not fully transform the economic industry by involving more black women, they merely support the existing structures that are oblivious to the struggles facing black women.

---

<sup>154</sup> 'Black Middle Class Doubles in Eight Years' UCT Unilever Institute of Strategic Marketing Report (2013).

## Chapter 5

### Conclusion

In my arguments I have argued that black women have long suffered marginalisation on the basis of race, gender and class. I have also highlighted the fact that racism in South Africa is not merely based on the colour of the skin largely due to the white supremacy ideology that socially structured the South African society. The racial exclusion of black people based on the ‘divide and conquer’ approach through legislation like the Group Areas Act<sup>155</sup> and the Immorality Act<sup>156</sup> had significant results. It produced a racial based structure with a hierarchal structure that privileged Indians then Coloureds and lastly placed Africans at the bottom. In addition to that, patriarchy transcends racial lines but in our society it also affirms heterosexuality. As discussed previously, even though black women remain along the margins socially and economically, African women still are in the majority of those adversely affected.

It is also important to realise that the resultant consequences of colonialism and apartheid not only affected black people in general but everybody else. In addition to that the words “we the people of South Africa” in the Constitution are meant to be inclusive of everyone within South Africa and serve as a reconciliatory voice. Sandra Liebenberg views the Constitution as capable of bringing “a fundamental change in unjust political, economic and social relations”.<sup>157</sup> As I have shown in the *Sonke Gender Justice* hate speech court case discussion, the Constitutional text and its interpretation have the mandate to transform social and economic relations in society.<sup>158</sup> In the light of the fact that the courts have a reluctance to depart from formalistic approaches, it is time that legal interpretation “develop(s) a more self-conscious style of adjudication

---

<sup>155</sup> Group Areas Act 27 of 1957.

<sup>156</sup> Immorality Act 5 of 1927.

<sup>157</sup> Liebenberg, S Needs, Rights and Transformation: Adjudicating Social Rights’(2005) *Paper 8 Center for Human Rights and Global Justice* 3.

<sup>158</sup> Andrews, P ‘Imagine all the Women: Power, Gender and The Transformative Possibilities of the South African Constitution in *Power, Gender and Social Change in Africa* Ndulo, M & Grieco, M (ed)(2009) 235.

which is characterised by a willingness to challenge deeply held assumptions and to articulate the moral and political beliefs through which their interpretations are filtered<sup>159</sup>. In her philosophical piece about post-apartheid being and becoming, van Marle views post-apartheid becoming as “the search for something new, for becoming minor in the sense of challenging the major model and standard. Given the socio-economic inequality brought about by decades of colonialism and apartheid, revolutionary becoming as espoused by Deleuze might be the only thing that could respond to what is intolerable”.<sup>160</sup>

What these scholarly arguments entail is the catastrophic impact of the legal interpretative process that stalls rather than lends valuable progress to post-apartheid jurisprudence. Such is the case in this study where we see a law that negatively affects the socio-economic conditions of black women in the public sector procurement process. It is the law, whether legislative or adjudicative that affirms an already oppressive culture as has been shown in the *Sonke Gender Justice* case. It is precisely the constraint in Constitutional adjudication that calls for black women to become minor, to challenge the prevailing status quo.

Revolutionary becoming in post-apartheid shall involve some of the following as suggested by Adrienne Wing; a programme that is comprehensive and multifaceted, designed by the people affected (men and women) and responsive to their multiple needs.<sup>161</sup> Therefore black women must take cue from the likes of Khwezi and the late Ms Irene Grootboom by asserting their place in society, challenge the existing oppressive culture and a law that shows an unwillingness to adapt to change. If the project of “transformative constitutionalism” advocated by Karl Klare and other scholars of law is to flourish and bear results, black women must through consciousness raising become minor. Revolutionary becoming must be their site of struggle against a law that constrains rather than instils progress and transformation.

---

<sup>159</sup> Botha, H ‘Freedom and Constraints in Constitutional Adjudication’(2004) *South African Journal of Human Rights* 20 249.

<sup>160</sup> Van Marle, K ‘Reflections on post-apartheid being and becoming in the aftermath of amnesty: Du Toit v Minister of Safety and Security’ *Constitutional Court Review* 2010 3 353.

<sup>161</sup> See 80 above.

## Bibliography

Albertyn, C 'Women and the Law: The discriminatory and gendered nature of the law and institutions of criminal justice', in Jagwanth S, Schwikkard PJ, Grant B (eds) (1994) *Women and the Law* 15-27 Pretoria: HSRC.

Albertyn, C & Goldblatt B 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) *South African Journal of Human Rights* 248-280.

Albertyn, C 'Feminism and the Law' in Roederer C & Mollendorf D (2004) *Jurisprudence South Africa*: Juta 291-327.

Albertyn C& Bonthuys E 'Introduction' in Albertyn C& Bonthuys E (2007) *Gender Law and Justice South Africa*: Juta 1-14.

Andrews, P E 'Imagine all the Women: Power, Gender and the Transformative Possibilities of the South African Constitution' in Ndulo, M and Grieco, M(eds) *Power, Gender and Social Change in Africa* (2009) New York: Cambridge Scholars Publishing 232-245.

Bolton, P *The Law of Government Procurement in South Africa* (2007) South Africa: LexisNexis Butterworths .

Bolton, P 'The Regulation of Preferential Procurement in State-Owned Enterprises' (2010) *Journal of South African Law* 101-118.

Botha, H 'Freedom and Constraint in Constitutional Adjudication' (2004) *South African Journal of Human Rights* 249-269.

Booyesen, L 'Barriers to Employment Equity implementation and retention of blacks in management in South Africa' (2007) *South African Journal of Labour Relations* 47-70.

Byrne, D *Social Exclusion* (2005) Berkshire: Open University Press.

Crenshaw, KW 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' in Crenshaw, KW Gotanda, N, Peller, G & Thomas, K (eds) *Race Theory the key Writings that Formed the Movement* 357-376.

Crenshaw, K 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine Feminist Theory and Antiracist Politics' in James J and Sharpley-Whiting T D (eds), *The Black Feminist Reader* (2000) Malden: Blackwell Publishers 208-238.

Coleman, Jordan E 'Race, Gender, and Social Class in the Thomas Hill Harassment Hearings: The Hidden Fault Lines in Political Discourse' in Wing, AK(ed) *Critical Race Feminism a Reader* (1996) New York: New York university Press 169-174.

Davis, A 'Women and Capitalism: Dialectics of Oppression and Liberation' in James J and Sharpley-Whiting T D (eds), *The Black Feminist Reader* (2000) Malden: Blackwell Publishers 146-182.

Davis, DA & Wildman, S 'The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings' in Wing, AK(ed) , *Critical Race Feminism a Reader* (1996) New York: New York University Press 175-182.

Elizabeth & Virahsawhmy L 'My Father Is the Father of My Daughter' accessed 22 April 2013 [www.genderlinks.org.za/article/my-father-is-the-father-of-my-daughter-2011-11-04](http://www.genderlinks.org.za/article/my-father-is-the-father-of-my-daughter-2011-11-04).

Frug, M A 'Postmodern Feminist Legal Manifesto (an unfinished draft)' *Harvard Law Review* 105: 1045-1075.

Harris, A 'Theorizing Class, Gender and the Law: Three Approaches' (2009) *Law and Contemporary Problems* 72 37-56.

Harris, A 'The Jurisprudence of Reconstruction' (1994) *California Law Review* 741-765.

Harris, A 'Race and Essentialism in Feminist Legal Theory' (1990) *Stanford Law Review* 142 3 581-616.

Hector, S 'Legal realism' in Roederer C & Moellendorf D (ed) *Jurisprudence* (2004) South Africa: Juta 159-185.

Hooks, B 'Black Women: Shaping Feminist Theory' in James J and Sharpley-Whiting T D (eds) (2000) *The Black Feminist Reader* Malden: Blackwell Publishers 131-145.

Intaher, MA and Badenhorst-Weiss 'Procurement Challenges South African Public Sector' (2012) *Journal of Transport and Supply Chain Management* 242-246.

Jackson, S 'Why a Materialist Feminism is (Still) Possible and Necessary' (2001) *Women's Studies International Forum* 24 3 283 -293.

Le Roux, W and van Marle, K 'Critical Legal Studies' (2004) in Roederer C and Moellendorf D (eds) *Jurisprudence* South Africa: Juta 246- 262.

Liebenberg, S 'Needs, Rights and Transformation: Adjudicating Social Rights' (2005) Center for Human Rights and Global Justice Paper 8 1-35.

MacDonald, M *Why Race Matters in South Africa* (2006) Cambridge: Harvard University Press.

MacKinnon, C *Sex Equality* (2007) 2<sup>nd</sup> Edition New York: Foundation Press

MacKinnon, C 'Feminism, Marxism, Method and the State: An Agenda for Theory'  
*Journal of Women in Culture and Society* 1982 7 3 515-544.

Russell, J 'On being a gorilla in the midst, on the life of one blackwoman in the legal academy' (2000) *Critical Race Feminism a Reader* New York: New York University Press 110-112.

Smart C, *Feminism and the Power of Law*, (1986) London: Routledge.

Terreblanche ,S *A History of Inequality in South Africa 1652-2002* (2002) South Africa: University of Natal Press.

Van Marle ,K & Bonthuys E, 'Feminist Theories and Concepts' in Albertyn C & Bonthuys E (ed) *Gender, Law and Justice* (2007) South Africa: Juta 15-51.

Van Marle,K 'Reflections on Post-Apartheid Being and Becoming in The Aftermath of Amnesty: Du Toit v Minister of Safety and Security' (2010) 3 *Constitutional Court Review* 347-367.

Van der Merwe, van Huyssteen, Reinecke and Lubbe, *Contract: General Principles* South Africa: Lexis Nexis Butterworths 1-15.

Wing, A 'Brief Reflections toward a Multiplicative Theory and the Praxis of being' (1996) in Wing, AK(ed) *Critical Race Feminism a Reader* New York: New York University Press 27-34.

Watemeyer, RB 'Regulating Public Procurement in Southern Africa through International and National Standards' South Africa: Stellenbosch October 2011.

Yuval-Davis, N 'Intersectionality and Feminist Politics' (2006) *European Journal of Women's Studies* 13(3) 193-209.

## **Case law**

*Black Top Surfaces (Pty) Ltd v Member of the Executive Council for Public Works and Roads in Limpopo Province and Others 2006 JOL 17099 T.*

*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) BCLR 150 Constitutional Court.*

*Chinese Association of South Africa v Minister of Labour and Others TPD Case no. 59251/207(unreported case).*

*Grootboom and Others v the Republic of South Africa 2001 (1) All SA 51*

*R v Mbombela 1933 AD 269.*

*Sonke Gender Justice Network v Malema 2010 7 BCLR 729.*

*Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty)Ltd and Another 2011 (2) BCLR (Constitutional Court).*

*Whitehead v Woolworths (Pty) Ltd (1998) 8 BCLR 862 (LC).*

## **Report**

University of Cape Town Unilever Strategic Marketing Report (2013) 'Black Middle Class Doubles in Eight Years' Volume 32.07